

16.12.11

DecisionOf the Bundesrat

Proposal for a directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation**COM(2011) 654 final; Council doc. 16000/11**

In its 891st session on 16th December 2011 the Bundesrat adopted the following Opinion pursuant to Article 12 Point b TEU:

1. The Bundesrat welcomes the draft directive's objectives of combating insider trading and market manipulation (market abuse). The Bundesrat shares the Commission's view that integrated and efficient financial markets and public confidence in these markets are crucial prerequisites for economic growth and prosperity.
2. The objection raised on the grounds of subsidiarity pursuant to Article 12 Point b TEU also pertains to the question of EU competences – see the Bundesrat Opinions of 9th November 2007, BR Official Document 390/07 (Decision), Point 5, and of 26th March 2010, BR Official Document 43/10 (Decision), Point 2. The subsidiarity principle in essence concerns the principle of the exercise of competences. The subsidiarity principle is also breached if there is no European Union competence in the area in question. For that reason, the first question to consider when conducting a subsidiarity check is the issue of the legal basis.
3. Article 83 Sub-section 2 TFEU is not a valid legal basis for the tabled proposal on a directive on criminal sanctions for insider trading and market manipulation.

In keeping with the principle of conferred powers as stipulated in Article 5 Sub-section 2 TEU the EU may only take action within the limits of the competences transferred to the EU by the Member States in the Treaties in order to attain the objectives stipulated in those Treaties. Article 83 Sub-section 2 TFEU provides that minimum rules may be adopted by means of directives concerning definition of criminal offences and stipulate sanctions if approximation of provisions in criminal law is essential to ensure effective implementation of EU policy in an area which has been subject to harmonisation measures. As a consequence, any EU legislative act based on Article 83 Sub-section 2 TFEU must satisfy the criterion of being essential.

In its ruling on the Act on Consent to the Treaty of Lisbon, the German Federal Constitutional Court (Federal Constitutional Court, Ruling of 30th June 2009 - 2 BvE 2/08 u. a. -, NJW 2009, 2267) commented as follows on this point: “If the circumstances justifying this exception are to be held to pertain and if ancillary authorisation to adopt criminal law legislation is thus to be considered to have been transferred (to the EU), it must be demonstrated that a significant shortcoming in enforcement actually exists and can only be overcome by the threat of sanctions”. The Federal Constitutional Court considered the Treaty of Lisbon to be consistent with the provisions of the German constitution, but only due to the restrictive wording used in the provisions of Article 83 Sub-section 2 TFEU, which consequently do not offer any scope at all to interpret ancillary competence more broadly. If this were not the case, ancillary competence would constitute a significant extension of competence for criminal justice: this would not be consistent with the principle of a substantiated and limited transfer of sovereign rights, nor would it be compatible with the requisite protection of national legislative bodies and the particular democratic fashion in which such bodies are accorded authority as a result of majority decisions by the electorate.

It must therefore be demonstrated that EU legislation can only be implemented effectively in a particular area by approximating the criminal laws and regulations of the Member States by establishing minimum standards. It should be possible to identify shortcomings in enforcement in precisely those Member States that do not have sufficient criminal laws and regulations in the area in question.

The draft directive does not satisfy these requirements of Article 83 Sub-section 2 TFEU:

- The directive does not address the question of whether and why EU-wide minimum standards for criminal sanctions would be essential to implement EU policy of preventing the most serious forms of market abuse.
 - Arguing, as the draft directive does, that EU measures under the aegis of criminal law could contribute to overcoming a problem or could have a positive impact on attaining a goal does not constitute a substantiation of the essential nature of such measures in the sense of Article 83 Sub-section 2 TFEU .
 - This also applies to the reference to the differences between sanction systems in the Member States and to the risk of perpetrators opting to shift criminal activities to countries with more lenient provisions on sanctions. The specific impact of differing sanction systems on criminal prosecution of market abuse is not presented; there is also no concrete evidence provided of the occurrence of such displacement of criminal activities, nor of the consequences which this would have. The mere theoretical possibility that perpetrators might choose to engage in criminal offences in countries with more lenient provisions is not a specific feature of financial market abuse, but holds true for all areas of criminal activity in which Member States' criminal law is not entirely approximated. This general theoretical consideration therefore cannot serve to demonstrate the essential nature of the proposed measures in the sense of Article 83 Sub-section 2 TFEU. In addition, the distinction between the provisions on competences in this Sub-section and the provisions pursuant to Article 83 Sub-section 1 TFEU would be whittled down by these proposals. The latter Sub-section does indeed authorise the adoption of EU minimum rules to address particular areas of criminal activity when the sole justification for such an approach is the particular cross-border nature of these activities, but restricts this approach such cases to an exhaustive list of concrete areas of criminal activities/offences; market abuse is not included on this list.
4. In addition, the Bundesrat refers to its Opinion on the Commission's Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards

an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, COMM(2011) 573 final of 4th November 2011 - BR-Official Document 582/11 (Decision), Point 3 – and to its Opinion on the Commission’s Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Reinforcing sanctioning regimes in the financial services sector, COMM(2010) 716 final of 11th February 2011 - BR-Official Document 811/10 (Decision), Point 1.