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Part 2/2

COMMISSION STAFF WORKING DOCUMENT

Annexes to the Impact Assessment

Accompanying the document

**PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF
THE COUNCIL**

**ON THE PROTECTION OF THE EURO AND OTHER CURRENCIES AGAINST
COUNTERFEITING BY CRIMINAL LAW, AND REPLACING COUNCIL
FRAMEWORK DECISION 2000/383/JHA**

{COM(2013) 42 final}
{SWD(2013) 20 final}

ANNEX 1

Evaluation of the implementation in Member States of the Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro

Summary of the evaluation reports of the Commission on the implementation of the Framework Decision 2000/383/JHA

Member States are under the obligation to comply with the Framework Decision 2000/383/JHA (the Framework Decision) by 29 May 2001. Following this date, the Commission has assessed the implementation of the Framework Decision in three successive reports.

Under Article 11(2) of the Framework Decision the Commission adopted on 13 December 2001 a report on its implementation which set out in detail the various transposition requirements and the way in which each Member State had complied with those requirements¹. In its conclusions on the report, the Council recognised that the Framework Decision had largely served its purpose. It nevertheless called on the Commission to draw up a second report containing the additional information still to be provided by Member States. On 3 September 2003 the Commission adopted the second report². At its meeting on October 2004, the Council took note of this second report and, in view of the enlargement of the European Union, called on the Commission to prepare a third report on the implementation of the Framework Decision, including Article 9a on the recognition of previous convictions.

On 17 September 2007 the Commission adopted a third report³ (hereafter: the Third report). This report assessed the state of play of transposal of the Framework Decision in the 15 Member States in the light of the conclusions of the second report, as well as the legislative situation in the 12 new Member States. It contains a detailed evaluation of the implementation of the Framework Decision by the 27 Member States. The information that the Commission received from the Member States regarding the measures of transposition of the obligations under the Framework Decision was very variable as regards comprehensiveness. The report was nonetheless drawn up on the basis of that information, supplemented by public sources where this was necessary and possible.

The Third report concluded in general that the transposition of the Framework Decision was "*satisfactory overall, despite some failures to transpose. The offences and penalties proposed in the Framework Decision have indeed been incorporated into the Member States' legislation. The euro is therefore protected by the efficient and effective measures called for by the Framework Decision. The Framework Decision has therefore achieved its objective and only the adoption of a small number of national measures is required for the implementation to be complete.*"

More specifically, this report concluded that the Framework Decision has achieved its objectives in the most important areas as follows: "*The fraudulent making or altering of currency, as well as the fraudulent uttering of currency, constitute infringements under the laws of all the Member States. The import, export and transport of counterfeit currency are also expressly sanctioned in most Member States. Some legal systems criminalise such acts by way of the concepts of transport or possession. Although varied, the penalties laid down to punish these criminal acts comply with the criteria laid down in the Framework Decision, except in the case of two Member States. In addition,*

¹ COM(2001) 771 final.

² COM(2003) 532 final.

³ COM(2007) 524 final.

most Member States have introduced the principle of the liability of legal persons. The legislation of most Member States makes provision for final convictions handed down in another Member State to be taken into account for repeat offences."

Despite this satisfactory overall conclusion of the third report, it was also noted that not all the Member States have incorporated all the provisions of the Framework Decision into national law, and identified some shortcomings in transposing the Framework Decision. The Third report pointed at some failures to fully transpose in particular the provisions on sanctions levels in some Member States. The report, in conjunction with other data, also pointed out important disparities among Member States in terms of sanctions provided by national legislation.

The amendments to the national laws of the Member States needed for transposition of the Framework Decision to be complete were mentioned in the point 5.2 of the third report as follows:

Article 2

Slovenia has to ratify the International Convention for the Suppression of Counterfeiting Currency, concluded in Geneva on 20 April 1929.

Article 3

Estonia and Slovenia must make the transport, import and export of counterfeit currency criminal offences in their national law.

The fraudulent making and receipt of instruments intended for the counterfeiting of currency must be made criminal offences in the legislation of Estonia and Poland.

Article 4

The counterfeiting of currency by use of legal facilities or materials must be made a criminal offence in the legislation of Spain.

Article 5

The counterfeiting of currency not issued but designated for circulation must be made a criminal offence in the legislation of the Czech Republic and Slovenia.

Article 6

Hungary's legislation must provide for a maximum term of imprisonment of at least eight years for counterfeiting coins.

Estonia's legislation must provide for a maximum term of imprisonment of at least eight years, regardless of whether the offence is a repeat offence or a large-scale counterfeiting operation.

Articles 8 and 9

The authorities of the Czech Republic, Slovakia and the United Kingdom must take the measures necessary to introduce the principle of liability of legal persons in order to comply with Articles 8 and 9 of the Framework Decision.

The legislation of Spain and Luxembourg must introduce fines as sanctions in cases where legal persons are liable.

Article 9a

The legislation of Greece, Luxembourg and Poland must provide for recognition of convictions handed down in another Member State for establishing repeat offences.

Communication of further information required by the Third report

In addition, the third report stated also that the authorities in the Member States below should send the Commission information regarding the implementation of the provisions of the Framework Decision specified in the point 5.3 of the report:

Bulgaria

Criminalisation of counterfeiting of currency not issued (Article 5), liability of legal persons (Articles 8 and 9) and international repeat offences (Article 9a).

Estonia

Criminalisation of counterfeiting of currency by use of legal facilities (Article 4) and criminalisation of counterfeiting of currency not issued (Article 5).

Ireland

International repeat offences (Article 9a).

Hungary

Criminalisation of counterfeiting of currency not issued (Article 5).

Malta

Ratification of the Geneva Convention, provision for the jurisdiction of national courts in accordance with Article 7, liability of legal persons (Articles 8 and 9) and international repeat offences (Article 9a).

Portugal

Liability of legal persons (Articles 8 and 9).

Romania

Criminalisation of counterfeiting of currency by use of legal facilities (Article 4), criminalisation of counterfeiting of currency not issued (Article 5), liability of legal persons (Articles 8 and 9) and international repeat offences (Article 9a).

Finland

International repeat offences (Article 9a).

The authorities of the United Kingdom must inform the Commission about international repeat offences (Article 9a) and the application of the Framework Decision to Gibraltar.

The level of implementation of the Framework Decision: current state of play

A questionnaire on the implementation of the Framework Decision was sent to the Member States in December 2011 and to the members of the Euro Counterfeiting Experts Group (CEEG) in January 2012 with a deadline to reply by end of January 2012 (later extended to 7 February). The Member States were asked to report on the additional measures adopted since 2006 concerning the implementation of the Framework Decision into national law, in view of addressing the issues which were raised in the 2007 report. A table with an overview of the replies of the Member States to the questionnaire is in the Annex 2.

Analysis

Based on the responses to the questionnaire, the initial assessment is that the implementation of the Framework Decision by the MS has advanced. The necessary improvements were made in the implementation of the Framework Decision in comparison with the 3rd report. 15 MS have reported on progress made in terms of improvements required by the conclusions of the 3rd Report. However, some failures to fully transpose in particular the provisions on sanctions levels and the liability of legal persons and sanctions for legal persons in some Member States as pointed out by the 3rd report appear to subsist or the information relevant to the implementation of certain provisions has not been provided in the replies to the questionnaire in certain cases, as highlighted below.

- *Ratification of the 1929 Convention – Article 2* – All Member States have ratified the 1929 Convention, except for Malta from which no information has been received.
- *General offences of counterfeiting of currency – Article 3* – It seems that the transport, import and export of counterfeit currency, as well as the fraudulent making, receiving or possession of instruments intended for the counterfeiting of currency, are sanctioned in all the Member States. Some legal systems criminalise such acts by the concepts of transport or possession.
- *Additional offences of counterfeiting of currency by use of legal facilities - Article 4* – Almost all the Member States punish the counterfeiting of currency using legal facilities within the meaning of Article 4 of Framework Decision. Nevertheless, a large number of Member States comply with this provision by prohibiting the counterfeiting of currency without reference to or distinction between the means used. In Spain's legislation there is no explicit provision of the criminal offence of counterfeiting of currency by use of legal facilities or materials. Estonia has not provided any information on this point. As stated in the third report, it is desirable for all Member States to adopt explicit provisions criminalising the counterfeiting of currency by use of legal facilities. The offence referred to in Article 4 can –in principle- only be committed by agents of the national authorities who have the right and possibility to use legal facilities. Under some legal systems, therefore, this conduct could also rank as abuse of authority by an official. As the offence clearly differs from counterfeiting, the penalties too might also differ. Although the non-differentiated nature of the national measures is satisfactory from the point of view of the transposition of Article 4 of the Framework Decision, explicit national penalties should be adopted for reasons of legal clarity.
- *Criminalization of counterfeiting of currency not issued but designated for circulation – Article 5* – The aim of this provision is to define the objective element in counterfeiting so that currency not yet issued may also be included. The provision is no longer fully effective in these cases: Slovenia has failed to transpose this article (the criminal acts in relation to currency not issued but designated for circulation could be sanctioned as fraud, and not as

counterfeiting of currency), Romania has not transposed this article (counterfeiting of currency not issued could be punished only as a crime of swindling, and is not considered as the crime of currency counterfeiting). Bulgaria has not provided the relevant information about the implementation of this provision.

- *Penalties - Article 6* - Pursuant to Article 6(2), the offences of fraudulent making or altering of currency must be punishable by terms of imprisonment, the maximum being not less than eight years. Some Member States have implemented this article in complex ways, in which the punishment by terms of imprisonment not less than 8 years for fraudulent making or altering the currency might appear excessive. The legislation of Finland, Sweden and Lithuania includes a restrictive criterion regarding the seriousness of the offence for the application of the maximum penalty: the legislation of Finland and Sweden provides for a maximum penalty of at least eight years' imprisonment only for serious offences; the legislation of Lithuania provides for a maximum term of at least eight years (ten years in this precise instance) only for offences involving amounts that are "large" or "of considerable value"). Although this does not reduce the effectiveness of Article 6 of the Framework Decision, the competent national courts will pass the maximum sentence only in cases of serious offences. Hungary's legislation reserves the maximum penalty of more than eight years for the counterfeiting of banknotes, the counterfeiting of coins being considered a lesser offence and thus punishable by a maximum term of imprisonment of five years. The provision in Hungary for the maximum sentence of five years for counterfeiting coins does not comply with the maximum sanction of the Framework Decision. However, it appears that the new Hungarian penal code under codification includes a provision for a maximum term of imprisonment of at least eight years for counterfeiting coins, although the quantity or the value of money is not substantial, in order to comply with the criteria of the Framework Decision.
- *Jurisdiction – Article 7* - No information is available on this point as regards two Member States (Bulgaria and Romania).
- *Liability of legal persons and sanctions – Article 8 and 9* - The implementation of the principle of the liability of legal persons and the sanctions for legal persons was flagged in the 3rd report for several MS (10 MS): for instance, the legislation of the UK does not provide for the liability of legal persons and the legislation of Spain does not contain fines as sanctions in cases where legal persons are liable. Based on the replies provided in the questionnaire, it seems that 5 MS complied and rectified the situation (CZ, LUX, PT, RO and SK). Information on progress on this issue is still missing for 5 MS: BG and MT on the introduction of the liability of legal persons and sanctions for legal persons, ES on the introduction of fines as sanctions for legal persons, HU on sanctions for legal persons and UK on the introduction of the liability of legal persons.
- *International repeat offences – Article 9a* – The legislation of most Member States makes provision for final convictions handed down in another Member State to be taken into account for repeat offences. The legislation of five Member States (Germany, Latvia, Lithuania, Slovenia and Sweden) does not explicitly mention foreign convictions but, in general, the convicted person's past without any specific distinction so as to cover convictions of all types. Although such legal provisions are not at variance with the requirements of the Framework Decision, legal certainty (which is taken into account when assessing effective transposition) would be increased if the legislation of such Member States were amended so that such convictions could be expressly mentioned as being constitutive of habitual criminality. The absence of an explicit reference to convictions handed down in another Member State could lead, in practice, to such convictions not being

taken into account. Three Member States did not supply any relevant information on the transposition of this article into national law (Ireland, Romania, UK).

- *Territorial application – Article 10* - The United Kingdom authorities have not notified any progress with the draft legislation to implement the Framework Decision in Gibraltar.

Conclusions

- The general level of implementation of the Framework Decision has advanced in comparison with the 3rd report.
- However, the sanction provisions in the Framework Decision have been transposed in quite diverging ways in the Member States. The foreseen maximum penalties vary between eight and thirty years, and no minimum penalties or only fines are foreseen in a number of Member States. There are furthermore important divergences in the application in practice of the provisions of the Framework Decision. This raises concerns from an EU perspective, because a lack of harmonization of sanctions might lead to safe heavens for criminals.

ANNEX 2

1. Counterfeiting of the euro: Questionnaire to Member States' experts

PART I: THE IMPLEMENTATION OF FRAMEWORK DECISION 2000/383/JHA

1) On the basis of the findings in the third implementation Report from the Commission (see Annex), please provide the Commission with information regarding additional measures relevant to the implementation of the Framework Decision in your Member State since 2006.

PART II: THE WAY FORWARD

2) In terms of protection with criminal sanctions, have you encountered any difficulties in practice, for instance in relation to cross border cooperation, that could be linked to discrepancies in the implementation of the Framework Decision's provisions in diverse Member States?

If yes, please describe shortly.

3) Do you think that the protection of the euro would benefit from new substantive criminal law provisions and or through actions to strengthen implementation of existing provisions?

Annex:

Third report from the Commission based on Article 11 of the Council Framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro.

2. Table with an overview of the replies of the Members States to the questionnaire

| Country | Who | Progress of transposition | Amendments required by 3rd report | Improvements towards full transposition | Position of the Member State on the revision of the Framework Decision ⁴ | Concrete text proposals in case Member State favor a directive |
|----------|----------|---------------------------|---|---|--|--|
| Austria | ECEG | | | In 2005 Austria implemented the „Verbandsverantwortlichkeitsgesetz“ BGBl. I Nr. 151/2005 which establishes inter alia the liability of legal persons. This Act is also relevant for the criminal actions relevant in connection with the mentioned Framework Decision | Does not see an urgent need to embark on further harmonisation steps | |
| Belgium | ECEG/JHA | | | | JHA: the existing legal framework is considered sufficient. ECEG: general support for new substantive criminal law (align offences and make same offences punishable, recognition of convictions in other MS) | |
| Bulgaria | JHA/ECEG | YES | YES- Criminalisation of counterfeiting of currency not issued Art. 5, jurisdiction Art. 7, liability of legal persons and sanctions for legal persons Art. 8-9, international repeat offences Art. 9a | Since 2006 there have been several amendments to the Criminal Code as to forging payment instruments, preparation or association, sanctions, international repeat offences, etc. Information on Art. 5, 7, 8 and 9 still missing. | Reinforce the implementation of existing Framework Decision | |

⁴ Council Framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro.

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|----------------|------|-----|--|--|---|--|
| Czech Republic | JHA | YES | YES - Art. 5 - Counterfeiting of currency not issued but designed for circulation made a criminal offence; Art. 8-9 - introduce liability of legal persons | The liability of legal persons was introduced and the Art. 5 is covered. | New legislation would be supported if it brings an added value; refuses of a pure "Lisbonisation" in view of the end of the transition period | Introduce minimal standard rules on special investigative techniques |
| Cyprus | JHA | | | No additional measures taken | General support for new substantive criminal law | Further harmonisation of penalties - introduce minimum levels for maximum penalties in relation to other offences than "fraudulent making or altering of currency" Art. 3(1a) included in the Framework Decision |
| Denmark | ECEG | | | Information received on attempt: separately criminalised, Art. 21 of the DK Penal Code; complicity and liability for legal persons are also criminalised | | |
| Estonia | JHA | YES | YES - Art. 3 – Make, transport, import and export of counterfeit currency as well as making and receipt of instruments intended for counterfeiting criminal offences; Art. 4 - Criminalisation of counterfeiting of currency by use of legal facilities; Art. 5 - criminalisation of counterfeiting of currency not issued; Art. 6 - provide for max term of imprisonment of at least 8 years; | All issues rectified by amendments to the Penal Code: Art. 333, 334 and 340. No information on Art. 4 of the Framework Decision, | General support for new substantive criminal law and reinforced implementation of existing Framework Decision | |
| Finland | JHA | YES | –No information provided about international repeat offences - Art. 9a | Penal Code refers in general to the record of convicted persons without distinction between foreign and | The existing substantive criminal law provisions are considered sufficient; | |

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| | | | | domestic judgments; this provision was already in the legislation at the time of the implementation of the Framework Decision. | reinforce implementation of existing Framework Decision | |
| France | JHA | YES | | Information received on implementation of Art. 4, 9 and 9a | The existing substantive criminal law provisions are considered sufficient | Better harmonisation of procedural criminal law such as special investigative techniques (interceptions, controlled delivery, etc.), joint investigative teams |
| Germany | ECEG/JHA/ Bundesbank | | | No additional measures taken | The existing legal framework is considered sufficient; <i>form Bundesbank: couterfeit definition in Regulation. 1338/2001 should be amended to mention notes and coins "deliberately" made or altered instead of "fraudulently" made or altered in order to be able to punish it even if the fraudulent intent is denied</i> | |
| Greece | JHA/ECEG | YES | YES - Art. 9a - Recognition of convictions handed down in other MS for establishing international repeat offences | Greece now explicitly provides for recognition of sentences handed down in another MS. | JHA: general support for new more efficient substantive criminal law provisions and procedures as well as reinforced implementation of existing Framework Decision. ECEG: supports the directive | ECEG: provisions obliging courts to release seized counterfeit currency for technical purposes following expert analysis |
| Hungary | ECEG/JHA | YES | YES - Art. 6 - Provide max. term of imprisonment of at least 8 years | <u>New penal code under codification</u> includes the required provision for counterfeiting coins if the quantity or the value of money is substantial | JHA: MS should concentrate on the application of the current Framework Decision and on the basis of it they should strengthen their cooperation. | |

| | | | | | ECEG: general support for new substantive criminal law | |
|------------|----------|-----|--|---|--|---|
| Italy | ECEG | | | Some fine tuning | General support for new substantive and procedural criminal law | Further aligning ("uniformity") of offences and penalties in order to have identical penalties for identical offences; introduction of special investigative techniques which don't exist in Italian legislation: undercover agent, controlled delivery, etc. |
| Ireland | JHA | | Information not provided on Art. 9a - Recognition of convictions handed down in other MS for establishing international repeat offences | Information still missing on the Art. 9a | The existing legal framework is considered sufficient | |
| Lithuania | ECEG/JHA | YES | Art. 3 - No provision for the "uttering" expression but only the "sale" of counterfeit currency in the legislation | ECEG - reports overall state policy shift towards a more active fight against financial crimes due to the financial crisis. JHA - provides an explanation that the word "realize, handle, distribute" in the Penal Code is interpreted by the Lithuanian courts in a wide sense and it means any transfer of financial instrument to a third person. | General support for new substantive criminal law | |
| Latvia | ECEG | | | | Strengthen implementation of existing provisions | |
| Luxembourg | JHA | YES | YES - Art. 8-9 - Introduce fines as sanctions for legal persons, Art. 9a - Recognition of convictions handed down in other MS for establishing international repeat offences | Both areas corrected - Provisions added | The existing legal framework is considered sufficient; reinforce implementation of existing Framework Decision | |

| | | | | | | |
|-------------|------|-----|--|---|--|--|
| Malta | ECEG | YES | Information not provided about:: Ratification of the Geneva Convention, provision for the jurisdiction of national courts -Art. 7, liability of legal persons -Art. 8-9 and international repeat offences Art. 9a | No information on the ratification of the Geneva Convention. In the area of international repeat offences courts have to take into account any previous convictions; Maltese courts may accept jurisdiction where offence was committed outside Malta, even if by non-Maltese national. Information regarding Art. 8-9 still missing. | The existing legal framework is considered sufficient | |
| Netherlands | JHA | | | No additional measures taken | The existing legal framework is considered sufficient | |
| Poland | JHA | YES | Art. 3 - Making and receipt of instruments intended for counterfeiting criminal offences; Art. 9a - recognition of convictions handed down in other MS for establishing international repeat offences | Both areas covered in line with requirements of the Framework Decision | The existing legal framework is considered sufficient; reinforce implementation of existing Framework Decision | |
| Portugal | ECEG | YES | Liability of legal persons and sanctions for legal persons Art. 8-9 | Amendments to Art. on liability of legal persons | General support for strengthened protection of the euro | |
| Romania | ECEG | YES | Criminalisation of counterfeiting of currency by use of legal facilities (Art. 4), criminalisation of counterfeiting of currency not issued (Art. 5), jurisdiction (Art. 7), liability of legal persons (Art.s 8-9) and international repeat offences (Art. 9a). | Art. 4 covered, sanctions for legal persons introduced. Art. 5 has not been transposed. Information on Art. 7 and Art. 9a still missing | The existing legal framework is considered sufficient | |
| Slovakia | JHA | YES | YES - Art. 8-9 - introduce liability of legal persons | Liability of legal persons introduced in sep.2010; sanctions on legal persons have the nature of protective measure (confiscation of property or confiscation of a sum of money) | General support for new substantive criminal law provisions; support for enhanced cooperation and information exchange | |

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|----------------|----------|-----|---|---|--|--|
| | | | | | between national and the EU agencies specializing in the fight against currency counterfeiting; support for Council's conclusions on the subject adopted at the 3135th Justice and Home Affairs Council meeting in Brussels on 13 and 14 December 2011 | |
| Slovenia | ECEG | YES | YES - Art. 2 - Ratify the Convention of 1929; Art. 3 - Make, transport, import and export of counterfeit currency as well as making and receipt of instruments intended for counterfeiting criminal offences; Art. 5 - Counterfeiting of currency not issued but designed for circulation made a criminal offence | Still no information on Art.5, other articles covered | | |
| Spain | ECEG/JHA | | YES - Art. 4 - Counterfeiting of currency by use of legal facility or materials to be made criminal offence; Art. 8-9 - Introduce fines as sanctions for legal persons | All relevant information still missing (however an informal information was obtained as to the legal liability of legal persons - it has been introduced in Spain in 2010) | The existing legal framework is considered sufficient (JHA); implementation of existing Framework Decision sufficient (ECEG) | |
| Sweden | JHA | | | Explanation provided on restrictive criterion for the application of maximum penalty: depends on seriousness of crime | General support for approximation in the field of criminal law while maintaining fundamental principles of criminal and procedural law and respecting differences between the various systems of the MS | |
| United Kingdom | ECEG | | YES - Art. 8-9 - Introduce liability of legal persons; Art. | All relevant information still missing | Implementation of existing Framework Decision | |

| | | | | | | |
|-------|---------------|-----------------------|------------------------------------|--|--|---|
| | | | 9a - international repeat offences | | sufficient | |
| | | | | | | |
| TOTAL | 27 MS replied | 15 MS report progress | | | 9 MS welcome the review of the current legal framework | Out of which 5 MS made proposals for a directive with added value |

| | |
|---|------|
| Some improvements/information needed (ORANGE) | 5 MS |
| No improvements/information reported (RED) | 3 MS |

ANNEX 3

Views of the stakeholders on the way forward

Member States experts (hereafter "MS") were involved in the consultation process both by means of a questionnaire and by means of formal and informal discussions in particular at the 2nd International Conference on the Protection of the Euro against counterfeiting (The Hague Conference) in November 2011, and the meetings of the Euro Counterfeiting Experts Group (ECEG)⁵. The European Central Bank (ECB) as well as Europol participated in this process and provided their input, also through direct contributions to the Commission.

1. Questionnaire

A questionnaire on the implementation of the Framework Decision and some questions on a potential way forward was sent to the MS in December 2011 and to the members of the ECEG in January 2012 (see Annex 2). The second part of the questionnaire consisted of a consultation of the stakeholders on the possible way forward and was addressed to the MS (JHA Counsellors⁶) and to the ECEG members. In the replies to the questionnaire, the stakeholders expressed the following views.

- Two fifths of MS experts consider that the current legal framework is sufficient or that there is no need for new substantive criminal law provisions.
- One fifth of MS experts welcome in general actions to strengthen implementation of existing provisions; for instance, Finland and other Member States prefer to ensure a better implementation in practice of the existing provisions and the general framework of mutual legal assistance, as well as mutual recognition instruments which can be applied also in cases of suspected euro counterfeiting. Finland and other States in substance are of the opinion that it would, in most cases, be better to make the current system more known to practitioners in order to improve the practice and ensure that current legislation achieves its full potential than to introduce new rules.
- Two fifths of MS experts welcome a reinforcing of the legal framework including changes providing added value by means of a directive.

Certain MS (Czech Republic and France) do not see a need for a new legal instrument, unless it will bring an added value. Cyprus proposed to extend the minimum for maximum sanctions, foreseen in Art. 6(2) to other offences referred to in Articles 3 and 4 (and not only to cover making and altering (referred to in Art. 3 (1)(a)). Italy flagged the problem of "penalty shopping" as the sanctions vary from MS to MS.

Two concrete proposals were received in relation to the improvement of procedural criminal law. The Czech Republic, France and Italy suggested considering an alignment of the investigative techniques such as controlled delivery, under-cover agents. Greece flagged the rules regarding the use of seized counterfeits for analysis purposes to prevent counterfeits to continue to circulate by adjusting machines which authenticate currency. Greece suggested therefore the introduction of provisions obliging courts to release seized counterfeit currency for technical purposes following expert analysis.

⁵ The ECEG is provided for in Regulation (EC) 1338/2001 and is composed of experts from Member States, ECB, Europol and OLAF/ETSC

⁶ The JHA Counsellors is a Council Group of representatives of the Member States administrations in the area of justice and home affairs.

2. Discussions at The Hague Conference

Experts and specialists were consulted at the 2nd International Conference on the Protection of the Euro against counterfeiting, in The Hague, organised by OLAF, the European Central Bank (ECB) and Europol on 23 – 25 November 2011. Twelve workshops were conducted, oriented to law enforcement, legal, judicial and technical issues relating to the protection of the euro. Among the conclusions reached at the Conference, the need for further harmonization of national legal frameworks was highlighted with regard to both criminal and procedural law to support an effective protection of the euro against counterfeiting.

The descriptions of national laws given by the experts showed that there are important differences among the national legal frameworks. On the basis of the experience of the experts, these differences can create problems in cross-border cooperation against counterfeiting of the euro. The experts agreed to the principle that the harmonization of criminal law rules against counterfeiting would add value. Harmonized criminal sanction provisions and harmonised offence definitions would facilitate the work with, for example, rogatory letters. Indeed, harmonized criminal sanctions and offences would facilitate the judicial cooperation between the authorities of Member States. Particularly, some experts called for the introduction of common EU minimum sanctions, and others pointed at the risk of *forum shopping*, as criminals may choose to focus their illicit activities on Member States with less severe sanctions. Other Participants expressed the view that new substantive rules would probably not add much value now; instead, the priority should be to make sure that existing rules are fully implemented and that their application in practice is ensured. The Commission (DG JUST) noted that a proposal for a directive on criminal law to replace the 2000 Framework Decision would to a significant extent reply to the "better implementation need" identified by experts. A directive will namely make it –at least-possible to put in place a stronger mechanism for monitoring the implementation of EU law in Member States.

Some participating countries indicated that new legislation gives the opportunity to expand the investigative methodologies, within those legislative systems that still do not provide such means, like controlled deliveries and undercover agents. The investigative tools similar to those adopted in combating organized crime, drug trafficking and other serious crime cases, should be made available in all Member States for the protection of the euro against counterfeiting⁷.

Among the final conclusions reached at The Hague Conference, the following points were stated:

- taking advantage of the entry into force of the Lisbon Treaty by replacing the Framework Decision 2000/383/JHA with a strengthened directive with criminal law measures against counterfeiting of the euro;
- supporting more homogeneous application of the actual legislation, in particular with respect to penalties applied by national courts;
- supporting harmonization of penal procedures within the EU, in particular with respect to the possible use of investigative tools, such as undercover agents, controlled deliveries, fictitious purchases;
- increasing the use of technical assistance provided by competent authorities (such as NACs⁸, CNACs⁹ and the European Technical and Scientific Centre (ETSC)¹⁰) during all stages of investigations against euro coins counterfeiting;

⁷ The same need was identified by the Final Report of the International Conference in Istanbul of June 2011, "A Community strategy to protect the euro".

⁸ NACs are the national analysis centres for counterfeit euro notes referred to in Regulation 1338/2001, OJ L 181, 4.7.2001, p.6.

⁹ CNACs are the coin national analysis centres referred to in Regulation 1338/2001, OJ L 181, 4.7.2001, p.6.

3. Discussions at the Euro Counterfeiting Experts Group (ECEG)

3.1. ECEG meeting of 10 November 2011

Criminal sanctions under the Lisbon Treaty were on the agenda of 58th ECEG meeting that took place on 10 November 2011. Experts were informed about the ongoing reflection within the Commission concerning criminal sanctions for the crime of counterfeiting under the Framework Decision in view of possibilities to strengthen the protection of the euro through a directive. It was noted that substantial differences exist between Member States with regard to the measures in place against the offence of counterfeiting, as well as in the effective implementation of sanctions, in terms of penalties actually handed down by national courts. A roundtable of the ECEG members revealed overall support of the review of the Framework Decision which should focus among other issues on the question of whether changes to sanctions could be useful. Also awareness-raising among prosecutors about criminal sanctions on counterfeiting was mentioned.

3.2. ECEG meeting of 14 March 2012

Following the analysis of the replies to the questionnaire, further discussions took place at the 59th ECEG meeting on 14 March 2012. The experts were informed about the results of the questionnaire and the potential three issues to be included in the new directive: the availability of special investigation techniques, the release of seized counterfeits during court proceedings for technical purposes and the harmonization of minimum sanctions. A room document focusing on these issues was distributed and discussion took place. The ECEG members showed support for a directive covering investigative techniques and the release of counterfeits during judicial procedures. As to the introduction of minimum sanctions, concerns were expressed that the minimum sanctions would require a change of the whole criminal system, for example of the suspension conditions, and a complete revision of the Criminal Code, for instance in France. Concerns were also raised by some representatives of Member States in the ECEG that a minimum sanction could be inappropriate in minor cases.

The ECB voiced its support of further harmonization of minimum sanctions, given that the euro is the single European currency; the fact that euro counterfeiting can be sanctioned differently in each MS is disquieting. While noting that full harmonization of sentencing in Member States is not realistic taking into account the procedural limitations, minimum sanctions could be an important step. The ECB also supports the proposal on the release of seizures of counterfeits since it would considerably improve prevention (counterfeits could at an early stage be prevented to circulate).

Europol expressed its interest in the introduction of minimum sanctions and mentioned a pilot study on "forum shopping". Europol informed that it is among the goals of the social study pilot project to identify if foreign criminals choose a certain country due to low penalties ("forum shopping"). Europol briefed the group on the status of the pilot project social study which has been ongoing in the Netherlands. It noted that while the sample of criminals to interview is limited, the quality of the interviews is, however, quite good. The final results will be known in the near future.

An excerpt of the report on the 59th Meeting of the "Euro Counterfeiting Experts Group" of 14 March 2012 on this topic follows below:

"The Commission/OLAF opened the topic of possibly improving the protection of the euro through an improved legal framework afforded by the Lisbon Treaty, mentioning the opportunities to improve the harmonisation of the level of criminal sanctions and to reinforce monitoring procedure

¹⁰ The European Technical and Scientific Centre (ETSC) analyses and classifies counterfeit euro coins and assists national authorities. It is attached to the European Anti-Fraud Office OLAF, see Commission Decision 2005/37/EC of 29 October 2004.

by the Commission and the Court of Justice. The Commission reported on the analysis of responses to a questionnaire sent to JHA counsellors and ECEG members. The discussion on the way forward essentially focused on three topics: investigation techniques, release of seized counterfeits for scientific and technical purposes and minimum sanctions.

About the sanctions policy, DG JUST stated that is currently an obligation of a minimum level of the maximum penalty in EU legislation adopted, such is the case in the Framework Decision 2000/383/JHA. Thus far in EU legislation there are no minimum sanctions. The consequences of the introduction of such provisions are unknown; this is the first discussion on minimum sanctions.

DG HOME is very interested in the discussion on minimum sanctions with regards penalties for organized crime in view of the experience with the most recent legal instruments adopted in this area. The confiscation package which has just been proposed by the Commission will be relevant for the discussion. Art. 83 TFEU gives the possibility to introduce "minimum rules" in some areas of legislation. A consideration of subsidiary and proportionality remain essential.

Voicing some concerns, the German expert explained that one of the problems with the minimum penalty is that it would undermine the systematic nature of their penal law. Germany usually has a minimum 1 year of imprisonment for counterfeiting offences and, as an exception, 2 years for offences committed by a group. In general practice, sentences of up to 2 years can be suspended. If the minimum should be raised, they would need to look at all offences and suspensions, and would not be able to examine counterfeiting in an isolated way. Criminal statistics show that over 80% of counterfeiting cases fall under minor violations, such as young people or people unaware of being in the possession of counterfeits, but professional perpetrators are caught much less frequently than amateurs. If a new minimum were to be accepted, Germany would need to overhaul the whole Penal Code.

The Dutch expert agreed that the introduction of minimum sanctions at EU level is not the way forward for minor violations committed by youth, but maybe for serious offences committed in an organized way by professionals disposing of illegal print shops or mints.

The Commission/OLAF explained that the existing provisions in the Framework Decision foresee a maximum penalty only for the main offence of producing counterfeited currency, thus making a distinction between the offences.

Malta also agreed with German and Dutch opinions. If Malta would have to change the minimum sanctions, this would necessitate a change of the Criminal Code and the whole criminal system. The representative noted that as in the case of Germany, someone can get a suspended sentence for a 2 years' imprisonment.

The Italian expert considered the possibility of having minimum sanctions but at the same time highlighted the need to study carefully the situation of the minimum penalties existing in different countries before imposing a minimum sanction.

Regarding undercover operations and the release of seized counterfeits, Italy considers that an important EU initiative could be to harmonize common rules and standards with respect to investigative techniques. France also supported the proposals on the investigative techniques and the possibility to recover and analyse seized counterfeits for analysis before the end of a trial.

France noted that the introduction of minimum sanctions would need a general revision of their Penal Code, since France does not have minimum penalties in its criminal law. France further suggested considering the possibility to confiscate the criminal assets and procured equipment from

the perpetrators as such an action would be more detrimental to a criminal compared to a few months imprisonment sentence."

4. ECB views

The ECB further supported the Commission's initiative by means of a letter of 17 April 2012 addressed to DG OLAF and DG JUST and a further letter of 29 August 2012 addressed to DG JUST. In these letters it voices its support for further harmonisation of the level of penalties by introducing minimum minimum sanctions, applying the current minimum maximum sanctions also to the offence of distributing counterfeits and of the framework for the release of seized counterfeits. From ECB's perspective, the fact that the euro is the single currency of the euro area Member States implies that the criminal act of euro counterfeiting must necessarily be considered to cause the same harm irrespective of where it is perpetuated.

The general rule of Article 6 of the Framework Decision leaves a lot of leeway to Member States with the consequence that the level of criminal sanctions for counterfeiting differs quite considerably from Member State to Member State: the minimum sanctions for the fraudulent making or altering of currency range from "no minimum" to 10 years and the minimum maximum sanctions range from 8 years (minimum imposed by the Framework Decision) to 30 years. Moreover the lack of harmonisation may lead to a "forum shopping" of perpetrators. Without the introduction of deterrent minimum sanctions, the ECB fears the risk that consumer will have doubts about the sufficient protection by sanctions and that they will lose their confidence in banknotes and coins. If consumers fear to receive counterfeit banknotes and coins, they might prefer other means of payment instead of cash, which could have an impact on trade.

As to the introduction of minimum minimum sanctions, the ECB states that they are necessary to ensure an effective deterrence in the EU; its absence in a number of MS would raise doubts whether the sanction in place are sufficient in terms of dissuasiveness. The ECB is aware that the introduction of minimum minimum sanctions would be a novelty for some Member States but this should not be an obstacle for a further harmonization of the legal framework under Article 83 of the TFEU. The concerns raised by the some representatives of Member States in the ECEG, namely that a minimum sanction could be inappropriate in "minor cases", could be addressed by an exception for minor cases.

According to the ECB, deterrent sanctions for distribution are also very important, in terms of minimum and maximum sanctions of a certain level. The ECB explains that organised crime, which produces most of the counterfeits recovered from circulation¹¹, seems to rely on an effective distribution network since the same counterfeits appear all over Europe. The importance of targeting the distribution channels is also proven by the fact that the disruption of a distribution channel by the law enforcement authorities has an immediately noticeable impact on the counterfeiting statistics. In contrast, the dismantling of an illegal printery by the law enforcement authorities does not seem to have a noticeable effect on the counterfeiting statistics which seems to indicate that the organised crime is able to substitute the closed printery with a new one rather quickly.

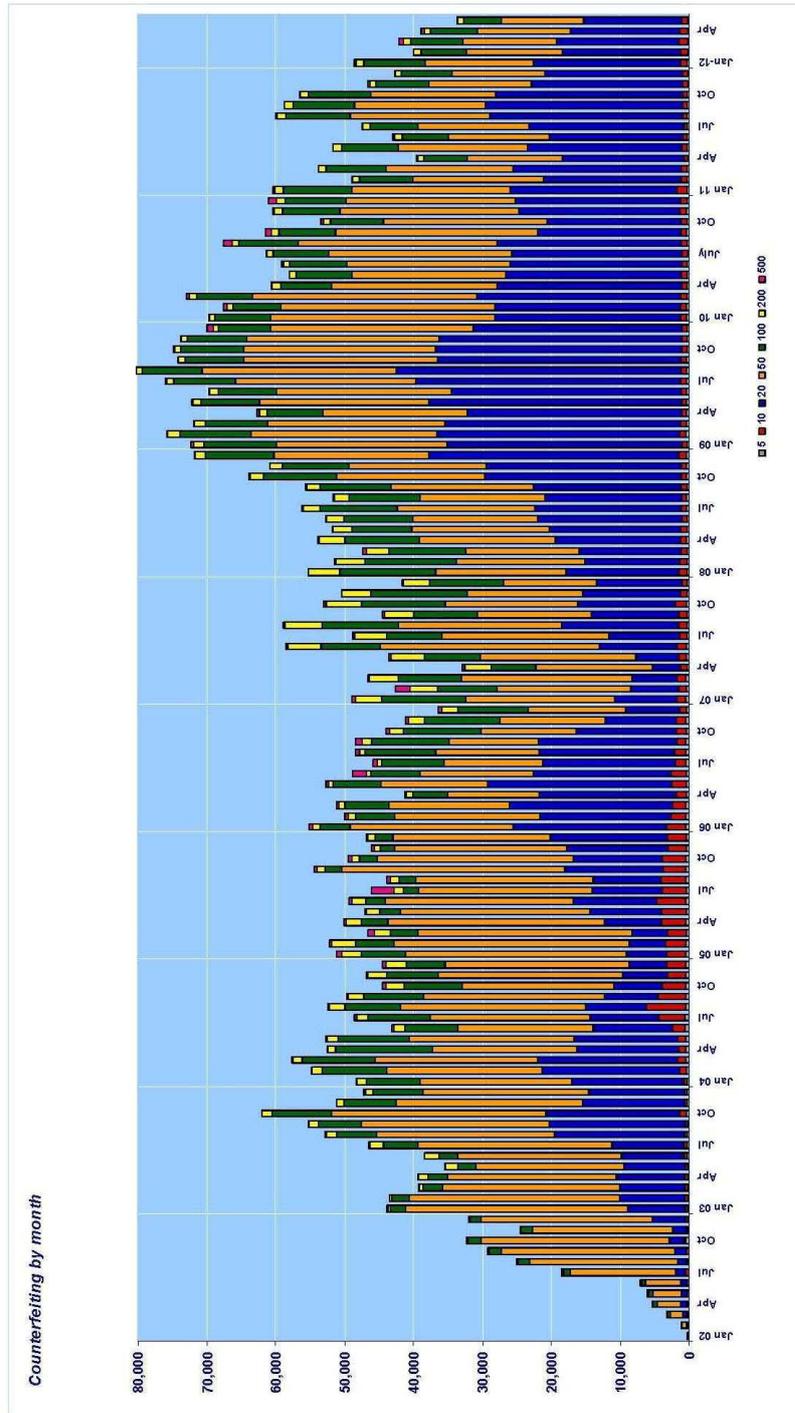
The ECB is in favour to harmonize further the legal framework for the release of seized counterfeits by courts before the end of the criminal trial. As highlighted by the ECB at earlier occasions, the ECB and the national central banks (NCBs) should as a rule be entitled to receive samples of banknotes used or retained as evidence in criminal proceedings in a timely manner, to ensure an effective protection of the euro against counterfeiting. An exception to this general rule should only

¹¹ According to the ECB statistics, 70% of all euro counterfeits recovered from circulation have been produced by 10 distinctly identifiable sources within 50 km radius of the city of Naples.

be made when a transfer during the criminal proceedings is impossible, taking into account the low quantity of seized counterfeits. In practice, the (judicial) authorities of some Member States still refuse transferring samples of counterfeit euro banknotes to the ECB and NCBs prior to the end of the criminal proceedings even if such transfer would be possible taking into account the quantity of seized banknotes. The transfer of such counterfeits after the end of criminal proceedings (which may take some time) is of limited value.

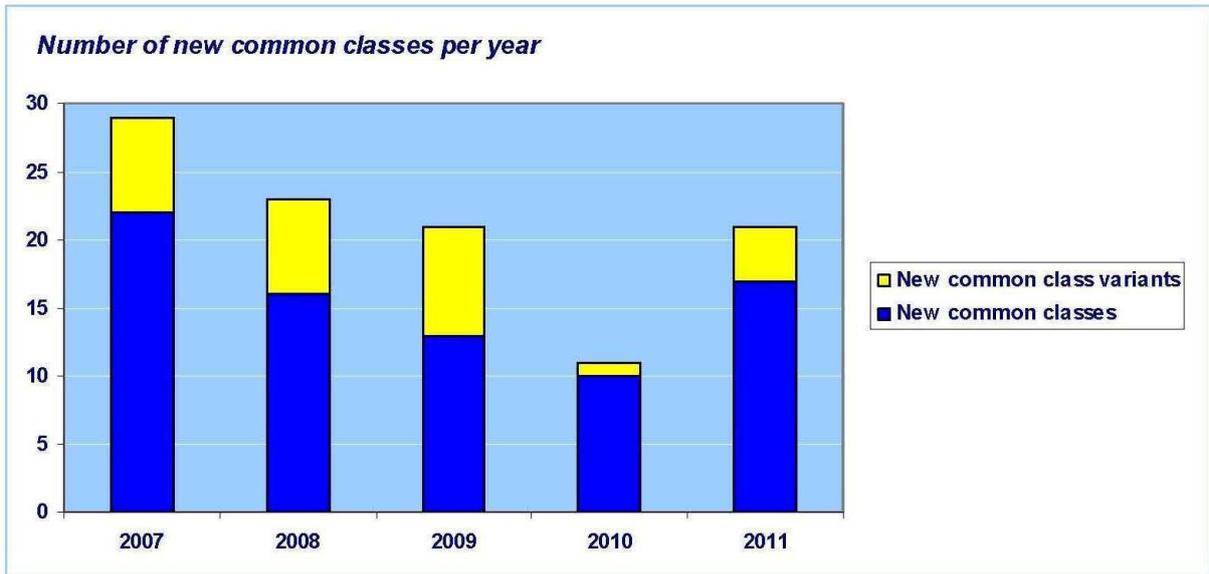
ANNEX 4

1. Status of euro banknote counterfeiting reported by the ECB at the 60th ECEG meeting in June 2012



The evolution of counterfeiting on a monthly basis:

2. Counterfeit banknote common classes¹² reported by the ECB at the 59th ECEG meeting in March 2012



¹² Class: group of counterfeits having matching technical characteristics, therefore assumed to have the same origin.

3. Extract from ETSC Annual Report “The protection of euro coins in 2011”

Visual and technical characteristics

The counterfeit coins are in general of a relatively good visual quality, particularly for stamped counterfeit coins. They are globally close to the dimensions and weight of genuine euro coins. Therefore, it is unlikely that the general public would recognise the counterfeits.

The electrical and magnetic parameters of counterfeits, which are particularly important for detection by vending and sorting machines, are usually quite different from genuine euro coins. Over the last few years, however, they have been increasingly approaching the technical properties of genuine euro coins.

Two recent examples are the following:

- ▶ 2-euro counterfeit type (common class 37) detected in circulation in 2009, whose technical characteristics are very similar to those of genuine coins;
- ▶ 1-euro class 37 detected in 2010, with some parameters within the specification.

In 2011, the quantities of these new classes increased sharply. Taking into account this evolution, a continuous effort must be made, for instance, by upgrading coin processing machines in order to detect the increasing number of sophisticated counterfeits.

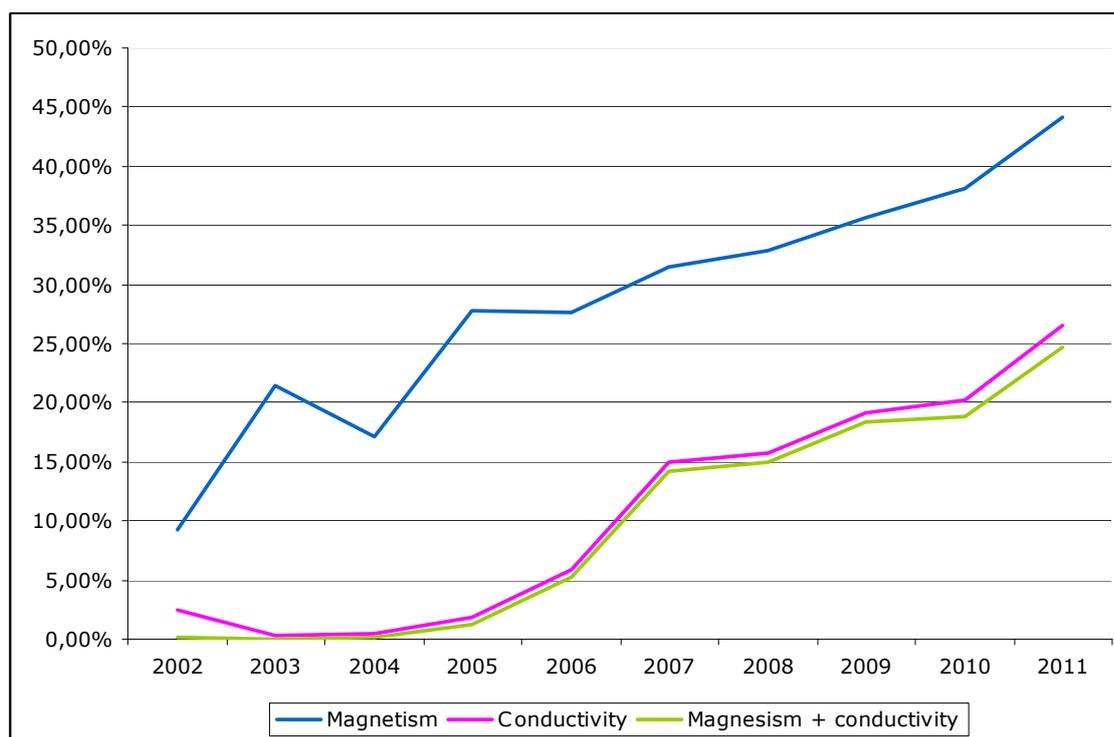
2 euro

The technical properties of the counterfeit 2-euro coins found in circulation continued to improve in 2011. The proportion of counterfeits featuring an imitation of the slight magnetism of genuine coins reached 44%. The proportion of counterfeits with an electrical conductivity roughly in the vicinity of the one of 2-euro coins increased to 26%. The evolution since 2002 can be seen in the following table and chart.

Table 7: Percentage of counterfeits imitating technical properties of the 2-euro coins

| Year | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 |
|----------------------|------|-------|-------|-------|-------|-------|-------|-------|-------|-------|
| Magnetism | 9,3% | 21,5% | 17,1% | 27,8% | 27,6% | 31,5% | 32,8% | 35,6% | 38,1% | 44,1% |
| Conduct. | 2,4% | 0,3% | 0,4% | 1,9% | 5,8% | 15,0% | 15,8% | 19,2% | 20,2% | 26,5% |
| Magn&Cond | 0,2% | 0,0% | 0,1% | 1,3% | 5,3% | 14,2% | 15,0% | 18,4% | 18,9% | 24,7% |

Chart 8: Evolution of counterfeits imitating technical properties of the 2-euro coins



1 euro

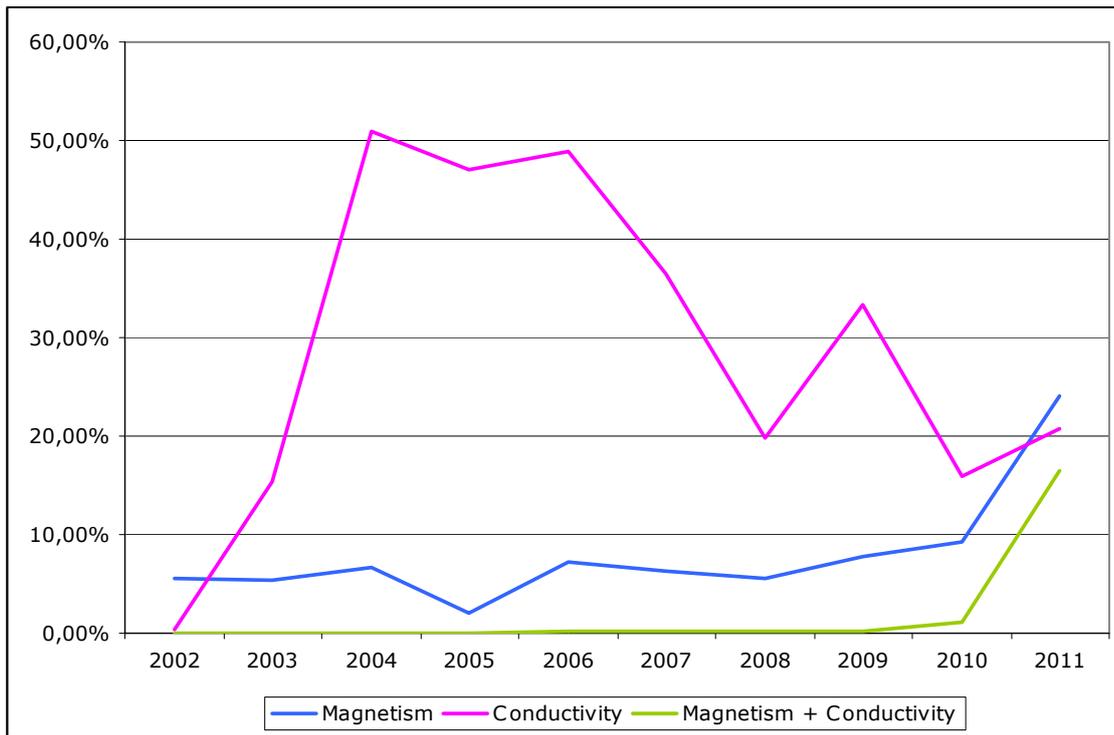
The proportion of counterfeit 1-euro coins found in circulation featuring an imitation of the slight magnetism of genuine coins increased sharply in 2011. The proportion of counterfeits with electrical conductivity and magnetism close to the technical specification rose from 1% in 2010 to 16,5% in 2011.

The evolution since 2002 can be seen in the following table and chart.

Table 8: Percentage of counterfeits imitating technical properties of the 1-euro coins

| Year | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 |
|----------------------|------|-------|-------|-------|-------|-------|-------|-------|-------|-------|
| Magnetism | 5.5% | 5.4% | 6.6% | 2.1% | 7.3% | 6.3% | 5.6% | 7.7% | 9.3% | 24.0% |
| Conduct. | 0.3% | 15.3% | 50.9% | 47,0% | 48.9% | 36.5% | 19.9% | 33.3% | 15.9% | 20.8% |
| Magn&Cond | 0,0% | 0,0% | 0,0% | 0.0% | 0.2% | 0.1% | 0.1% | 0.2% | 1.1% | 16.5% |

Chart 9: Evolution of counterfeits imitating technical properties of the 1-euro coins

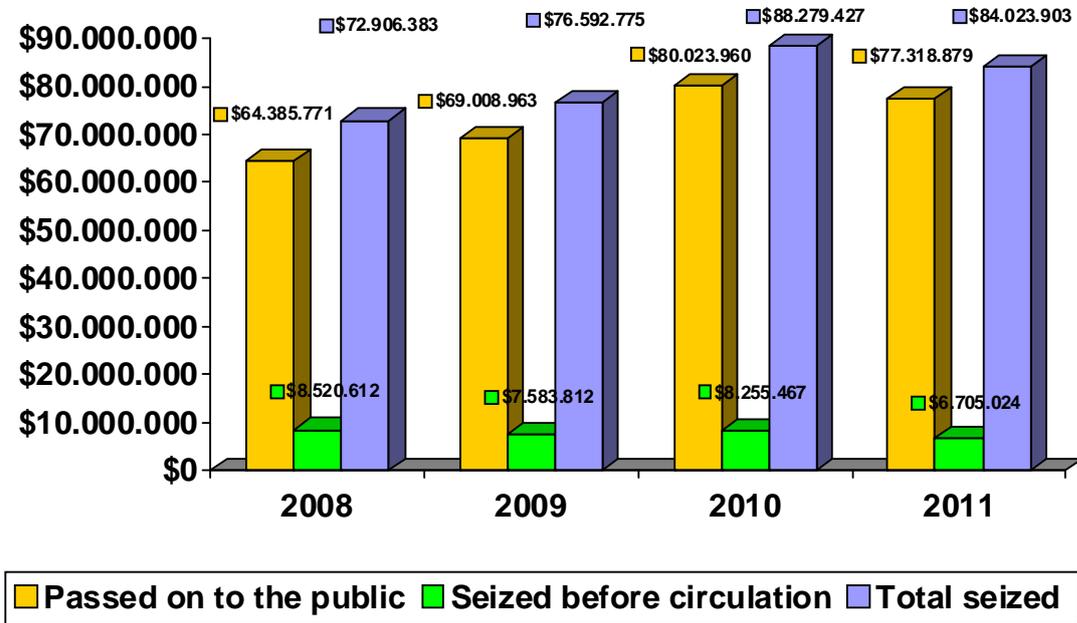


50 cent

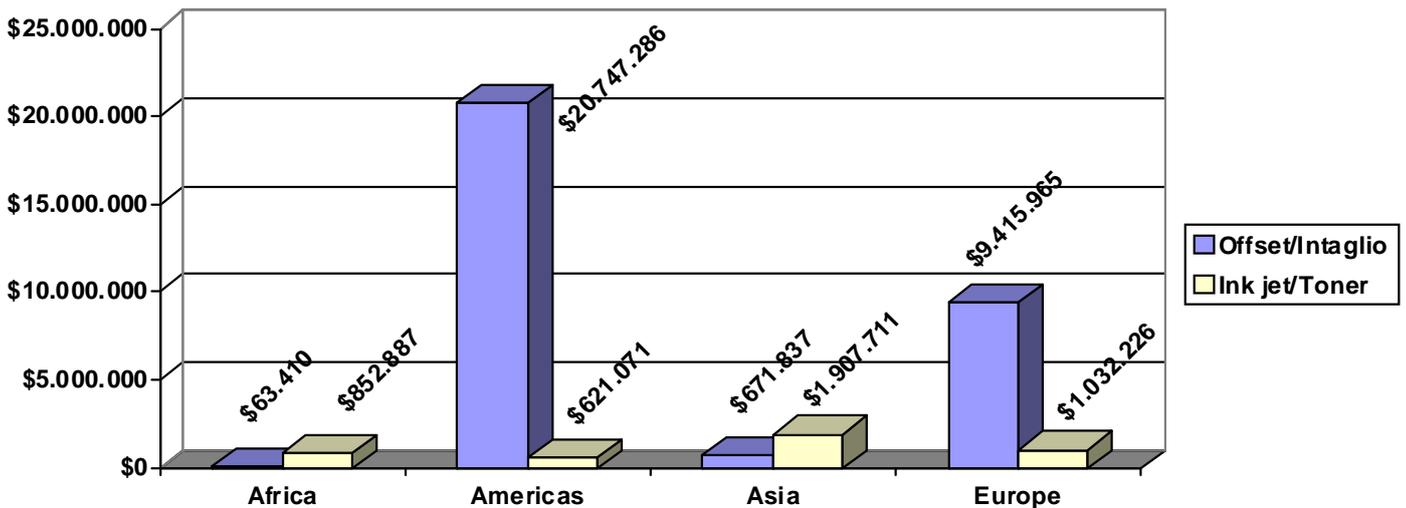
The counterfeits of class 1, representing the majority of 50-eurocent counterfeits found in circulation, show a good quality visual appearance. Except for this class, the visual appearance of 50-eurocent counterfeits is still relatively poor, as compared to bicolour counterfeit coins. Stamped counterfeit 50-eurocent coins are usually made of brass. They are easily rejected by vending and sorting machines.

4. Status of US Dollars counterfeiting as reported by Interpol at the Euro North-East Conference in April 2012 (Warsaw)

4a. Counterfeit US Dollars seized worldwide



4b. Value of counterfeit US Dollars seized in INTERPOL member countries in 2011 by Region, excluding the United States of America



ANNEX 5

Table with sanctions in place in the Member States¹³

| Country | Crime | Minimum sentence | Maximum sentence | Law | § | Comment |
|---------|--------------|------------------|------------------|-----------------------------|------------|--|
| DE | Production | 1 year | 15 years | Strafgesetzbuch | 146 | |
| DE | Distribution | 1 year | 15 years | Strafgesetzbuch | 146 | |
| FR | Production | no Minimum | 30 years | Code Penal | 442 | |
| FR | Distribution | no Minimum | 10 years | Code Penal | 442 | |
| AT | Production | 1 year | 10 years | Strafgesetzbuch | 232 | |
| AT | Distribution | no Minimum | 5 years | Strafgesetzbuch | 233 | |
| BE | Production | 5 years | 20 years | Penal Code | 162 173 | coins: 5-10 years banknotes 15-20 years |
| BE | Distribution | 5 years | 20 years | Penal Code | 168 176 | coins: 5-10 years banknotes 15-20 years |
| BG | Production | 5 years | 15 years | Penal Code | 243 | |
| BG | Distribution | no Minimum | 8 years | Penal Code | 244 | |
| CY | Production | no Minimum | 8 years | Currency Law 2004-2008 | . | |
| CY | Distribution | no Minimum | 8 years | Currency Law 2004-2008 | . | |
| CZ | Production | 3 years | 12 years | Act 40/2009 (Criminal Code) | 233 | |
| CZ | Distribution | 3 years | 12 years | Act 40/2009 (Criminal Code) | 233 | |
| DK | Production | no Minimum | 12 years | Criminal Code | 166 | |
| DK | Distribution | no Minimum | 12 years | Criminal Code | 167 | |
| EE | Production | fine | 8 years | Karistusseadustik | 333 | |
| EE | Distribution | fine | 10 years | Karistusseadustik | 334 | |
| ES | Production | 8 years | 12 years | Codigo Penal | 386 | |
| ES | Distribution | 8 years | 12 years | Codigo Penal | 386 | |
| FI | Production | 4 months | 10 years | | | |

¹³ German Bundesbank, April 2011

| | | | | | | |
|-----------|--------------|------------|----------|---------------------------------|-----|------------------------|
| FI | Distribution | 4 months | 10 years | | | |
| GR | Production | 10 years | 20 years | Penal Code | 207 | |
| GR | Distribution | 10 years | 20 years | Penal Code | 208 | |
| HU | Production | 2 years | 10 years | Act IV of 1978 on Criminal Code | 384 | coins: 2-5 years |
| HU | Distribution | 2 years | 10 years | Act IV of 1978 on Criminal Code | 384 | |
| IE | Production | fine | 10 years | | | |
| IE | Distribution | fine | 10 years | | | |
| IT | Production | 3 years | 12 years | Penal Code | 453 | |
| IT | Distribution | 1 year | 6 years | Penal Code | 455 | |
| LT | Production | fine | 10 years | Criminal Code | 213 | |
| LT | Distribution | fine | 10 years | Criminal Code | 213 | |
| LU | Production | 10 years | 15 years | Code Penal | 173 | coins: 5-10 years |
| LU | Distribution | 1 year | 5 years | Code Penal | 177 | banknotes: 10-15 years |
| LV | Production | 3 years | 10 years | Criminal Law | 192 | |
| LV | Distribution | 3 years | 10 years | Criminal Law | 192 | |
| MT | Production | 2 years | 9 years | Central Bank of Malta Act | 45 | |
| MT | Distribution | 2 years | 9 years | Central Bank of Malta Act | 45 | |
| PL | Production | 5 years | 25 years | Penal Code | 310 | |
| PL | Distribution | 1 year | 10 years | Penal Code | 310 | |
| NL | Production | fine | 9 years | Criminal Law | 208 | |
| NL | Distribution | fine | 4 years | Criminal Law | 210 | |
| PT | Production | 3 years | 12 years | Penal Code | 262 | |
| PT | Distribution | no Minimum | 5 years | Penal Code | 265 | |
| RO | Production | 3 years | 12 years | Criminal Code | 282 | |
| RO | Distribution | 3 years | 12 years | Criminal Code | 282 | |
| SE | Production | no Minimum | 10 years | Penal Code | 6 | |
| SE | Distribution | no Minimum | 10 years | Penal Code | 9 | |
| SI | Production | 6 months | 8 years | Penal Code | 243 | |
| SI | Distribution | 6 months | 8 years | Penal Code | 243 | |
| SK | Production | 3 years | 20 years | Penal Code | 270 | 271 |
| SK | Distribution | 3 years | 20 years | Penal Code | 270 | 271 |

| | | | | | | |
|-----------|--------------|------------|----------|---|---|--|
| UK | Production | no Minimum | 10 years | . | . | |
| UK | Distribution | no Minimum | 10 years | . | . | |

ANNEX 6

Member States that need to change their legislation¹⁴

| MINIMUM SANCTION for production and/or distribution.- 6 months | MAXIMUM SANCTION for distribution - 8 years |
|--|---|
| Austria (for distribution only) | Austria |
| Bulgaria (for distribution only) | |
| Cyprus | |
| Estonia | |
| Finland | |
| France | |
| <i>Ireland*</i> | |
| | Italy |
| Lithuania | |
| | Luxemburg |
| The Netherlands | The Netherlands |
| Portugal (for distribution only) | Portugal |
| Sweden | |
| <i>UK*</i> | |
| 10+ (2) =12 | 5 |
| TOTAL 12 ** | |

* subject to opt-in

¹⁴ Established on the basis of the table of sanction in place by the German Bundesbank, April 2011, see Annex 5

** 10 +5 but Austria, Portugal and the Netherlands being the Member State which would have to adapt both the maximum and the minimum level of sanction and therefore not counted twice