Folketinget — Europaudvalget
Christiansborg, den 5. juli 2006

Til

udvalgets medlemmer og stedfortrædere.

Ad
KOM (2006) 0168 **Ændret forslag til Europa-Parlamentets og Rådets direktiv om strafferetlige foranstaltninger til håndhævelse af intellektuelle ejendomsrettigheder**

Subsidiaritets- og proportionalitetstest fra det hollandske parlament vedr. forslag til direktiv om strafferetlige foranstaltninger til håndhævelse af intellektuelle ejendomsrettigheder

Til orientering omdeles vedlagt henvendelse af 3. juli 2006 fra det hollandske parlament til Kommissær Frattini vedr. subsidiaritets- og proportionalitetstest af forslag til Europa-Parlamentets og Rådets direktiv om strafferetlige foranstaltninger til håndhævelse af intellektuelle ejendomsrettigheder (KOM (2006) 0168). Der henvises i den forbindelse til konklusionerne fra XXXIV COSAC i London i efteråret 2005 vedr. implementeringen af subsidiaritetstest i de nationale parlamenter, jf. Info-note (05) I 3.

Det fremgår af henvendelsen, at det hollandske parlament vurderer, at forslaget ikke er i overenstemmelse med subisidiaritets- og proportionalitetsprincippet.

Med venlig hilsen
Anne-Sofie Jensen,
udvalgssekretær.

	
To Mr F. Frattini Vice-President of the European Commission Commissioner for Justice, Freedom and Security European Commission B-1049 BRUSSELS	
	The Hague, 3 July 2006
135275.03	

Dear Mr Frattini,

In accordance with the procedure adopted by them, both Houses of the States-General of the Kingdom of the Netherlands have checked the amended proposal of the European Commission for a directive on criminal measures aimed at ensuring the enforcement of intellectual property rights (COM(2006)168 final) by reference to the principles of subsidiarity and proportionality. In doing so they have applied Article 5 of the EC Treaty and Protocol 30 to the Treaty of Amsterdam on the application of the principles of subsidiarity and proportionality. In addition, both Houses have thus also implemented the conclusions of XXXIV COSAC (London, 10-11 October 2005) regarding the implementation of the subsidiarity test by the national parliaments.

On the basis of the considerations set out in this letter, both Houses have concluded that the proposal in question does *not* comply with the principles of subsidiarity and proportionality. In particular, they consider that the present proposal falls outside the powers of the Community. Pursuant to conclusion 3.4 of XXXV COSAC (Vienna, 22-23 May 2006) both Houses would appreciate receiving a reasoned response from the European Commission to the objections formulated by them in this letter.

Yours sincerely,

[signed] [signed]

Y.E.M.A. Timmerman-Buck
President of the Senate

F.W. Weisglas
President of the House of Representatives

Reasoning

Introduction

Piracy, counterfeiting and infringement of intellectual property rights cause very great damage to the economies of the European Union and can also have other serious consequences. The Netherlands too is confronted by these adverse consequences. The European Commission rightly points out that additional action is necessary to prevent and combat piracy, counterfeiting and infringement of intellectual property rights. However, the instrument proposed by the European Commission for use in the battle against piracy, namely an EC directive including a criminal law enforcement provision concerning the minimum level of the maximum sentence, encounters serious objections from both Houses of the States General. These are explained below.

The power issue

The European Commission considers the present amended draft directive to be necessary for the protection of the internal market and bases itself in this connection on Article 95 of the EC Treaty, which comes under the so-called First Pillar. The power to include a criminal sanction in the proposal is derived from the judgment of 13 September 2005 of the Court of Justice of the European Communities in Case C-176/03, which was, however, limited to criminal sanctions in the case of offences against European environmental policy. The proposal for a directive (in the First Pillar) now under consideration introduces for the first time a criminal law measure concerning the minimum level of the maximum penalty. EU Member States are to be obliged to introduce this by law.

In the view of both Houses, the question of whether power is granted in the EC Treaty for the intended aim of the proposed action must be answered, strictly speaking, in the negative. Both Houses have serious doubts about the European Commission's broad interpretation of the judgment, as set out *inter alia* in Communication COM(2005)583. Although the possibility cannot be excluded that, subject to the conditions specified in the judgment, criminal sanctions can be included in an instrument under the First Pillar, the broad applicability of the judgment has not yet been conclusively established. More clarity about this may emerge later this year when the Court of Justice gives judgment in a comparable case concerning measures to combat pollution by shipping[1]. Both Houses of Parliament also refer in this connection to the fact that the EU Treaty provides for a 'passerelle' (bridge) provision (Article 42), under which the Council may decide unanimously to transfer certain parts from the Third Pillar (under which cooperation in criminal matters is classified) to the First Pillar.

The subsidiarity issue

As the Court of Justice has indicated, criminal law does not in principle belong to the competence of the Community, although its use by the Community cannot be entirely excluded. However a number of strict criteria must then be fulfilled. The use of 'effective, proportionate and dissuasive' penalties by the competent national authorities must be an 'essential measure' in the battle against acts that seriously undermine the policy field to be protected, in order to be able to take measures which are connected with the criminal law of the Member States and which the Community considers necessary in order to ensure the complete effectiveness of the standards to be set by it in this field.

The legal considerations of the Court of Justice in this matter can be read in such a way that the stipulations applied in them constitute

cumulative requirements that must be fulfilled. Both Houses are of the opinion that this requirement has not been fulfilled in this case for the following reasons:

- In many countries investigation and enforcement of intellectual property rights does not have a high priority, and there is also little specialised knowledge available for investigation and enforcement. Against this background it has not been established that effective measures to combat piracy necessitate expansion of the existing range of measures and sanctions under procedural law. The establishment of priorities and the transfer of knowledge are possibly of greater importance.

- The Commission does not submit that in the event of a major difference in penalties pirates or counterfeiters could operate from the country with the lowest maximum sentences and that this would seriously hinder effective protection of intellectual property. As it does not submit this there is no factual justification for its position.

- It should also be noted that an offence committed in a Member State with 'low' penalties may quickly create a power of criminal prosecution in other Member States, namely where the counterfeit goods end up in normal circulation in the other Member State. In such circumstances, an offender in the Member State with low penalties is very likely to be prosecuted as instigator, accomplice or co-perpetrator in a Member State with higher penalties.

- It should also be noted that implementation of Directive 2004/48/EC[2] on measures and procedures to ensure the enforcement of intellectual property rights is currently being considered by the House of Representatives of the States-General, in which connection provision is made for the inclusion of separate procedural provisions for intellectual property cases in the Code of Civil Procedure. Above all, the broader powers to make orders for the costs of proceedings in that proposal can operate as a kind of punitive damages[3], and can thus be regarded as sanctions.

In view of the above, the two Houses take the view that violations of intellectual property rights cannot be treated as such a serious violation of the policy field to be protected that the harmonised deployment of criminal law measures must be considered essential in the battle against these violations.

Inclusion of minimum maximum penalties

The fact that the European Commission also includes minimum maximum penalties in the amended proposal for a directive on criminal measures aimed at ensuring the enforcement of intellectual property rights (COM(2006)168 final) must also be regarded as not expedient, if for no other reason than on the basis of the above considerations.

It would have been preferable if the European Commission had confined herself to drafting a provision that the legal remedy should be 'effective, proportional and dissuasive', leaving the final decision as to the exact nature of the remedy to the Member States.

Conclusion

Both Houses of the States-General conclude that no power has been granted to the Community in respect of the aim of the proposed action. Nonetheless, both Houses have – for the record – scrutinised the present proposal by reference to the principles of subsidiarity and proportionality and concluded that the proposal does *not* comply with them.

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[1] Case C-440/05

[2] Kamerstukken II 2005-2006, 30392

[3] D.J.G. Visser, NJB 3 March 2006, no. 9, p. 538