



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 1 June 2012

10737/12

JUSTCIV 217

NOTE

from:	Delegation of the United Kingdom
to:	Working Party on Civil Law Matters (General Questions)
Subject:	Proposal for a Council Decision on the Signing, on behalf of the European Union, of the Council of Europe Convention on contact concerning children - Note from the delegation of the United Kingdom

1. Member States will be aware that proposals for signature of this Convention have been made over a considerable period of time, and successive Presidencies have worked very hard to try to identify a solution acceptable to all Member States. The UK would like to express its sincere gratitude to those Presidencies for their efforts.
2. As a matter of policy, it has been the UK's position throughout that it shares the common concern of all Member States to find a solution that enables Member States who wish to operate the Convention to do so, whilst those who do not will be permitted not to operate it. However, the UK has always been concerned that the solution should be legally secure.

3. The current proposal (JUSTCIV 346 of 8 December 2011) is that signature of the entire Convention will be authorised on behalf of the European Union. Signature will not of course bind the Union, but it is an important expression of intent on the international level and it would be expected that a proposal for Conclusion by the Union would rapidly follow. Recital 8 reads –
- “When, at a later stage, the Decision is taken to approve the Convention on behalf of the Union, the Convention should be binding in its entirety only on those Member States which become party to the Convention for the parts which fall within their national competence.”*
4. In the UK’s opinion this recital does not provide sufficient legal certainty regarding the position of Member States who do not wish to ratify the Convention, nor indeed for third parties relying on the Convention. The UK’s views on the legality of this measure are set out below.

The principle of conferral of competence

5. It is without debate that the Union has no competence whatsoever for the bulk of the provisions of the Convention.
- The Convention itself contains no provision that would allow a contracting party to ratify only a part of the Convention. It specifically states that no reservations are permitted - it must be applied as a whole or not at all. There is therefore no option allowing the EU to ratify in relation only to those elements within its competence and Council of Europe lawyers have already confirmed this point.
 - The terms of the Convention permit the Union to sign and conclude it but there is no reference in the Convention to Union participation being limited to matters within Union competence. However, as a matter of Union law, in purporting to sign and later conclude the entire Convention the EU will be purporting to exercise a competence (regarding the substantive law provisions) that it does not have. This would be in breach of Union law and the principle of conferral of competence and will have the effect of making the Decision either illegal, or null and void¹. Neither result is appropriate.

¹ *Consorzio Cooperative D’Abruzzo v. Commission*, Case 15/85 at paragraph 10; *Commission v. BASF* C-137/92 P paragraphs 47-50. See also the *Cartagena Protocol* opinion, Opinion 2/2000 paragraphs 5 and 6.

Would Member States who do not ratify the Convention in their own right nevertheless be bound to apply the whole Convention?

6. There are reasons to believe that a non-ratifying Member State might still be obliged to apply the whole Convention as a matter of Union law –

- Under Article 216 TFEU all Member States are bound by international agreements which the Union concludes. It is unclear how Member States' obligations arising from such conclusion could be restricted to just three provisions where the Convention itself allows no reservations.
- The recital indicating that only those Member States who additionally ratify in their own right are to be bound to the entirety of the Convention does not give sufficient protection to the other Member States against having to apply the whole instrument. Although the Commission will respect the recital and so will not actively seek this result, it is still possible that the matter could come before the Court of Justice and an adverse decision made against a non-ratifying Member State because of a complaint from a third country, or a parent of a child, affected by the refusal of such a Member State to apply the entirety of the Convention. It is therefore not possible to approach signature and conclusion on the basis that the issue will not in future be raised or litigated.
- Connected to these points, it is unclear whether the Union would be bound by the Convention on the basis of the current proposal as a matter of *international* law. Article 46 of the Vienna Convention on the Law of Treaties¹ states that –

“1. A State may not invoke the fact that its consent to be bound by a Treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and good faith.”

¹ There is an equivalent Vienna Convention to the VCLT which concerns the Law of Treaties between States and International Organisations or Between International Organisations (21st March 1986), Article 46 of which makes the same provision.

The defect in terms of the lack of competence to sign or conclude most of the Convention is very unlikely to be apparent to other Contracting States so there is a risk that the Union might be bound *at the international level* to apply the whole Convention despite the lack of legal competence to sign and conclude.

Practical operation of Articles 14 to 16 in the absence of ratification of the whole Convention

7. Finally, even if Member States who did not ratify the Convention in their own right were only required to apply Articles 14 to 16 of the Convention (as indicated by the current proposal), the practical and legal problems arising from such an approach are overwhelming.
 - The Convention is designed to apply as a whole. Contracting States are likely to be unaware of or confused about the limits of the obligations of a Member State not applying the whole Convention.
 - If such a Member State does not apply the principles underpinning the whole Convention, it is unclear why another Contracting State should recognise and enforce its orders, and there is a risk that no reciprocity will, or even should, be afforded to that Member State.
 - It is also unclear what criteria such a Member State can properly apply to the recognition and enforcement of orders from other Contracting States when it does not itself reciprocate on the contact principles, nor whether other Contracting States would feel obliged to apply the Convention properly when sending orders to such a Member State.

Competence issues

8. With regard to the assertion of Union exclusive external competence relating to Articles 14 to 16, the UK accepts that competence is indeed exclusive on Articles 14 and 15. Upon reflection, the position is less clear as regards Article 16. Article 16 relates to a situation where a child is not returned at the end of agreed cross border contact. It is drafted in very general terms so that the return must be achieved by –

- (a) applying relevant international instruments (e.g. the 1980 Hague Convention);
- (b) applying internal law; and
- (c) where they exist, implementing safeguards imposed by the order for contact/ access.

It is not entirely clear whether there is an absolute obligation on the requested State to ensure return, or only where the possibilities at (a) to (c) above are available in that State's law/ the provisions of the individual order.

The competence position would appear to be mixed on this provision (particularly in the light of ongoing discussions on the proposals for accession to the 1980 Hague Convention) and we would suggest that any future proposal refer to the position on competence in Article 16 by reference to the Union having exclusive competence for “*elements of*” Article 16.

Future proposals

9. The UK remains fully committed to finding a solution which will allow those Member States that wish to ratify and apply the Convention to do so. However it will only be able to support a proposal which is legally secure. There are two such legally secure possibilities which are:
- (a) the Union and the Member States seek a renegotiation of the Convention as permitted by Article 21 thereof, to enable the Union to participate to the extent of its competence by derogating from the remainder of the Convention. Such a renegotiation would need to address the practical problems at paragraph 7 so that non-ratifying Member States can operate the recognition and enforcement provisions, including (a) criteria for such recognition where the substantive provisions of the Convention were not to be operated; and (b) to ensure reciprocity from Contracting States for recognition and enforcement of orders from such Member States;

alternatively -

- (b) a return to the proposal of the Belgian Presidency, which enjoyed widespread support amongst Member States. This is legally permissible in Union law (see Article 2(1) TFEU). The proposal will need to reflect the points made at paragraph 8 above.
