



EUROPEAN COMMISSION

Brussels,
C/2009/7913

11 NOV. 2009

Dear Mr Sobotka,

Thank you for the Resolutions of the Czech Senate on the Commission's Proposals for a Council Regulation establishing a procedure for the negotiation and conclusion of bilateral agreements between Member States and third countries concerning sectoral matters and covering jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, parental responsibility and maintenance obligations, and applicable law in matters relating to maintenance obligations (*COM(2008)894 final*) and for a Regulation of the European Parliament and of the Council establishing a procedure for the negotiation and conclusion of bilateral agreements between Member States and third countries concerning sectoral matters and covering applicable law in contractual and non-contractual obligations (*COM(2008)893*).

In line with the Commission's decision to encourage National Parliaments to react to its proposals to improve the process of policy formulation, we welcome this opportunity to respond to your comments. I enclose the Commission's response and hope you will find this a valuable contribution to your own deliberations.

I look forward to developing our policy dialogue further in the future.

Yours sincerely,

Margot WALLSTRÖM
Vice-President of the European Commission

Mr. Přemysl Sobotka
President of the Senate
of the of the Parliament
of theCzech Republic

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Brussels, October 2009

COMMENTS OF THE EUROPEAN COMMISSION ON A RESOLUTION FROM THE CZECH SENATE

COM (2008)893 - PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ESTABLISHING A PROCEDURE FOR THE NEGOTIATION AND CONCLUSION OF BILATERAL AGREEMENTS BETWEEN MEMBER STATES AND THIRD COUNTRIES CONCERNING SECTORAL MATTERS AND COVERING APPLICABLE LAW IN CONTRACTUAL AND NON-CONTRACTUAL OBLIGATIONS

COM (2008)894 - PROPOSAL FOR A COUNCIL REGULATION ESTABLISHING A PROCEDURE FOR THE NEGOTIATION AND CONCLUSION OF BILATERAL AGREEMENTS BETWEEN MEMBER STATES AND THIRD COUNTRIES CONCERNING SECTORAL MATTERS AND COVERING JURISDICTION, RECOGNITION AND ENFORCEMENT OF JUDGMENTS AND DECISIONS IN MATRIMONIAL MATTERS, PARENTAL RESPONSIBILITY AND MAINTENANCE OBLIGATIONS, AND APPLICABLE LAW IN MATTERS RELATING TO MAINTENANCE OBLIGATIONS.

The Commission welcomes the favourable opinion Senate of the Czech Republic on these proposals and consider the political dialogue with the National Parliaments through the transmission of its new proposals as an important step of the Community legislative process.

The aim of the Regulations is to authorize Member States to negotiate and conclude an agreement with third States in some areas falling under the exclusive Community external competence when there is not an immediate interest in the negotiation and conclusion of a Community agreement.

It is nevertheless clear that the possibility given to Member States to take measures in areas falling under the exclusive Community competence must be regarded as **exceptional** and is granted only on a **temporary basis** and for **very limited matters**.

The scope of the Regulation concerning family law includes **matrimonial matters, parental responsibility and maintenance obligations**. As it is clear from the adopted Regulation the Community legislator has recognised that there may be a need for the citizens of the Member States to be able to benefit from Member States bilateral agreements with third States covering these issues in order to facilitate their access to justice in States which are often neighbouring or connected with the Member States for

agreements with third States covering these issues in order to facilitate their access to justice in States which are often neighbouring or connected with the Member States for historical reasons, which may be evidenced by specific rules related to divorce, childcare and cross-border right of access. Besides, we have to take into account the fact that certain of our neighbouring countries are not actively participating in the relevant Hague Conventions e.g. on child protection, and some Member States have a tendency to build their relations with those third States on the basis of bilateral agreements.

The Regulation concerning applicable law deals with very specific situations, relating to the need for the Member States to adopt provisions concerning applicable law in contractual and non-contractual matters to regulate particular issues with third countries. Many of these cases relate to airport, road or railways management (especially questions of liability and work conditions).

The Commission is pleased to note that, thanks also to the commitment showed by the Czech Presidency of the European Union during negotiations, a political agreement has been reached on the proposed Regulations. This agreement has been confirmed at the Justice and Home Affairs Council of 4/5 June 2009 and the Regulations have been adopted on 7 and 13 July respectively 2009. The Regulations No 662/2009 and 664/2009 have been published in the Official Journal L 200 of 31 July 2009, p.25 and p.46).

Therefore, the analysis below will be based not on the original Commission's proposal but on the final text of the Regulations. The text as adopted appears quite balanced and takes into account all the concerns expressed by the Czech Senate.

1. The "broad agreements" (point II.1 of the Resolution)

The Commission is aware of the problem of the so-called "broad agreements", which are the bilateral agreements on legal assistance with third States containing general provisions on jurisdiction and/or applicable law and/or recognition and enforcement in civil and commercial matters, and in addition, may cover other matters such as criminal or administrative law matters.

Member States may have the need to adapt/replace this type of agreements but it is clear that their renegotiation, in certain matters of civil law, falls under the exclusive Community competence. As a consequence, Member States are not anymore allowed to carry out the negotiations.

However, in order to facilitate the positive outcome of negotiations and to avoid repeated requests from the Member States that acceded in 2004 and 2007 to extend the scope of the proposals in order to cover the broad agreements, that are prior to their accessions and that may include certain incompatibilities with the *acquis*, the Commission will make, at the time of adoption of the proposal, a statement on the application of Article 307 of the EC Treaty.

The statement takes the view that acceding Member States can renegotiate the existing agreements which are not in line with the *acquis* pursuant to Article 307 of the EC Treaty, first subparagraph.

The renegotiation of the existing agreements in order to align them with the Community acquis is **under the responsibility of the Member State in question**, which is clearly not allowed to negotiate a completely new agreement or insert in the old one matters which were not included beforehand falling into the exclusive external Community competence. The Commission's view is that no special procedure for Member States is foreseen in order to start the renegotiation of these agreements.

At the same time, the Commission offers its cooperation to achieve a satisfactory result. The Commission foresees that the result of these renegotiations should be reviewed after 8 years from the adoption of the Regulations. In the light of this, even if no special procedure for authorization of the renegotiation of these agreements is provided, it is recommended to inform the Commission of the opening of negotiations with the third State and of the results achieved.

2. Assessment by the Commission (points II. 2 and 6 of the Resolution)

The assessment of the Commission will be carried-out on a case-by-case basis taking into account specific conditions. In view of the wide range of subjects covered by the ever developing area of civil justice within the Community, and of the different solutions that Member States can choose to regulate their relations with third States, it has been decided not to set in advance "standard clauses" to be included in the agreements.

Obviously, if the Community has already concluded an agreement on the same subject matter with the third State concerned, the Member State is not allowed to negotiate or conclude the agreement with the third country and any application submitted will be rejected.

Firstly, the Commission will assess if a negotiating mandate for a Community agreement is specifically envisaged within the following 24 months. This reference offers more legal certainty as compared with the previous wording "*in the near future*". Then, the Commission will evaluate a) the existence of a specific interest of the Member State in concluding the agreement with the third State because of particular economic, geographic, cultural, historical, social or political ties between the Member State and that third country; b) the fact that the agreement appears not to render Community law ineffective and appears not to undermine the proper functioning of the system established by its rules c) the fact that the agreement would not undermine the objective and purpose of the Community's external relations policy.

3. Authorization to open formal negotiations and to conclude the agreement. (points II 3 and 4 of the Resolution)

The current wording of Article 5 (authorization to open formal negotiations) foresees that, if the envisaged agreement meets the conditions set out above, the Commission shall give a reasoned decision to the Member State within 90 days of date of receipt of the notification by the Member State of the intention to open formal negotiations.

A similar provision is established by Article 8 (authorization to conclude the agreement).

4. **Review and expiry of the Regulation** (point II.5 of the Resolution)

As the Regulations provide for an exceptional procedure, they are also of **temporary application in time**. The Commission will submit a report on the application of the Regulations no earlier than 8 years after their adoption. In this report, the Commission shall confirm the expiry of the Regulations 3 years after the submission of the report or recommend its replacement by new Regulations.

Moreover, notwithstanding the expiry of the Regulations, all negotiations ongoing at that date shall be allowed to continue and to be completed in accordance with the Regulations.