

## **Reasoned opinion of the Swedish Parliament**

The examination with regard to the subsidiarity principle was based on Article 5 of the Treaty on European Union. Under that Article, in areas which do not fall within its exclusive competence, the Union must act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States themselves, but can rather be better achieved at Union level. The words 'only if and in so far as' should be taken to mean that the subsidiarity check involves a proportionality criterion and thus that the proposed action should not go beyond what is necessary to achieve the desired objectives. A parliament should therefore be free to carry out this type of proportionality test as part of its subsidiarity check.

### *The legal basis of the proposal is questionable*

The legal basis specified by the Commission for its Proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law (COM (2012) 363) is Article 325(4) TFEU. This article authorises the EU to adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in the Union's institutions, bodies and offices.

An earlier Commission Communication - Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law (COM(2011) 573) – states, among other things, that criminal law legislation has a significant impact on individuals, whether it is introduced at Member-State or at EU level. The Commission takes the view that criminal law legislation within the EU, like criminal law measures in the Member States, must be considered carefully and should always be a last resort. The general principles highlighted by the Commission in its Communication are the subsidiarity principle and respect for the fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Swedish Parliamentary Committee on Justice issued an opinion on the above Communication. In it the Committee noted that, as the legal basis for such legislation is formulated in Article 83(2) TFEU, only minimum rules may be established, by which is meant an approximation of the laws of the Member States; full harmonisation of criminal law is not possible. In the Committee's view it is important for new legislation containing criminal law measures to be formulated with due regard for fundamental legal principles, and it is particularly important to observe the general subsidiarity requirement for EU law (see 2011/12:JuU10 p. 8 ff).

The Swedish Parliament questions the legal basis for the proposal and feels that there are grounds for considering that the EU's powers to adopt criminal law measures in this field should be based on Article 83(2) TFEU. The Parliament notes that the scope for legislation is narrower under Article 83(2) than under Article 325(4). The Parliament therefore considers that the legal basis of the proposal is open to doubt and is broader than that which applies

specifically to the criminal laws and regulations of the Member States, and under which only minimum rules may be established, ruling out a full harmonisation of criminal law. It is quite possible that the risk of the proposed measures going beyond what is necessary to achieve the desired objectives would be greater as a result of the reference to a legal basis which offers greater scope for legislative measures at EU level.

### *Aspects of the proposal are contrary to the subsidiarity principle*

The Swedish Parliament can certainly agree with the Commission's view that it is appropriate to take measures at EU level in order more effectively to prevent and combat crime affecting the Union's financial interests and that these measures may include a degree of approximation regarding the constituent elements of criminal acts. The proposal is so wide-ranging, however, that the question arises in places as to whether the proposed measures go beyond what is necessary to protect the EU's financial interests and are therefore contrary to the above-mentioned proportionality criterion in the subsidiarity check.

It is primarily Article 8 on penalties and Article 12(2) and 12(3) on prescription periods which the Swedish Parliament regards as being incompatible with the subsidiarity principle.

Article 8 lays down certain levels of penalties for EU fraud which the Member States are required to introduce, but only for crimes that give rise to an advantage or damage up to certain minimum amounts. In the Swedish Parliament's opinion there are insufficient grounds for tying the Member States' penalty levels to particular financial thresholds in this way. It is already stated in Article 7 that penalties must be effective, proportionate and dissuasive, which in the Swedish Parliament's view is sufficient to protect the EU's financial interests while at the same time allowing the Member States greater scope to adapt their legislation so that it is effective, proportionate and equivalent.

The Swedish Parliament takes a similar view with regard to Article 12(2) on the interruption of the prescription period and Article 12(3) on prescription of penalties in the event of a prison sentence. Under Article 12(2) the Member States must ensure that any act of a competent authority counts as an interruption of the prescription period, whereupon a new prescription period starts to run. Under Article 12(3) the prescription period for penalties for the crimes covered by the proposal may in no case be less than 10 years from the time of the final conviction. The added value of prescribing such broad and detailed measures is probably limited, while at the same time it makes it more difficult for the Member States to adapt the provisions to fit in better with their own legal systems. In the Swedish Parliament's opinion, it ought to be possible to achieve the objective of the measures – greater effectiveness in preventing and combating crime affecting the Union's financial interests – with less stringent provisions. It is also important to protect fundamental principles of criminal law with regard to proportionality and equivalence, i.e. that punishment should be determined according to the seriousness of the crime and that similar cases should receive similar treatment.

The Swedish Parliament accordingly takes the view that, at least in relation to the three above-mentioned articles, the proposal fails to comply with the principle of subsidiarity.