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to: Mr Uwe CORSEPIUS, Secretary-General of the Council of the European  
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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

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Delegations will find attached Commission document SWD(2013) 19 final Part 1/2.

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EUROPEAN  
COMMISSION

Brussels, 5.2.2013  
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Part 1/2

**COMMISSION STAFF WORKING PAPER**

**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}  
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## 1. INTRODUCTION

Counterfeiting of currencies remains a concern throughout the European Union. Counterfeits harm citizens and businesses that are not reimbursed for counterfeits even if received in good faith. It also decreases the acceptability of notes and coins.

Counterfeiting of the euro is of special concern as the euro is the single currency shared by the 17 Member States of the euro area in use for 330 million people in this area.<sup>1</sup> It is also used at a large scale in international trading transactions and serves as important reserve currency for third countries. Today the euro is the second most important international currency worldwide. This Impact Assessment will therefore concentrate on the euro. However the counterfeiting is a major problem also for other currencies circulating in the European Union as demonstrated by the statistics in Annex 4. The problems identified in relation to the euro can be therefore considered of a general nature and valid also for other currencies.

The euro continues to be a target of organised crime groups active in the forgery of money.<sup>2</sup> The worldwide importance of the euro means that it is particularly open to the risk of counterfeiting on a transnational scale. Based on the findings of Interpol, these organised crime groups are involved in currency counterfeiting in the majority of cases.<sup>3</sup> This has led to a financial damage of at least 500 million euro since the introduction of the euro in 2002. Data from the European Central Bank show peaks in the number of counterfeit notes during the period 2009 – 2010 and another peak in the second half of 2011. Furthermore, the European Technical and Scientific Centre (ETSC)<sup>4</sup> reports a continuous discovery of new types of counterfeit euro coins. This data demonstrates that the threat of euro counterfeiting is a continuous and constant one. Europol considers that there is a long-term trend towards an increase in the crime level and notes that the criminal threat remains serious.<sup>5</sup> These developments and the continuous discovery each year of illegal printeries and mints also suggest that the protection of the euro against counterfeiting should be improved.

### **What is the scope of the analysis?**

This Impact Assessment Report will examine to what extent national criminal law systems ensure a sufficient protection of the euro. Criminal law action is essential in the fight against counterfeiting of currency which is traditionally subject to high levels of penalties since the times of the ancient Roman law. The overall aim of the initiative is to look at possible ways to reinforce the level of protection and the credibility of the monetary system of the Union, for which the European single currency is the fundament.

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<sup>1</sup> Total figure of genuine notes in circulation in first half of 2012 amounts to 14.6 billion.

<sup>2</sup> Europol Organised Crime Threat Assessment 2011 (OCTA 2011)

<sup>3</sup> According to an Interpol presentation in the framework of the 3rd Euro North-East Meeting of European Counterfeiting Experts.

<sup>4</sup> European Technical and Scientific Centre (ETSC) carries out technical analysis and an annual report on the situation as regards counterfeiting (the ETSC is based on Article 1 of Commission Decision C (2004) 4290 of 29 October 2004).

<sup>5</sup> Europol Organised Crime Threat Assessment 2011 (OCTA 2011)

## 2. CURRENT LEGISLATION AND CONSULTATION OF INTERESTED PARTIES

### 2.1. Legal and policy context

To protect the euro and other currencies against counterfeiting in the euro area and beyond, EU laws aim at ensuring efficient coordination of anti-counterfeiting measures between national law enforcement and judicial authorities and criminal penalties for counterfeiters.

#### 2.1.1. Legislative framework

Following the ratification of the International Convention for the Suppression of Counterfeiting Currency agreed on 20 April 1929<sup>6</sup>, a certain degree of approximation of national legislation against counterfeiting of currency has since taken place.

Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro<sup>7</sup> aims at supplementing, on the territory of European Union, the provisions of the Geneva Convention of 1929. The Framework Decision covers the euro, the national currencies of Member States outside the euro area as well as any other currency which is legal tender. It identifies practices which are to be regarded as punishable in addition to the actual act of counterfeiting currency, such as distribution. For these offences, the Framework Decision requires effective, proportionate and dissuasive penalties. The Framework Decision established a minimum level of maximum penalty of imprisonment of at least eight years for the main offence of currency counterfeiting. In addition, it contains provisions on jurisdiction and on the liability of legal persons. The Framework Decision was amended by Framework Decision 2001/888/JHA of 6 December 2001<sup>8</sup>, which introduced a provision on mutual recognition of convictions for the purpose of recognizing "repeat offences".

The Framework Decision is part of a larger legal framework consisting also of administrative and training measures:

- ✓ Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro<sup>9</sup>. Article 12 of this regulation obliges the Member States which have adopted the euro to ensure adequate sanctions against counterfeiting and falsification of euro notes and coins;
- ✓ Council Regulation (EC) No 1338/2001 of 28 June 2001 laying down measures necessary for the protection of the euro against counterfeiting, updated through Council Regulation 44/2009 of 18 December 2008. It regulates how euro notes and coins can be uttered in such a manner as to protect them against counterfeiting. Furthermore, issues such as gathering and accessing technical and statistical data relating to the counterfeit notes and coins, the examination of counterfeit notes and coins by the National Analysis Centres and obligations of credit institutions and centralisation of information at national level are addressed;
- ✓ Decision of the European Central Bank of 16 September 2010 on the authenticity and fitness checking and recirculation of euro notes (ECB/2010/14);

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<sup>6</sup> The Convention has been ratified by 26 Member States. Malta has not (yet) ratified.

<sup>7</sup> OJ L 140 of 14 June 2000, p. 1.

<sup>8</sup> OJ L 329 of 14 December 2001, p. 3.

<sup>9</sup> OJ L 139, 11.5.1998, p.1.

- ✓ Regulation (EU) No 1210/2010 of the European Parliament and of the Council of 15 December 2010 concerning authentication of euro coins and handling of euro coins unfit for circulation<sup>10</sup>;
- ✓ Council Regulation (EC) No 2182/2004 of 6 December 2004 concerning medals and tokens similar to euro coins, amended by Council regulation (EC) No 46/2009 of 18 December 2008;
- ✓ Targeted actions for exchange, assistance and training of law enforcement agents to establish closer professional ties for a more efficient fight against euro counterfeiting are financed by the Union through the Pericles programme, which was established by Council Decision 2001/923/EC of 17 December 2001<sup>11</sup>.

The Commission Communication "Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law" is an important policy compass for future criminal law instruments to be developed on the basis of the Lisbon Treaty. The Communication refers explicitly to the protection of the euro against counterfeiting through criminal law in order to strengthen the public's trust in the security of means of payment.<sup>12</sup>

### 2.1.2. *Actors*

At European level, responsibilities on preventing and fighting counterfeiting are shared between the European Commission, the European Central Bank, Europol and Eurojust:

- In the Commission, the European Anti-Fraud Office (OLAF) prepares with the Directorate General of Justice legislative initiatives and organises and finances training and technical assistance to the Member States and manages the ETSC, the centre for technical analysis of new types of counterfeit coins.
- The European Central Bank (ECB) performs a technical analysis of new types of counterfeit euro notes, stores the technical and statistical data on counterfeit notes and coins in a central database and disseminates them to all those involved in combating counterfeiting.
- Europol as the Central Office for combating euro counterfeiting supports the Member States' law enforcement services in preventing and combating euro counterfeiting by facilitating the exchange of information and providing operational and strategic analysis
- Eurojust facilitates investigations and prosecutions between competent authorities in Member States, as well as the execution of international mutual legal assistance and the implementation of extradition requests.

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<sup>10</sup> For historical and political reasons the responsibility for the conception of legal instruments on notes and coins is divided respectively between ECB and the Commission/OLAF.

<sup>11</sup> For an update on the programme, see proposal for a Regulation of The European Parliament and of The Council establishing an exchange, assistance and training programme for the protection of the euro against counterfeiting (COM(2011)0913) final.

<sup>12</sup> COM(2011)573 final.

At international level, Interpol facilitates and assist cross border police cooperation through secure global police communication services, operational data services and databases for operational issues.

## **2.2. The level of implementation of the Framework Decision: current state of play**

The Commission has evaluated the implementation of the Framework Decision in three reports<sup>13</sup> (see Annex 1).

A questionnaire on the implementation of the Framework Decision and questions on a potential way forward were sent to the Member States in December 2011 and to the members of the Euro Counterfeiting Experts Group (ECEG)<sup>14</sup> in January 2012 asking Member States to report on the additional measures adopted since the third report concerning the implementation of the Framework Decision into national law, in particular on the issues which were flagged in 2007.

Annex 2 contains an overview of the replies from the Members States to the questionnaire. The evaluation of the replies indicates that Member States have, with minor exceptions, implemented the Framework Decision correctly.

The few shortcomings concern the transposition of the provisions on sanction levels and on the liability of and sanctioning of legal persons<sup>15</sup> as follows: One Member State set out a maximum penalty of five years for counterfeiting coins instead of eight years. In another Member State's legislation there is no explicit provision of the criminal offence of counterfeiting of currency by use of legal facilities or materials. The legislation of the same Member State does not contain fines as sanctions for legal persons. Yet another Member State does not provide for the liability of legal persons.

## **2.3. The views of stakeholders on the way forward**

Consultation of the stakeholders started at the 58th Euro Counterfeiting Expert Group (ECEG) meeting on 10 November 2011 and continued during subsequent ECEG meetings. Experts and specialists<sup>16</sup> were further consulted at The Hague Conference which took place from 23 – 25 November 2011. A questionnaire on the implementation of the Framework Decision was sent to Member States on 20 December 2011. The results of the questionnaire and a possible way forward were discussed further at the 59th ECEG meeting on 14 March and the 60th meeting on 13 June 2012. The European Central Bank (ECB) as well as Europol participated in this process and provided their input, also through direct contributions to the Commission.

From all the consultations carried out it can be concluded that there is a general support for new legislation that would bring added value in specific areas that need improvement.

In their replies to the questionnaire the stakeholders considered that the existing legal framework is sufficient while others welcomed reinforcement of the legal framework by

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<sup>13</sup> The first report adopted in December 2001, COM(2001) 771 final; the second report in September 2003, COM(2003) 532 final; the third report in September 2007, COM(2007) 524 final.

<sup>14</sup> The ECEG is provided for in Regulation (EC) 1338/2001 and is composed of experts from Member States, ECB, Europol and OLAF/ETSC.

<sup>15</sup> See third report of September 2007, COM (2007) 524 final.

<sup>16</sup> Representatives from law enforcement agencies, judicial authorities, Central Banks and Mints.

criminal law measures provided that it adds value, for instance to practitioners. During the Hague Conference the Member States experts welcomed the initiative of the Commission to reinforce the protection of the euro against counterfeiting by means of criminal law taking advantage of the entry into force of the Lisbon Treaty.

In the framework of the ECEG meetings the Member States experts showed support for a Directive covering investigative techniques and the transmission of seized counterfeits during judicial proceedings. Concerns were expressed regarding introduction of minimum sanctions for reasons of proportionality, for instance in minor cases and for reasons of changes necessary in the national criminal codes.

The ECB expressed strong support for reinforcing the criminal law framework, in particular by strengthening and harmonising the sanctions, including by setting standards for minimum sanctions. The ECB also supported new provisions on the release of counterfeits during judicial proceedings since such a provision would considerably improve prevention.

For a detailed overview of the views of the stakeholders on the way forward see Annex 3.

## **2.4. Chronology of the Impact Assessment**

### *2.4.1. Internal consultation*

An Interservice Steering Group was created composed of representatives from the Directorate-General for Justice, OLAF, the Secretariat-General, the Legal Service and all affected services (DG ECFIN, DG HOME, DG MARKT). ISSG meetings were held on 20 January, on 16 March 2012 and on 26 June 2012. At the meetings and in subsequent communication with individual DGs, comprehensive feedback was received which has been taken into account throughout this report.

### *2.4.2. The Impact Assessment Board*

The Commission's Impact Assessment Board met on 5 September 2012.

The comments of the Impact Assessment Board as to the strengthening of the problem definition were addressed as follows: the state of implementation of the Framework Decision and the underlying implementation and transposition problems were specified and the diverging stakeholders' and Member States' views on the need for action were presented more in detail. As to the baseline scenario, it was projected how counterfeiting activities would evolve if no legislative action would be taken. The policy options were better described and a clear distinction was made between their content and impact. A chapter on discarded policy options was added. The analysis of proportionality, particularly as regards the possible effects of the policy options on national legal systems were better explained and the compliance costs for all actors involved quantified more in detail.

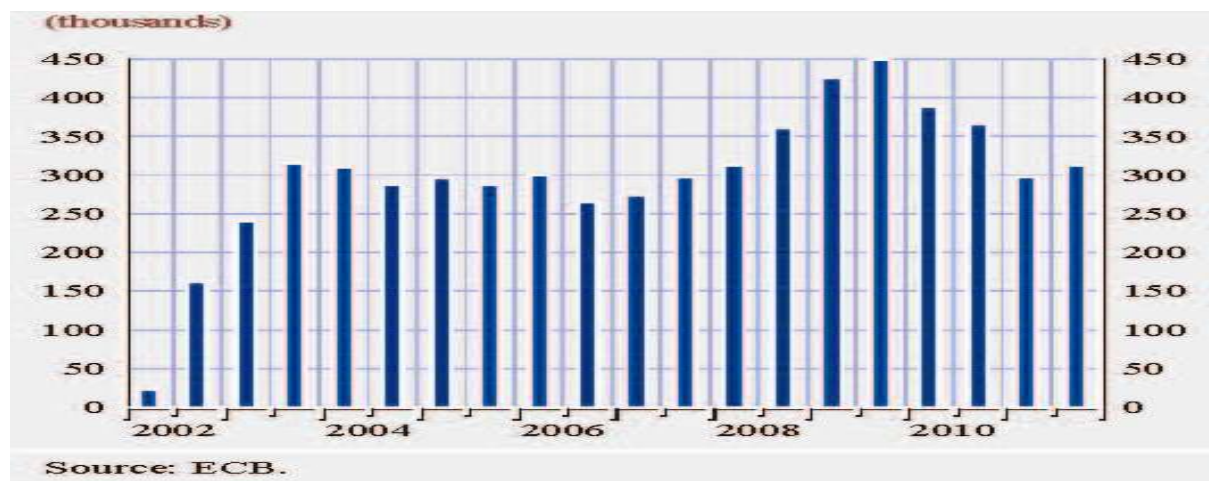


### 3. PROBLEM DEFINITION

#### 3.1. The scale of euro counterfeiting

Counterfeiting continues to be a threat to currency and in the EU mainly to the euro. The table below shows a continuously high and substantial level of counterfeiting throughout the years since the introduction of the euro.<sup>17</sup>

Number of counterfeit euro notes recovered from circulation from 2002 until 2011<sup>18</sup>



According to data assembled by the ECB<sup>19</sup>, the total established financial damage of counterfeited euro registered in Europe since the introduction of the euro in 2002 amounts to more than 500 million euro. According to a recent bi-annual report from the ECB, 310 000 counterfeit euro notes with a total value of around 15 million euro were withdrawn from circulation in the second half of 2011<sup>20</sup>, and the financial damage for the first half of 2012 seems to reach some 13 million euro.<sup>21</sup> A greyzone remains, as these figures only cover those notes which were detected and seized.

Europol (OCTA 2011<sup>22</sup>) indicates that there is a long-term trend towards an increase in the crime level and notes that the criminal threat remains serious and that it is likely that the crime rate will rise considerably if law enforcement reduces its pro-active approach against the continuously upcoming new techniques of euro counterfeiting. The ETSC Annual Report<sup>23</sup> shows a sharp increase in the number of sophisticated counterfeit coins and indicates that still a significant number of illegal mints are operating which could point to a lack of deterrence of the sanction system put in place in the Member States and/or insufficient enforcement and prevention (see Annex 4).

<sup>17</sup> Table on dollar counterfeiting statistics can be found in Annex 4.

<sup>18</sup> ECB annual Report 2011

<sup>19</sup> Report of the ECB of June 2012, see Annex 4.

<sup>20</sup> Press release from ECB of 16 January 2012, <http://www.ecb.int/press/pr/date/2012/html/pr120116.en.html>.

<sup>21</sup> Total figure of genuine notes in circulation in first half of 2012 amounts to 14.6 billion

<sup>22</sup> <https://www.europol.europa.eu/sites/default/files/publications/octa2011.pdf>; correspondence between ECB and the Commission has confirmed it.

<sup>23</sup> The Protection of Euro Coins in 2011. Situation as regards euro coins counterfeiting and the activities of the European Technical and Scientific Centre (ETSC) based on Article 4 of Commission Decision C (2004) 4290 of 29 October 2004.

There are indications that counterfeiting is often done in an organised way by organised crime groups that can rely on important capacities for counterfeiting<sup>24</sup>. For organised crime groups, currency counterfeiting is potentially a very lucrative criminal market, which yields very important financial benefits.

### **3.2. Weaknesses of the framework for the protection of the euro**

There are a number of instruments to protect the euro, such as the legal framework on authentication of euro notes and coins, awareness raising and training through the Pericles Programme and the general Union framework for strengthening judicial and police cooperation.

The legal framework for authentication ensures that circulating euro notes and coins are authentic. To this end, credit institutions, other payment service providers and other economic agents involved in the processing and distribution of notes and coins are under obligation to check the authenticity of the euro notes and coins they receive before they put them back into circulation. Recently the implementation rules for the authentication obligation, set out separately for notes and coins, have been updated.<sup>25</sup>

The Pericles Programme funds exchanges, assistances and training for authorities, banks and others involved in combating euro counterfeiting – both in the euro area, in EU countries outside the euro area and in third countries. In previous years, Pericles has funded training seminars, workshops and conferences, staff exchanges, operational cross-border activities, scientific studies and the development of technical support tools and educational materials. The Commission has adopted a proposal for the renewal of the Pericles Programme for the period of 2014 – 2020 (Pericles 2020).

Both measures are expected to have a positive effect on the number of prevented and detected counterfeits.

It is important that the protection provided by criminal law keeps up with these developments to ensure adequate and efficient protection.

Concerning the extent to which criminal law can address the issue of protection against counterfeiting, existing EU legislation has shown to have some weaknesses as identified by the Commission's evaluation of the current framework. As will be demonstrated below it does not create a sufficient basis to prevent, investigate and sanction in a consistent manner throughout the Union. This hampers cooperation between Member States and makes it potentially attractive for criminals to move their activities to states considered to be more lenient in their reaction to counterfeiting of the euro.

As a result of the evaluation of the Commission on the basis of three Commission reports, a dedicated questionnaire on the state of implementation of the Framework Decision and a

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<sup>24</sup> See OCTA 2011 and discussions at the ECEG meeting of March 2012.

<sup>25</sup> Decision of the European Central Bank of 16 September 2010 on the authenticity and fitness checking and recirculation of euro notes (ECB/2010/14) and Regulation (EU) No 1210/2010 of the European Parliament and of the Council of 15 December 2010 concerning authentication of euro coins and handling of euro coins unfit for circulation.

consultation of stakeholders at different experts' meetings, the following weaknesses have been identified:

- the level of penalties;
- differences in availability of efficient investigative techniques;
- deficiencies in transmission of seized counterfeits for analysis to competent authorities during judicial proceedings.

### *3.2.1. Problem 1. The level of penalties for currency counterfeiting is not sufficiently dissuasive and effective*

Currency counterfeiting covers the conduct of fraudulent making or altering of currency ("production") and uttering of counterfeit currency, the import, export, transport, receiving or obtaining of counterfeit currency with a view to uttering ("distribution").<sup>26</sup> All these offences are linked. All illicit activities start with the fraudulent making or altering of money and continue with its distribution.

Professional counterfeiters are criminals with an expertise in this field. Distributors of counterfeit currency are usually not limiting their expertise to euro counterfeits but distribute whatever illicit product is profitable on the market, for example drugs. It is confirmed by Interpol that professional distributors use almost identical distribution channels for currency counterfeiting on one hand and for drug trafficking and other typical organised crime offences on the other hand.<sup>27</sup>

#### *3.2.1.1. Insufficient deterrence*

To protect the euro and other currencies, it must be ensured that the penalties are deterrent in all Member States.

Potential and actual perpetrators too often find the risk of being caught, effectively sanctioned and their illegal proceeds recovered as too low to act as an effective deterrent as shown by the statistics throughout the report. The deterrent effect is lower in some Member States than in others. This is inappropriate for the protection of the European single currency. The fact that the euro is the single currency of the euro area Member States implies that the criminal act of euro counterfeiting causes the same harm to the euro area as a whole, irrespective of where it is perpetrated.

#### **How can potential perpetrators be convinced not to commit counterfeiting offences against the euro? A hands-on explanation of deterrence:**

Public policies seek to influence conduct in a way which results in voluntary refraining from the commission of illegal acts. This is the task of "deterrence".

The "fear of being caught", "certainty of sentencing" and/or "be shamed" by thorough criminal investigations, proceedings, trial, conviction and/or a criminal record, as well as the risk of being

<sup>26</sup> Art. 3 (1) (a), (b) and (c) of the Framework Decision.

<sup>27</sup> Interpol presentation in the framework of the 3rd Euro North-East Meeting of European Counterfeiting Experts: Like the US dollar, the counterfeiting of the euro, as an international currency, has demonstrated to be an activity of organised crimes groups moving around the world.

"disrupted" in the course of their illegal business, can have an effect on potential perpetrators' decisions as to whether to cross the Rubicon into *intentional* illegality, particularly regarding individuals enjoying a relatively good reputation or social status.

Deterrence against intentional acts requires (i) legal provisions containing appropriate legal definitions of illegal conduct and associated sanction levels, (ii) at least vague notions of the existence of such provisions on the part of the person to be deterred, and (iii) an expected practice of actual enforcement of these provisions by the authorities.

Though the European legislator set a minimum of eight years for the maximum sanction for production and required effective, proportionate and dissuasive criminal penalties for distribution in the Framework Decision 2000/383/JHA, the number of counterfeits did not considerably sink and remains at a substantial level.

A table of sanctions in place in the Member States as of summer 2011 can be found in Annex 5 to this report<sup>28</sup>. The table indicates that there are important differences between the sanctions foreseen in Member States.

As to **maximum sanctions for production**, all Member States respect the minimum limit of eight years, with the exception of one Member State where the maximum sentence provided for is five years (for coins)<sup>29</sup>. The range of the upper level of the sanction then varies between eight years and thirty years.

However, the situation concerning the **minimum level of sanctions** for currency counterfeiting is different. There are no minimum sanctions in place in some of the Member States, and the minimum sanction in others is as high as ten years imprisonment. According to the available information, the criminal codes of four Member States allow fines as their minimum sentences for both production and distribution, five Member States have no minimum penalties in place for both production and distribution and three more Member States do not have minimum sanctions for distribution.

| <b>MS with no minimum sanctions</b> | <b>MS having fines as a minimum sanction</b> |
|-------------------------------------|--|
| Austria (for distribution)          | Estonia                                      |
| Bulgaria (for distribution)         | Ireland                                      |
| Cyprus                              | Lithuania                                    |
| Denmark                             | The Netherlands                              |
| France                              |  |

<sup>28</sup> The table is based on information gathered by the German Bundesbank.

<sup>29</sup> Hungary envisages amending their Criminal Code in order to comply with the maximum term of imprisonment of the Framework Decision.

|                             |  |
|-----------------------------|--|
| Portugal (for distribution) |  |
| Sweden                      |  |
| United Kingdom              |  |

The current level of sanctions is one of the reasons for insufficient deterrence and uneven protection across the European Union of its currency. The maximum level for criminal sanctions constitutes one tool for the prosecutors and judges to determine the sanction to be imposed on the criminal, but it remains incomplete without a set minimum level. The minimum sanctions contribute to a consistent EU wide system for the protection of the euro.

In practice, it will be the knowledge of the possible sanctions which will deter those who are tempted to begin counterfeiting the euro. The difference of being sentenced to imprisonment for a certain minimum duration instead of, e.g. getting away with a fine is obvious.

The current lack of a minimum and maximum level of sanctions for distribution offences is a further reason for insufficient deterrence with respect to the possible distribution within the EU of counterfeit notes produced in third countries, considering the number of dangerous printerries dismantled in third countries (e.g. Columbia and Peru) and the consequent seizure of large amounts of counterfeit euros and other currencies ready to be exported to and distributed in the EU.<sup>30</sup> This represents a serious threat for the EU. The problem is not limited to notes. In 2011, the first mint for production of counterfeit euro coins was dismantled in Colombia.<sup>31</sup>

Stakeholders confirmed that there is a serious gap in deterrence in relation to the offences of distribution. According to the ECB, deterrent sanctions for distribution are also very important. Organised criminal groups which produce most of the counterfeits recovered from circulation<sup>32</sup> seem 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.

### 3.2.1.2. *The risk of forum shopping*

As follows from the text in section 3.2.1.1 above, there are important differences between the relevant criminal law sanctions in place in Member States. These create a situation where there is practically no coherent defence of the European currency from counterfeiting, and there is therefore a need for action to reverse this situation.

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<sup>30</sup> According to the Europol Reports on Euro counterfeiting of 2009, 2010 and 2011 five important printerries were dismantled and a value of 5 million euro was seized in Colombia and Peru.

<sup>31</sup> See press release available at [http://ec.europa.eu/anti\\_fraud/media-corner/events-calendar/events/2012/events20123028\\_01\\_en.htm](http://ec.europa.eu/anti_fraud/media-corner/events-calendar/events/2012/events20123028_01_en.htm).

<sup>32</sup> 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.

As organised crime groups with substantial resources are often strongly involved in currency counterfeiting, it will be easy for them to move their activities across the borders. These groups may often already have activities located in several Member States, which means that the risk of criminals moving to countries with a more lenient criminal law system is substantial (forum shopping).

Data collected by OLAF in the framework of an ECEG study<sup>33</sup> indicate that Member States which have no minimum sanctions in place or only have fines as their minimum sanctions had a high number of illegal printerries dismantled in the course of the last nine years, as the table below shows:

**Number of illegal printerries dismantled in the period 2002 – 2011**

|   |     |
|---|-----|
| In MS with no minimum sanctions or fines as minimum sanctions (DK, FR, NL, SE)                              | 343 |
| In MS with minimum sanction more than 6 months of imprisonment (BG, DE, EL, ES, FI, HU, IT, LV, PL, PT, RO) | 179 |

These figures seem to suggest that Member States with low levels of sanctions tend to attract counterfeiters while other factors such as the effectiveness of crime detection by law enforcement also need to be taken into consideration.

No differences in law enforcement efforts between euro and non-euro Member States can be substantiated on the factual evidence.

**Case example:**

Early June 2012, the French police announced that they broke the biggest counterfeiting workshop in France and second largest in Europe, which channelled to the market 350,000 notes. More than nine million euro in counterfeit notes of 50 and 20 million were channelled to the market from this laboratory in the outskirts of Paris. The first notes were of a very good quality using digital printing and appeared on the market in 2007. The workshop was an industrial building in a small village east of Paris. According to the competent authorities, dozens of people were arrested and all items and hardware lab seized. Approximately 30 to 40 laboratories producing counterfeits are dismantled every year in France, but this was the first time such a large facility was found and dismantled.

The case below shows intelligent criminal logistics employed in euro counterfeiting. It suggests that the criminals chose their distribution channel wisely based on low penalties applicable in that country. Lithuania provides only for fines as the minimum sanction for distribution in its Criminal Code.

**Case example:**

In January 2009 in Italy, the Carabinieri Currency Anti-Counterfeiting Unit concluded one of the biggest police operations against currency counterfeiting ever performed in Europe. The

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<sup>33</sup> The study focused on the following 15 Member States: BG, DE, DK, EL, ES, FI, FR, HU, IT, LV, NL, PL, PT, RO and SE.

investigation, started in 2005, targeted an Organised Criminal Group (OCG) based in the Naples area involved in the production and distribution of counterfeit euro notes and coins.

During the final raid, 107 arrest warrants were executed. The investigation led to the discovery of four illegal workshops in Italy, to seize 20 and 50 counterfeited euro notes for a total amount of 1.242.000 counterfeited euro and to dismantle the whole criminal organisation operating all over the Italian territory with strong connections to Germany, Spain and Lithuania.

The outcome of the investigation revealed the very complex structure of the criminal organisation especially concerning the distribution network used by the criminals in order to smuggle the fake notes throughout Europe. In fact, evidence - gathered mainly using wire tapping activities - demonstrated that the OCG established the distribution network (using connections with Italian national emigrants) especially in Lithuania where penalties for money counterfeiting offences are limited to fines.

The more the other available tools for protecting the euro are performing and convergent, the more the discrepancy of sanctions will be an important factor taken into account by criminals when they choose the country in which to establish their illicit activities (the phenomenon of forum shopping).<sup>34</sup>

### *3.2.1.3. Insufficient effectiveness of judicial cooperation*

#### *1) Diminished priority given to currency counterfeiting by law-enforcement agencies; mutual trust*

The disparate level of sanctions may have a negative impact on judicial cooperation. If a Member State has low minimum sanctions in its criminal code, this could lead to low priority given by law enforcement and judicial authorities to investigate and prosecute currency counterfeiting cases. This can also have a negative impact for the cross border cooperation when another Member State asks for assistance, in terms of timely processing of the request. Disparities in sanction levels can be expected to benefit particularly strongly the most serious offenders, i.e. transnational organised crime groups which have operative bases in several Member States.

Stakeholders confirmed that cross-border cooperation can be affected by different levels of sanctions. For instance, according to the ECB the intensity of criminal investigations may to some extent depend on the public judgement of the criminal act within the legal system of a particular Member State. One relevant factor for the public judgement of a criminal offence is the level of the minimum sanction which varies considerably across the EU.

Based on testimonies given by practitioners, it can be concluded that there are two main factors which have an influence on the level of priority which is given to a particular

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<sup>34</sup> Given that the obligation of financial institutions to authenticate euro notes and euro coins in circulation by financial institutions is relatively new and is expected to have an important impact on the phenomenon, the system for the protection of the euro will gradually become more performing following this recent achievement and the differences in sanctions will then gain in weight. The implementation rules for the authentication procedure, set out separately for the notes and coins, entered into force in 2010 and their application is obligatory only since 1 January 2011 and 1 January 2012, respectively.

investigation: the infringement classification as crime or as misdemeanour in the general part of the criminal code and the range of imprisonment. A low range of sanctions, particularly the lack of imprisonment as a minimum sanction, can cause a case to be given lesser priority.

## 2) *Reduced possibility to use the European Arrest Warrant (EAW)*

The EAW has proved to be a successful mutual recognition instrument in practice<sup>35</sup>. Available statistics compiled for the years between 2005 and 2009<sup>36</sup> record 54689 EAWs issued and 11630 EAWs executed.

An EAW may be issued by a national judicial authority if the person, whose return is sought, is accused of an offence for which the maximum period of the penalty, according to the law of the issuing Member State, is at least one year in prison or if he or she has been sentenced to a prison term of at least four months. In the stage of prosecution, an EAW can be issued for a person accused of counterfeit production as the maximum period of this offence is at least eight years. However, in the post-sentence stage, not all sentences for counterfeit production make it possible to request an EAW, due to the lack of a minimum level of the sanction which may result in sentences of less than four months or a fine.

In the twelve Member States where only a fine or no minimum sanctions are foreseen for production or distribution, this can be the case. Figures on current issues of surrender in protection of EU single currency against counterfeiting are unavailable, in particular figures on how often European Arrest Warrants were refused. As the Member States authorities are aware of the current conditions for issuing a European Arrest Warrant, they do not request it for low sentences and do therefore not communicate problems in this respect. On the other hand, it can be deduced from the requirements for the content of the European Arrest Warrant that harmonised sanction levels facilitate execution of a warrant because they would avoid to a certain extent diverging interpretations of proportionality issues in the Member States concerned.<sup>37</sup>

### 3.2.2. *Problem 2: Cross-border investigations and prosecutions may be unsuccessful due to cooperation problems resulting from differences in availability of efficient investigative tools.*

In some EU Member States currency counterfeiting which is a typically organised crime activity is still not dealt with by means of investigative tools that are typically used for organised crime and transnational cases. This circumstance has a strong impact in the weakness of investigation and prosecution and leads to insufficient international cooperation between the Member States. On the basis of information available, Cyprus, Greece and Italy do not have some of the investigative techniques (telephone interceptions, tracking devices, controlled deliveries and undercover agents) at their disposal in currency counterfeiting cases.

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<sup>35</sup> Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM (2011)175.

<sup>36</sup> Council 9005/5/06 COPEN 52; 11371/5/07 COPEN 106; 10330/2/08 COPEN 116; 9743/4/09 COPEN 87; 7551/7/10 COPEN 64.

<sup>37</sup> Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), Article 8 (1)(f), which requires information on "the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State".



The absence of these techniques often prevents the identification of producers and others involved in the chain of fraudulent making of currency, once the person who has put counterfeits in circulation, has been identified. Moreover, once investigations on counterfeiting cases are started abroad with particular investigative techniques, it is not possible to continue them in the same way when they arrive in a Member State whose legislation lacks provisions on these techniques. In this case, this may not only cause delays or additional costs for investigations, but lead to discontinued investigations in relation to the source.

The lack of harmonised rules on the use of investigative tools in relation to currency counterfeiting is harmful for cross-border cooperation. Counterfeiting is often committed in two or more Member States in parallel, with production taking place in one Member State and distribution in another. The tools to detect these activities therefore need to be the same.

#### **Case example:**

In 2009 the Czech authorities carried out an investigation against an organised criminal group involved in the distribution of counterfeit notes belonging to the class 100P7<sup>38</sup>. This counterfeit is known to be produced in Italy in one of the biggest production areas of Europe. This particular class is one of the three main classes covering about 65% of all the counterfeits detected in circulation in Europe (the classes of counterfeits known as 20P2, 50P5 and 100P7). According to the recent investigations carried out by the Italian law-enforcement in order to be cost-effective the organised criminal groups producing these classes never set up a production line for less than 100.000 counterfeit notes<sup>39</sup>, which in case of the class 100P7 means a financial damage of at least 10 million euro. The Czech investigation was stopped at the distribution level without the possibility to continue the investigation in Italy which could have led to the dismantling of the printery producing counterfeit class 100P7. The investigation was discontinued because of the impossibility to receive assistance from the Italian law-enforcement which could not allow operation of a foreign under-cover agent on its territory, nor provide its own under-cover agent for this case. In the light of what is mentioned above the financial damage can be estimated being at least 10 million euro.

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<sup>38</sup> A Class is a group of counterfeits having matching technical characteristics. Before any counterfeits are grouped and linked to the same class, there must be proven evidence that they originate from the same source. Two main types of classes can be distinguished: Local classes and Common classes. The two main types of classes can have variants (subclass) corresponding to modification of and/or improvements in production technique within a single class. The identifier of a class is known as the Class Indicative. Every part (digits and letters) of the indicative represents a certain value so that the "Class Indicative" itself describes the class clearly and non-ambiguously. The class indicative of both, the Common and Local classes reflect the following information: whether the class is common or local (EU or ISO-codes of all relevant countries); series (A series); the denomination (it will reflect the value of the notes); the technology used (P for print); the sequential number; the variant (optional). Example: EU A 0100 P00007 (shortened 100P7), 7th common class of printed counterfeit notes of the 100 euro.

<sup>39</sup> Most important illegal printeries discovered in Italy:

- 30.05.2006 in Castel Volturno (Napoli), printery dismantled, 500.000 notes belonging to class 50P5 and class 20P2 seized (potential damage of more than 12 million);
- 26.10.2007 in Lusciano (Caserta), printery dismantled, 275.260 notes belonging to class 20P2 seized (potential damage of more than 5 million);
- 27.07.2009 in Gricignano d'Aversa (Napoli), printery dismantled, 150.000 notes belonging to class 50P30 seized (potential damage of more than 7 million);
- 11.08.2010 in Ponticelli (Napoli), printery dismantled, 100.000 notes belonging to class 50P5 seized (potential damage of more than 5 million).

Cross-borders investigations are always linked to common classes. As stated in the case example, the minimum financial damage of each common class varies from 2 to 10 million euro (depending on the denomination). Therefore it is clear that the impossibility to continue an investigation due to the lack of homogeneous investigative tools has an important negative impact in terms of financial damage.

The stakeholder's survey, mentioned in section 2.2., confirmed the need which has been expressed at different expert forums on Police cooperation for several years: to have the investigative tools for the protection of the euro harmonized at the EU level.<sup>40</sup> This particular issue has been more extensively discussed recently at the International Euro Conference in Istanbul of June 2011, The Hague Conference of November 2011 and the ECEG meetings of November 2011 and March 2012. In the replies to the questionnaire on the implementation of the FD with regards to difficulties encountered in practice in relation to cross-border cooperation, the experts of some Member States (Italy, Czech Republic, France) flagged again the issue of alignment of the investigative techniques in the Member States in particular regarding certain special investigative techniques such as the use of an informant, undercover agents and controlled delivery.

### *3.2.3. Problem 3: Delay in adjustment of machines for detecting counterfeits resulting from deficiencies in transmission of seized euro counterfeits for analysis to competent authorities during judicial proceedings*

On the basis of the EU authentication provisions specific measures apply to detect euro counterfeits in circulation. Credit institutions, other payment service providers and other economic agents involved in the processing and distribution of euro notes and coins are under obligation to check the authenticity of the euro notes and coins they receive before they put them back into circulation by means of banknote handling machines, coin-processing machines or trained personnel.

The identification of counterfeit euro notes and coins is centralised at the National Analysis Centres (NAC) and, respectively, the Coin National Analysis Centres (CNAC) which are designated or established in accordance with Art. 4 and 5 of Council Regulation 1338/2001.

Seized counterfeit notes and coins are indispensable for:

- (i) adjusting banknote handling machines and coin-processing machines to recognise the new types of counterfeits and to reject them (large quantities of counterfeits are necessary for that because they are damaged after a couple of uses);
- (ii) training purposes;
- (iii) deeper forensic analyses.

Currently there is no obligation to transmit seized euro counterfeits during judicial proceedings. The transmission practices vary from Member State to Member State, many times depending on the individual assessment of the judge dealing with the case. In practice, in some cases the judicial authorities refuse transferring samples of counterfeit euro notes and coins for analysis prior to the end of the criminal proceedings even if such transfer would be possible taking into account the quantity of seized counterfeits. The transfer of such counterfeits after the end of the criminal proceedings is of limited value. There are often

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<sup>40</sup> The topic was included already on the agenda of Euro South-East Conference, meeting of European counterfeiting experts, Prague, 4 - 8. July 2005

considerable delays, sometimes years, before the note handling and coin processing machines used by financial institutions can be adjusted and staff trained. In principle all the financial institutions who are subjected to the obligation to authenticate<sup>41</sup> are affected and by extension all the users of the euro. Even if only one Member State fails to transfer counterfeits for analysis to strengthen the prevention, users in other Member States can suffer as a result

The machines used as well as trained staff involved in authentication are therefore unable to recognize the newest types of counterfeits which have appeared on the market and have been seized by national authorities and therefore the prevention is weakened. As the following case example shows it can lead to impossibility to prevent a damage that could have been avoided.

Both ECB and the Member States indicated the lack of harmonised obligation to transmit seized counterfeits during judicial proceedings for analysis and further detection of counterfeits. This issue has been raised during Seminar on Judicial Issues and Criminal Proceedings in relation to the Protection of the euro in November 2009. During the ECEG meetings the Member States' experts showed support for a directive covering the release of counterfeits during judicial proceedings.

#### **Case example:**

On 3 October 2011 when a counterfeiter's printery was dismantled near Warsaw, a large quantity of €50 (8.889 notes) and €500 (1.132 notes) counterfeits were seized, along with printing machines and ancillary printing equipment. The police made available many photographs of the crime scene, but neither the ECB, nor the Polish National Analysis Centre, nor National Bank of Poland experts were invited to examine the evidence physically, nor were any samples taken before all the evidence was sealed up. This was unfortunate because, although the 50 euro bills could be identified as belonging to counterfeit class 50P31, the 500 euro bills could not be identified as belonging to a particular class based on the photographs. Subsequently, the 500 euro bills were wrongly authenticated by the acceptor mechanism of note processing equipment operated by a commercial bank in another Member State. This could have been avoided if an early access to the counterfeits had been granted and the test pack for these machines updated in a timely manner.

### **3.3. How would counterfeiting activities evolve in the baseline scenario?**

Under the current framework continued, one might expect a complete implementation by all Member States in the medium term of the provisions of the Framework Decision, following targeted monitoring actions by the Commission. For example, the liability of legal persons as required by Articles 8 and 9 might be improved in five Member States<sup>42</sup>. A better implementation of the existing provisions of the Framework decision could also be achieved by making this legal framework better known to law enforcement practitioners through the Pericles programme. Though being a useful instrument for training and technical support, the Pericles programme does not have a deterrent effect on criminals; neither can it replace national law enforcement efforts.

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<sup>41</sup> See Regulations 1338/2001, 1210/2010 and the ECB decision of 16.09.2010, mentioned in section 2.1.

<sup>42</sup> See Annex 1: for more details on the state of play of the Framework Decision.

The prevention and detection of counterfeits coming into or already in circulation is enhanced by the recently improved legal instruments on authentication<sup>43</sup>. These instruments can make the uttering of counterfeits, especially of new classes, more difficult if the authentication measures are applied at an early stage. The instruments will not be able to decrease the production of counterfeits as such. One could even expect, if the production is not sufficiently deterred, an increased export of counterfeits to third countries which do not apply these authentication measures.

In the long run, stronger EU rules on the confiscation of assets in relation to the proceeds of several offences, including counterfeiting could provide a deterrent effect and thus reduce counterfeiting activities. An improvement of the legislation as proposed by the Commission<sup>44</sup> seeks to attack the financial incentive which drives crime, but aims mainly to protect the licit economy against criminal infiltration and corruption and to return criminal profit. This initiative alone would however not be sufficiently deterrent as confiscation in general only occurs following a conviction. Moreover its deterrent effect will be limited if criminals better hide their assets or displace them, resulting in a net capital flight of criminal money out of the EU.

The improvements mentioned above would not comprehensively address the problems described in this report. Since the problems identified are of legal nature they require a clear and strong legal action.

In particular the problem of deterrence would not sufficiently be addressed due to a lack of insufficient levels of sanctions. The continuous threat of counterfeiting underpinned by the statistics of the ECB would probably remain constant or increase. The long-term trend towards an increase in the level of crime in relation to counterfeiting, signalled by Europol, most probably will not be mitigated. The risk of the use of legal facilities for producing "counterfeits" might also increase, due to the aggravated economic crises.

Furthermore the problems identified above in relation to cross-border investigations would not be solved since not all Member States would be able to use investigation tools for serious counterfeiting offences with a transnational character.

No solution would be presented for the problem of the release of counterfeits during judicial proceedings. Therefore risk that counterfeits remain in circulation due to a lack of timely authentication will remain.

### **3.4. Does the EU have the power to act?**

#### *3.4.1. The legal basis*

The Treaty of Lisbon contains provisions to strengthen the EU criminal law framework.<sup>45</sup> Article 83 (1) TFEU stipulates that minimum rules may be adopted by means of a directive concerning the definition of criminal offences and sanctions in the areas of particularly

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<sup>43</sup> See Regulations 1338/2001, 1210/2010 and the ECB decision of 16.09.2010, mentioned in section 2.1.

<sup>44</sup> Proposal for a Directive on the freezing and confiscation of proceeds of crime in the European Union of 12 March 2012, COM(2012)85 final.

<sup>45</sup> See the Communication of 20 September 2011 "*Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law*", COM(2011) 573 final

serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.<sup>46</sup> Counterfeiting of means of payment is explicitly mentioned in Article 83 (1) TFEU as such an area of particularly serious crime. The legal basis would cover also issues such as the use of investigative tools and the use of counterfeits for prevention purposes, to the extent that the proposed actions are necessary to make the criminal law framework function.

Article 83(2) could also be considered as a legal basis, since the criminal law protection of the euro is a necessary feature of the Union policy on the common European currency, but the principle of *lex specialis* would in any case imply that the most specific legal basis would be used, in this case Article 83(1) should be relied on.

Article 83 (1) TFEU limits the choice of legal instruments to a Directive.

#### *3.4.2. Subsidiarity: Why the EU is better placed to take action than Member States*

It is essential to ensure that effective and efficient criminal law measures protect the euro and any other currency whose circulation is legally authorised in an appropriate way in all Member States.

Only the EU is in a position to develop binding common legislation with effect throughout the Member States, and thus to create a legal framework which would contribute to overcoming the weaknesses of the current situation as described in section 3.2.1. The EU should also comply with the principle of non-discrimination between domestic and foreign currency in relation to criminal sanctions established by the Geneva Convention and taken over by the Framework Decision.

The euro is from its nature of single Union currency a core European interest, which needs to be protected in a manner similar to the financial interests of the Union<sup>47</sup>. In this sense, counterfeiting of the euro poses a genuine problem for the Union and for its institutions. This pan-European dimension requires that counterfeiting is fought in a similar manner and that criminals encounter equivalent sanctions, wherever in the European Union the crime is committed.

Considering the position of the euro as a pan-European currency, the protection of the euro must by nature be ensured at EU-level. As such, the euro is even more "EU-centred" than a field subject to the harmonisation of rules in the Member States. The rules on protection of the euro may be compared in form and substance to rules on the EU institutions', bodies',

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<sup>46</sup> Denmark is not participating in newly adopted measures on substantive criminal law, while the United Kingdom and Ireland only participate in the adoption and application of specific instruments after a decision to "opt in".

<sup>47</sup> See Communication from the Commission of 26.5.2011 "On the protection of the financial interests of the European Union by criminal law and by administrative investigations - An integrated policy to safeguard taxpayers' money (COM(2011) 293 final), and the Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, COM(2012) 363 final.

offices' and agencies' self-protection, such as in terms of physical or IT-security. As a result, they cannot reasonably be dealt with by the Member States alone.

Any criminal law measure needs to be carefully assessed and designed in view of its possible effects on the protection of fundamental rights. This report will include such an assessment.

#### 4. OBJECTIVES

| <b>Objectives:</b> |   |
|--------------------|---|
| <b>General:</b>    | <ul style="list-style-type: none"> <li>▪ To prevent counterfeiting of the euro and other currencies by strengthening the criminal law protection and by strengthening cross-border judicial and law enforcement cooperation, in full compliance with the Charter of Fundamental Rights of the EU.</li> <li>▪ To keep and strengthen the trust in the genuine character of the single European currency and other currencies</li> </ul>  |
| <b>Specific:</b>   | <ul style="list-style-type: none"> <li>▪ A - To appropriately increase effectiveness and deterrence in relation to counterfeiting (production and distribution) and eliminate incentives for forum shopping in some Member States</li> <li>▪ B - To facilitate the proportionate application of the European Arrest Warrant in relation to currency counterfeiting (production and distribution)</li> <li>▪ C - To facilitate cross-border investigations in relation to the counterfeiting offences and to reduce delays in processing cooperation requests</li> <li>▪ D - To strengthen the prevention of counterfeiting by increasing the possibility of detecting notes and coins by a timely application of authentication procedures</li> </ul> |

#### 5. POLICY OPTIONS AND THEIR IMPACT

##### 5.1. Discarded policy options

###### 5.1.1. *Soft law and awareness raising*

The Commission could take various actions aiming at harmonising the legal practices in Member States on a voluntary basis. The elaboration of EU recommendations on national practices as regards sanctions could be considered in this context. This action could be accompanied by awareness raising through dedicated expert meetings organised directly by the Commission or with the use of EU funding in view of facilitating the exchange of information and best practices as regards sanctions, law enforcement and prevention. The general efforts to strengthen the mechanisms for mutual legal assistance and mutual recognition would continue.

This option was discarded since soft law is already being extensively used through the Pericles Programme, but is not sufficient to bring solutions to the problems identified for

which an adequate legal basis is necessary. It helps to raise the awareness of law enforcement and judicial authorities but has no direct effect to deter criminals to counterfeit.

5.1.2. *A Directive to replace the 2000 Framework Decision with only formal changes (Pure "Lisbonisation"<sup>48</sup>)*

A Directive could be prepared on the basis of Article 83 (1) TFEU with the same substantive content of the Framework Decision. The legal form of a Directive would strengthen the direct and indirect monitoring powers of the Commission.

This option was discarded since the same effect would be obtained with the status quo by the expiry of the transitional period as from 1 December 2014 (in accordance with Protocol 36 to the Treaty of Lisbon).

5.1.3. *A Directive to replace the 2000 Framework Decision including a merger with related instruments on counterfeiting and fraud with other means of payment than notes and coins*

The content of this option is inspired by practitioners' suggestion to address counterfeiting of notes and coins together with counterfeiting of other means of payment like bank or credit cards. Indeed, the Framework Decision on non-cash means of payment<sup>49</sup> and potential new initiatives on fraud are closely related to currency counterfeiting from a content perspective, and a common legal instrument would bring more transparency of legal instruments and visibility.

This option was discarded since this initiative would require a detailed analysis of national systems, which could take several years to conduct. The feasibility of the option is at this point uncertain. Moreover it would not provide a short-term solution for the counterfeiting threat as identified in previous chapter.

## 5.2. Description of considered policy options

This impact assessment considers three policy options:

- ***Policy Option 1 – Retention of status quo***

No action would be taken at EU level other than that the one foreseen by the existing framework, i.e. normal continuation of implementation efforts of the Framework Decision, as well as awareness-raising, training and advice activities for specialised investigators and prosecutors. The Pericles programme would continue to provide funding for exchange of information and best practices, training and prevention programmes. In addition to this, the

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<sup>48</sup> The removal of the old third pillar introduces the possibility of infringement procedures in this area, which could be launched by the Commission to enforce EU law. Given the five year transition period stipulated in Protocol no. 36 to the TFEU, the impact of this change may sometimes take slightly longer to be felt in its entirety. However, the Commission has the possibility to speed up matters in selected areas by "Lisbonising" some of the old third pillar instruments. The EU can adopt under Article 83 of the Treaty on the Functioning of the European Union (TFEU, or Lisbon Treaty) directives with minimum rules on EU criminal law for different crimes. Measures can be adopted under Article 83(1) TFEU concerning a list of explicitly listed ten offences (the so-called "Euro crimes") which refers to -inter alia- counterfeiting of means of payment.

general efforts to strengthen the mechanisms for mutual legal exchange of information would continue. The monitoring of the implementation of the rules in the Framework Decision would be automatically strengthened as from 1 December 2014 (in accordance with Protocol 36 to the Treaty of Lisbon). From this date, the full enforceability of the Framework Decision will be ensured through the possibility of launching an infringement procedure.

- ***Policy Option 2 - A Directive to replace the 2000 Framework Decision and to introduce provisions on investigative tools and the transmission of seized counterfeits***

This policy option takes over the content of the current Framework Decision and replaces it by a Directive which also foresees cross-border law enforcement cooperation, in particular with regards to investigative tools and rules on detection of counterfeits, in particular with regards to technical analysis of counterfeits, in response to problems 2 and 3.

#### *Investigative tools*

Member States which currently do not allow for using the investigative tools in counterfeiting investigations (such as undercover agents and controlled deliveries) would be obliged to provide for this possibility to address the problem of unsuccessful cross-border investigations. This would imply that all the Member States would be able to fight counterfeiting by means of the tools already used in organised crime or serious crime cases. This issue would be addressed through a general provision on investigative techniques which already exists for other crimes comparable with its seriousness to the currency counterfeiting.

#### *Transmission of seized counterfeits*

The national authorities would be obliged to ensure that samples of seized counterfeits of the euro are transmitted to the National Analysis Centres (NACs) and Coin National Analysis Centres (CNACs) for analysis and detection, including during judicial proceedings, to strengthen the prevention. If the transmission is not possible for the risk of compromising the evidence an access should be granted.<sup>50</sup>

- ***Policy Option 3 - A Directive to replace the 2000 Framework Decision and to introduce provisions on the minimum and maximum level of criminal sanctions, investigative tools and the transmission of seized counterfeits***

This policy option includes the content of Policy option 2 (investigative tools and transmission of counterfeits) supplemented by a minimum and maximum level of sanctions for production and distribution of counterfeits (compared to currently only a maximum sanction for production).

Currency counterfeiting is due to its seriousness a crime traditionally subject to high levels of penalties for which our societal values justify a strong punishment by minimum imprisonment. In Art. 83 of the Lisbon Treaty, the counterfeiting of means of payment is

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<sup>50</sup> On the basis of Articles 4 and 5 of Regulation 1338/2001 the ECB and ETSC are involved at a later stage. The Regulation provides an obligation of the NACs and CNACs to send every new type of suspected counterfeit note to the ECB and every new type of suspected counterfeit coin to the ETSC.



explicitly listed among particularly serious crimes with a cross-border dimension for which minimum rules concerning sanctions can be adopted by means of a Directive. The penalties for these crimes need to have a sufficient deterrent effect and constitute an effective mean to combat the crime.

In the following text only the additional item of minimum and maximum sanctions for production and distribution will be considered. For investigative tools and for preventive measures reference is made to Policy Option 2.

#### *Minimum level of sanctions for production and distribution*

The Member States would be obliged to introduce a minimum sanction of at least six months of imprisonment for production and distribution, which are interlinked and cause the problems identified above. The proposal does not include a minimum level of penalty for the offences relating to the instruments for currency counterfeiting, since these can be considered as preparatory acts for the actual counterfeiting. This choice is justified by the principle of the proportionality of the proposed measure.

The minimum sanction level of six months is considered as the lowest (and thus most proportionate) possible figure which, subject to a proportionality check by the issuing judicial authorities, still allows a practical prospect of permitting surrender among EU Member States under the European Arrest Warrant<sup>51</sup>, which is particularly relevant for the often cross-border type of currency counterfeiting cases. Under this instrument, only penalties higher than four months can trigger surrender, which – taking into account mandatory sentencing reductions available in some Member States depending on circumstances<sup>52</sup>– leads to a normal minimum level of six months for the system to work in all cases of convictions for currency counterfeiting cases.

#### *Maximum level of sanctions for distribution*

The Member States would be obliged to introduce the same minimum level for the maximum sanction that applies already for production also for distribution. These offences are interlinked and cause the problems identified above. The proposal does not include a maximum level of penalty for the offences relating to the instruments for counterfeiting currency, since these can be considered as preparatory acts for the actual counterfeiting. This choice is justified by the principle of the proportionality of the proposed measure.

The maximum sanction level of eight years is currently requested for the production of counterfeit currency. Eighteen Member States apply in their national law the same minimum maximum level for the offence of production and the offence of uttering and related offences. Only the following nine Member States distinguish between these offences: France, Austria, Bulgaria, Greece, Italy, Luxemburg, Poland, Netherlands and Portugal. The maximum level in these Member States ranges between four years to twenty years in Belgium, Greece and Slovakia. Only Austria, Italy, Luxemburg, the Netherlands and Portugal have a minimum maximum level of less than eight years.

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<sup>51</sup> Framework Decision 2002/584/JHA, Art. 2(1).

<sup>52</sup> E.g. §49(1) no. 2 of the German criminal code.

### 5.3. Impact analysis of considered policy options

In accordance with the Communication from the Commission on the Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union<sup>53</sup>, this Impact Assessment Report also examines the impact on the Fundamental Rights of the options proposed, in particular in the light of the 'fundamental rights check list' presented in the Communication. Mainly the right to liberty (Article 6), the respect for private and family life (Article 7), the freedom to choose an occupation (Article 15), the freedom to conduct a business (Article 16), the right to property (Article 17), the right to a fair trial (Article 47), the presumption of innocence and the right of defence (Article 48), the principles of legality and proportionality of criminal offences (Article 49), the right not to be tried and punished twice (Article 50) are concerned by criminal law measures for the protection of the euro and other currencies. As will be described for each option individually, all the policy options affect fundamental rights as set out in the Charter.

#### 5.3.1. *Policy option 1: Retention of the status quo including automatic "Lisbonisation" of the Framework Decision on the basis of the Protocol no. 36*

##### *Impact as regards meeting the objectives*

This policy option does not meet any of the specific objectives.

The problem of deterrence would not be addressed due to a lack of insufficient levels of sanctions. Furthermore the problems identified above in relation to cross border investigations would not be solved since not all Member States would be able to use investigation tools for serious counterfeiting offences with a transnational character. No solution would be presented for the problem of the release of counterfeits during judicial proceedings and therefore the risk of counterfeits remaining in circulation due to a lack of timely authentication might increase.

##### *Impacts as regards compliance costs*

This option of retaining the status quo would not cause any compliance costs.

##### *Impacts on fundamental rights*

The impact on fundamental rights would not change compared to the current situation. The Court of Justice could be asked by national courts of all Member States to interpret the EU rules in the light of the Charter, and the Commission would be able to launch an infringement procedure. This would strengthen the protection of the fundamental rights.

Awareness raising activities would have a positive impact as more targeted application of the Directive's provisions and consequently better targeted investigations would not lead to unlawful and unnecessary limitations of the right to liberty and security or right to property. Better knowledge of the application of the rights under the Charter when the Convention is being applied could also strengthen the protection of the persons concerned against the unlawful interventions of State authorities. Specific training of prosecutors and investigators

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<sup>53</sup> [http://ec.europa.eu/justice/news/intro/doc/com\\_2010\\_573\\_4\\_en.pdf](http://ec.europa.eu/justice/news/intro/doc/com_2010_573_4_en.pdf).

could enhance their ability to correctly assess the nature of the criminal offence and thus safeguard the principle of legality and proportionality of criminal offences. Their training could also limit the unnecessary interventions into the right of property or freedom to conduct business and freedom to choose an occupation.

*Stakeholders' views*

The questionnaire survey indicated that a majority of Member States experts consider that the current legal framework is in principle sufficient, but are in favour of actions to strengthen implementation of existing provisions. Some of these Member States see as a better option to improve the implementation of the existing provisions in practice as well as the general framework of mutual legal assistance, mutual recognition instruments which can be applied also in cases of suspected currency counterfeiting. Some Member States find 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 adopt new rules.

Other stakeholders, like the ECB, consider the status quo to be inadequate.

| <b>Expected Impact of Policy option 1 – Status quo</b> |   |
|--|---|
| <b>Effectiveness in meeting objectives</b>             | This policy option does not meet any of the specific objectives.<br><br>However, the monitoring and enforcement powers of the Commission on the implementation of the provisions currently contained in the FD will be strengthened after 1 December 2014 (following the Protocol 36 to the Treaty of Lisbon). A better implementation could lead to higher trust in the currency and the avoidance of counterfeits affecting commerce negatively. These benefits would, however, be limited, as the weaknesses identified above in the legal framework would remain. |
| <b>Impact on fundamental rights</b>                    | Not more than now (rights to liberty, family life, freedom to choose an occupation and to conduct a business, right to property, legality and proportionality of criminal offences, right not to be tried twice).   |
| <b>Compliance costs<sup>54</sup></b>                   | None.   |
| <b>Intrusiveness in domestic justice systems</b>       | None to low, as in case of any implementation process.  |
| <b>Proportionality</b>                                 | Not applicable  |
| <b>Opinion of stakeholders</b>                         | Three fifths of Member States' experts when replying to questionnaire in December 2011 considered that the current legal framework is sufficient or that there is no need for new substantive criminal law  |

<sup>54</sup> Compliance costs refer to costs to Member State authorities and EU budget in implementing the policy option.

|  |   |
|--|---|
|  | provisions. However the experts in the framework of the Hague Conference supported the idea of further harmonisation of criminal law. The ECB and a number of Member States think that the current framework needs strengthening. |
|--|---|

5.3.2. *Policy option 2: A Directive to replace the 2000 Framework Decision and to introduce provisions on investigative tools and the transmission of seized counterfeits*

**Investigative tools**

*Impact as regards meeting the objectives*

Introduction of the missing investigative tools in some Member States will decrease the number of unsuccessful cross-border investigations involving those Member States. This will have particular impact on prevention of counterfeiting in Italy which is traditionally a production country. Substantial losses like those indicated in the case example in section 3.2.2. will be avoided.

The introduction of common investigative techniques would require the adaptation of the national legislation in those few Member States which do not currently have such techniques for currency counterfeiting offences (Cyprus, Greece and Italy). The measure suggested would extend the existing investigate measures for organised crime or other areas of serious crime (such as drug trafficking, money laundering, child exploitation and trafficking in human beings) to currency counterfeiting offences.

*Impacts as regards compliance costs*

The costs for the Member States with regard to the investigative tools would be limited to the modification of the national law of three Member States (Cyprus, Greece and Italy) to extend the investigative techniques available for other types of serious crime to the crime of currency counterfeiting. In practice small costs related to technical equipment, such as copying the wire-tapping software on more devices, are to be expected.

*Impacts on fundamental rights*

In addition to the assessment carried out for option 1, the introduction of new investigative techniques might have an additional impact on the right to liberty and security, the respect of private and family life, the protection of personal data (phone tapping), the right to an effective remedy and to a fair trial, the presumption of innocence and the right of defence in cases where such evidence is used in a trial. Sufficient safeguards must be taken as to the conditions under which new investigative techniques can be used and as to the conditions under which the evidence can be treated in the later criminal proceedings.

In accordance with Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

In this respect, more efficient investigative techniques could positively affect the protection of right to liberty and security and respect for private and family life of third parties. The counterfeit currency can easily enter into circulation and be used by an innocent person without his or her knowledge. Such a person might then be held liable or subject to investigation when the counterfeited currency is discovered. Moreover counterfeited currency will be seized and not replaced and the innocent person's right to property will be impacted.

The special investigative techniques would contribute to preventing and combating currency counterfeiting and its negative consequences on the safeguard of the fundamental interests outlined above. Subject to the principles of necessity and proportionality, these are legitimate and sufficiently important objectives which could justify limitations on the right to private and family life. Concerning the defendant's rights, the risk of violation can be avoided through safeguards and careful drafting of the legislative texts as well as proper implementation and application by Member States. It should in particular be noted that the measure suggested would not introduce any new investigative measures in Member States, but only make existing measures applicable to currency counterfeiting offences. Existing fundamental rights safeguards at the national level would thus automatically be extended to counterfeiting.

### *Stakeholders' views*

Experts and specialists consulted during The Hague Conference in November 2011, indicated the opportunity to expand the investigative methodologies, within those legislative system that still do not have these, with the introduction among other things of controlled deliveries and undercover agents. The investigative tools similar to those adopted in combating money laundering and drug trafficking should be used for the protection of the euro and other currencies against counterfeiting.

In their replies to the questionnaire on the potential way forward, the Czech Republic, France and Italy made proposals in relation to the alignment of the investigative techniques such as controlled delivery, under-cover agent, etc. came up again.

During the ECEG meetings its members further showed support for the proposal to harmonize the investigative techniques.

### **Transmission of seized counterfeits**

#### *Impact as regards meeting the objectives*

A more coherent approach by the national courts during court proceedings on the transmission of euro counterfeits would be achieved which would result in strengthened prevention thanks to timely adjustments of machines and training of personnel on new types of counterfeits.

Judicial authorities may be reluctant to apply this obligation in practice because they may consider that the transmission of counterfeits would have a negative impact on the principle of fair trial in terms of evidence. In order to minimize this negative impact, the transmission of counterfeits would have to be accompanied by a general clause to safeguard the judicial proceedings.

The national authorities would need to implement the obligation to transfer counterfeits during the judicial proceedings in a way which does not prevent the use of suspected counterfeits as evidence in criminal proceedings. This proposal will lead to a modification of

the procedural criminal law in the Member States which do not transmit seized counterfeits for analytical purposes during judiciary proceedings.

*Impact on compliance costs*

The implementation of the obligation to transmit seized counterfeits by courts before the end of the trial for technical analysis purposes may cause low costs for national authorities, such as for secure judicial delivery or dedicated office space for the local analysis. However, these costs would only apply to those Member States which do not yet transmit the counterfeits during criminal proceedings to the national analysis centres. This includes at least Greece, Italy and Poland.

*Impact on fundamental rights*

As regards the impact of this proposal on fundamental rights, particular attention should be paid to the right to a fair trial (Article 47 EU Charter), considering that the seized counterfeit notes and coins are used or retained as evidence in criminal proceedings.

In order to improve the protection of the euro against counterfeiting while ensuring the respect of that fundamental right, transfer of notes and coins for examination during the trial should not go beyond what is necessary in order to achieve the objective pursued, and always take into account the quantity of seized counterfeits. Therefore, the impact on fundamental rights should be minimised by rules aimed at making sure that the transfer will not be required in case of a low quantity of counterfeits, the quantity requested is limited to what is necessary for the pursued objective and there is no risk of altering evidence which is necessary for the trial.

*Stakeholders' views*

In the consultation through the questionnaire sent to the ECEG experts and the discussions in the ECEG, some ECEG members proposed a further harmonisation of the framework for the transmission of seized counterfeits during the criminal proceedings for technical purposes, to ensure an effective protection of the euro against counterfeiting.

Also the ECB welcomed the proposal for a further harmonisation of the rules on the transmission of seized counterfeits by courts before the end of the criminal trial.

| <b>Expected Impact of Policy option 2 - A Directive to replace the 2000 Framework Decision and to introduce provisions on investigative tools and the transmission of seized counterfeits</b> |  |
|---|--|
| <b>Effectiveness in meeting objectives</b>  | <p>This option meets the specific objectives C and D.</p> <p>It would contribute to a better protection of the currencies against counterfeiting by decreasing the number of unsuccessful cross-border investigations and in relation to the euro by increasing the possibility of detecting notes and coins by a timely application of authentication procedures. To a certain degree it will respond to a persistent threat of</p> |

|  |   |
|--|---|
|  | <p>currency counterfeiting and especially to the recent improvements in quality of counterfeiters.</p> <p>Financial benefits (avoided damage caused by counterfeiters) can be expected as a result of the measure proposed.</p>   |
| <b>Impact on fundamental rights</b>              | <p>Low to medium (rights to liberty and security, respect of private and family life, protection of personal data, right to a fair trial, presumption of innocence and right to defence, right not to be tried twice). New provisions on investigative tools and transmission of seized counterfeiters may have a direct effect on certain fundamental rights. The special investigative tools are known in all Member States and are used only in cases of serious crime. The new provision would allow the enforcement authorities to make use of these tools as well when investigating serious currency counterfeiting cases.</p> |
| <b>Compliance costs</b>                          | <p>Low costs, related to changing national legislation and to technical resources, can be caused to make available the investigative techniques and to ensure the transmission or access to counterfeiters during judicial proceedings.</p>   |
| <b>Intrusiveness in domestic justice systems</b> | <p>Low. The rules on investigative tools may need to be adapted, but this only to a relatively limited extent in the Member States where the investigative tools cannot be used for the currency counterfeiting offences.</p>   |
| <b>Proportionality</b>                           | <p>The measure would not be excessive compared to the objective pursued. The modifications in national legal systems are limited and would be outweighed by the beneficial results – in terms of lower number of unsuccessful cross-border investigations and in terms of increased prevention due to timely adjustment of machines and training of staff. The benefits also include the general financial gains stemming from a maintained trust in the single European currency.</p>  |
| <b>Opinion of the stakeholders</b>               | <p>Based on the questionnaire, a substantial number of Member States experts welcome a reinforcing of the legal framework including changes providing added value by means of a Directive. The Member States' experts in the framework of the ECEG meetings underlined the importance of investigative techniques as well as the transmission of counterfeiters for technical analysis. Furthermore the need to improve these instruments was confirmed by the replies to the questionnaire.</p> <p>The ECB fully supports further harmonisation of the framework for the transmission of seized counterfeiters.</p>                  |

5.3.3. *Policy option 3: A Directive to replace the 2000 Framework Decision and to introduce provisions on the minimum and maximum level of criminal sanctions, investigative tools and the transmission of seized counterfeits*

In the following text only the additional item of minimum and maximum sanctions for production and distribution will be considered. For investigative tools and for preventive measures reference is made to section 5.3.2. . Impacts in relation to the other provisions are identical to those in policy option 2.

### **Minimum level of sanctions for production and distribution**

#### *Impact as regards meeting the objectives*

Introducing a minimum sanction of at least six months of imprisonment for production and distribution of counterfeit currency will have a beneficial deterrent effect in the nine Member States where there is no minimum sanction for production or the minimum sanction is a fine; and in the 12 Member States where there is no minimum sanction for distribution or where the minimum sanction is a fine.

The introduction of minimum sanctions will guarantee a certain consistency across the EU<sup>55</sup> in terms of the minimum penalties and sanctions that apply in any Member State for a given type of offence. This will constitute an important step towards strengthening protection of the single European currency and would considerably reduce the possibility of existence of "safe havens" in Europe. Of course there is a risk that production capacities will be moved outside Europe. For this reason, the EU is already counterbalancing the threat of counterfeiting coming from third countries by other measures, such as awareness raising and training in the framework of the Pericles Strategy. Special trainings are being held in South America and on the EU Eastern border which are the areas mainly affected by euro counterfeiting outside Europe.

Introducing this minimum sanction would solve as well several problems linked to effectiveness. It would guarantee a possibility to use when necessary the European Arrest Warrant which is highly relevant for the often cross-border type of currency counterfeiting cases.

This minimum level would ensure that the crime of counterfeiting would be considered equally serious and therefore be given better priority by national law enforcement and judicial authorities in all Member States which in turn would help eliminate delays in the cross-border cooperation and also provide national prosecutors with a stronger rationale to prosecute.

The proposed six months level of the minimum sanction is considered as the lowest possible which creates a deterrent effect, allows the use of the EAW and ensures consistency of the sanctions system across the Member States.

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<sup>55</sup> Denmark is not participating in newly adopted measures on substantive criminal law, while the United Kingdom and Ireland only participate in the adoption and application of specific instruments after a decision to "opt in".



### *Impact on Member States' legislation*

The minimum sanction for production and distribution of counterfeit currency requires adaptations of the criminal codes of some Member States. This proposal will have a significant impact on the legal systems of the Member States which have no minimum sanctions (Cyprus, Denmark, France, Sweden and the United Kingdom for both production and distribution and Austria, Bulgaria and Portugal for distribution) or have fines as their minimum sanctions (Estonia, Ireland, Lithuania and the Netherlands). Considering that existing minimum sanctions levels are already relatively high in most Member States, the effect in practice on the sanction levels is likely to be limited to those Member States that have a particularly low level of minimum sanctions and thus the intrusive effect into national law is not considerable.

### *Impact as regards compliance costs*

The introduction of a common minimum sanction in the national laws would have low costs of changing legislation for ten<sup>56</sup> Member States that would have to change their national law to introduce a minimum sanction of at least six months for production and/or distribution. These Member States may also incur some additional criminal justice system costs, such as imprisonment costs associated with more punitive custodial sentences. The average amount spent per day of detention of a person in penal institutions varies considerably from Member State to Member State (from 2.29 € in Bulgaria to 240 € in Sweden).<sup>57</sup>

### *Impact on fundamental rights*

The introduction of stronger or more coherent criminal sanctions will have direct and indirect effects on fundamental rights (right to liberty, respect of private and family life, freedom to choose an occupation and conduct a business, right to property, principles of legality and proportionality of criminal offences and penalties). Harmonisation of minimum sanctions should however allow the Member States to impose sanctions below the minimum thresholds, in accordance with the general rules and principles of national criminal law on the application and execution of sentences, depending on the concrete circumstances in each individual case (e.g. for juveniles and minor cases), in order to provide a safeguard for Article 49 of the EU Charter of fundamental rights. Harmonisation of minimum sanctions would also contribute to more equal treatment of people affected by the Directive. The higher deterrent effect would also lead to less counterfeits in circulation and consequently a lower impact on the right to property of those who are in good faith in possession of counterfeit currency.

### *Stakeholders' views*

The opinion of the experts and specialists consulted during The Hague Conference, organised by OLAF, the ECB and Europol in November 2011, is that important differences existing between the legal frameworks can create real problems in cross-border cooperation against counterfeiting of the euro and other currencies. The experts agreed with the principle that the harmonization of criminal law rules against counterfeiting would add value and harmonized criminal sanctions and criminal offences would facilitate the judicial cooperation between the authorities of Member States. Particularly, some experts called for the introduction of

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<sup>56</sup> In case the UK and Ireland would opt in, the number would increase to twelve.

<sup>57</sup> According to the Council of Europe Annual Penal Statistics – Space I – Survey 2010, available at: [http://www3.unil.ch/wpmu/space/files/2011/02/SPACE-1\\_2010\\_English.pdf](http://www3.unil.ch/wpmu/space/files/2011/02/SPACE-1_2010_English.pdf)

common EU minimum sanctions, and others pointed at the risk of forum shopping, as criminals may choose to focus their criminal activities to Member States with less severe sanctions, due to the lack of harmonization of criminal sanctions.

Member States' experts expressed concerns within the ECEG group meeting that the introduction of minimum sanctions could have an interfering impact on general principles of national legal systems.

The ECB voiced its support for further harmonisation of the level of penalties by introducing minimum sanctions. From the 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 perpetrated and would therefore merit the same degree of punishment. The ECB considers in particular minimum minimum sanctions necessary to ensure effective deterrence in the EU. According to the ECB the introduction of minimum sanctions would help countering the risk that consumer have concerns about the sufficient protection of cash and that they will lose their confidence in notes and coins. It will thus help preventing that consumers fear to receive counterfeit notes and coins and that they prefer other means of payment instead of cash, which could have an impact on trade.

Also Europol expressed its support for the introduction of minimum sanctions.

## **Maximum level of sanctions for distribution**

### *Impact as regards meeting the objectives*

The introduction of maximum sanctions will increase the consistency across the EU in terms of the maximum penalties and sanctions that apply in any Member State for a given type of offence. This will constitute an important step towards strengthening the protection of the single European currency and would considerably reduce the possibility of existence of "safe havens" in Europe.

This common maximum level would ensure that the crime of counterfeiting would be considered equally serious and therefore be given better priority by national law enforcement and judicial authorities in all Member States which in turn would help eliminate delays in the cross-border cooperation and also provide national prosecutors with a stronger rationale to prosecute.

The introduction of a common minimum maximum level for distribution would hit organised crime where it is vulnerable. Organised crime seems to rely on an effective distribution network because counterfeits of relevant classes appear all over Europe. The disruption of distribution channels has an immediate, noticeable impact on the counterfeiting statistics.

The proposed level of the maximum sanction of at least eight years is considered as the lowest possible which creates a deterrent effect. It would ensure consistency of the sanctions system across the Member States.

### *Impact on Member States' legislation*

Introducing a maximum sanction of at least eight years of imprisonment also for distribution will have a deterrent effect in the following five Member States where the maximum sanction is less than eight years: Austria, Italy, Luxemburg, Portugal and the Netherlands. Member

States which fixed a higher maximum level of sanction will remain free to keep it and thus the intrusive effect into national law would not exceed the objectives pursued.

#### *Impact as regards compliance costs*

The introduction of a minimum level for the maximum sanction to the existing prohibition of making counterfeit currency in the national laws would have small costs of changing legislation for five Member States which do not have at least eight years as the minimum maximum sanction in their current national legislation for distribution. However, compared to the introduction of a common minimum level of sanctions, this measure will not create additional costs.

#### *Impact on fundamental rights*

The introduction of stronger or more coherent criminal sanctions will have direct and indirect effects on fundamental rights (right to liberty, respect of private and family life, freedom to choose an occupation and conduct a business, right to property, principles of legality and proportionality of criminal offences and penalties). The higher deterrent effect would also lead to less counterfeits in circulation and consequently a lower impact on the right to property of those who are in good faith in possession of counterfeit currency.

#### *Stakeholders' views*

The opinion of the experts and specialists consulted during the 2011 The Hague Conference, stressed that important differences existing between the legal frameworks can create real problems in cross-border cooperation against counterfeiting of the euro and other currencies. The Member States experts agreed to the principle that the harmonisation of criminal law rules against counterfeiting would add value. Harmonised criminal sanction provisions would facilitate the work with, for example, rogatory letters. Indeed, harmonised criminal sanctions and offences would facilitate the judicial cooperation between the authorities of Member States.

The ECEG members expressed concerns about the necessary changes in the criminal codes, 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 fully supports further harmonisation of the level of penalties by introducing minimum sanctions, given that the euro is the single European currency. According to the ECB the fact that euro counterfeiting can be sanctioned differently in each Member State is disquieting. While noting that although 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 considers that the same minimum and maximum level of sanctions should be introduced for all types of counterfeiting offences or at least for those concerning the production and the distribution. In its view, deterrent sanctions for any form of distribution are of particular importance.

**Expected Impact of Policy option 3 - A Directive to replace the 2000 Framework Decision and to introduce provisions on the minimum and maximum level of criminal sanctions, investigative tools and the transmission of seized counterfeits**

|   |  |
|---|--|
| <p><b>Effectiveness in meeting objectives</b></p>       | <p>This option meets all the specific objectives.</p> <p>In addition to the benefits achieved under policy option 2, it would contribute to a better protection of the euro and other currencies against counterfeiting by increasing the deterrence, reducing forum shopping, and increasing the possibility to use the EAW.</p> <p>Although an increase in forum shopping in third countries is possible as a result of this option, this risk would be mitigated by the activities carried out in the framework of the Pericles Programme in third countries and by the conclusions of administrative cooperation agreements between OLAF and thirds countries. In relation to distribution, the import from third countries is sanctioned with the same severity as production in the EU and therefore acts as a strong deterrent.</p> |
| <p><b>Impact on fundamental rights</b></p>              | <p>Medium. Harmonisation of minimum and maximum sanctions, new investigative tools and preventive measures may have a direct effect on certain fundamental rights (rights to liberty and security, respect of private and family life, freedom to choose an occupation and to conduct a business, right to property, legality and proportionality of criminal offences, right to a fair trial, presumption of innocence and right to defence, right not to be tried twice).</p>  |
| <p><b>Compliance costs</b></p>                          | <p>In total, twelve<sup>58</sup> Member States would have to adapt their national law<sup>59</sup>(see Annex 6). Member States might also incur additional imprisonment costs associated with more punitive custodial sentences on the grounds of a minimum sanction of six months for production and distribution of counterfeits.</p>  |
| <p><b>Intrusiveness in domestic justice systems</b></p> | <p>As for policy option 2, the rules on investigative tools will need to be adapted. For those Member States that will need to introduce minimum sanctions as a new legal concept, the intrusiveness will be significant. Indeed, the introduction of minimum and further maximum sanctions will also have a certain impact on the sentencing practices of judges</p>  |

<sup>58</sup> In case the UK and Ireland would opt in, the number would increase to fourteen.

<sup>59</sup> Austria, Portugal and the Netherlands being the Member State which would have to adapt both the maximum and the minimum level of sanction

|   |   |
|---|---|
|   | <p>and the system for execution of penalties, as more offenders can be expected to be sentenced to imprisonment and be jailed. On the other hand, intrusive effect of minimum sanctions is attenuated if the minimum sanction required will be relatively low (i.e. under one year). Considering that existing sanctions are already relatively high in most Member States, the effect in practice on sanction levels will be limited to those Member States that have a particularly lenient sanctions system.</p>   |
| <p><b>Proportionality</b></p>             | <p>The measure would not be excessive compared to the objective pursued. The modifications in national legal systems that the introduction of minimum and further maximum sanctions would imply, would be outweighed by the beneficial results – in terms of lower number of counterfeits - that a reinforced mechanism to fight currency counterfeiting would produce. To the benefits should also be counted the general financial gains stemming from a maintained trust in the single European currency.</p> <p>The instrument limits the introduction of the minimum and maximum levels of sanction only to the main offences of production and distribution. Harmonisation of minimum sanctions will allow the Member States to impose sanctions below the minimum thresholds in accordance with the general rules and principles of national law on the application and execution of sentences, depending on the concrete circumstances in each individual case (e.g. for juveniles, in case of only secondary participation, in case of contribution of the perpetrator to discover or prevent serious offences) and in clearly specified cases where intensity of the offence and the criminal energy can be considered to be minor.</p> |
| <p><b>Opinion of the stakeholders</b></p> | <p>Member States experts agree that harmonising sanctions brings added value. However, concerns were expressed as to the changes in criminal codes which the introduction of minimum sanctions would trigger. Minimum sanctions were considered inappropriate in minor cases.</p> <p>The ECB fully supports the harmonisation of penalties by introducing the minimum level of sanctions.</p>   |

**6. COMPARATIVE ASSESSMENT OF POLICY OPTIONS**

The table below sets out a comparison of the relative rating of the three policy options as described in the section 5 against the specific objectives as defined in section 4. The policy options are classified according to their potential to meet the objectives defined in section 4, with two checkmarks (++) indicating highest relative potential.

| <b>Objectives/<br/>impacts</b>                                       | <b>Policy option<br/>1<br/>Status quo</b> | <b>Policy option<br/>2<br/>With new<br/>provisions on<br/>investigative<br/>tools and<br/>transmission<br/>of seized<br/>counterfeits</b> | <b>Policy option<br/>3<br/>Like option 2,<br/>but with<br/>minimum<br/>and<br/>maximum<br/>sanction<br/>levels</b> |
|--|---|---|--|
| <b>Effectiveness</b>   |   |   |  |
| <b>Improved<br/>deterrence</b>                                       | 0   | 0   | ++   |
| <b>Contribute to<br/>limiting forum<br/>shopping</b>                 | 0   | 0   | +  |
| <b>Reduced delays<br/>in processing<br/>cooperation<br/>requests</b> | 0   | 0   | +  |
| <b>Effective<br/>execution of<br/>EAWs</b>                           | 0   | 0   | +  |
| <b>Limiting number<br/>of unsuccessful<br/>investigations</b>        | 0   | ++  | ++   |
| <b>Improved<br/>detection of<br/>counterfeits</b>                    | 0   | ++  | ++   |
| <b>Efficiency</b>  |   |   |  |
| <b>Compliance costs</b>  | 0   | Low   | Low  |
| <b>Coherence</b>   |   |   |  |
| <b>Impact on<br/>fundamental<br/>rights</b>                          | 0   | Low to medium   | Medium   |
| <b>Intrusiveness in<br/>domestic justice<br/>systems</b>             | 0   | Low   | Significant for<br>those Member<br>States which<br>have to<br>change their<br>national law                         |

## 7. THE PREFERRED OPTION

The analysis in this Impact Assessment shows the benefits of strengthening the protection of the euro and other currencies against counterfeiting beyond the provisions of the current Framework Decision.

Policy option 2 would be effective in relation to the specific objectives C and D by decreasing the number of unsuccessful cross-border investigations and by increasing prevention by a timely application of authentication procedures.

Policy option 3 would be significantly more effective in comparison to Policy option 2 in achieving the objectives to appropriately increase effectiveness and deterrence in relation to production and distribution of counterfeits, eliminate incentives for forum shopping in some Member States, reduce delays in processing cooperation requests and increase the possibility to use the EAW (objectives A and B). Thus it would achieve all the specific objectives.

| <b>Summary of the preferred policy option</b>  |  |
|--|--|
| <p>The preferred policy option would involve a combination of the following elements.</p> <ul style="list-style-type: none"> <li>• <i>The provisions from the Framework Decision of 2000 will be maintained in substance in a new proposal, with minor modifications, taking into account the Treaty of Lisbon.</i></li> <li>• <i>The provisions on sanctions will be modified with respect to the Framework Decision, by introducing a minimum penalty of six months for production and distribution and by introducing a maximum penalty of at least eight years for distribution.</i></li> <li>• <i>A new provision obliging Member States to provide for the possibility to use certain investigative tools in currency counterfeiting investigations will be introduced.</i></li> <li>• <i>A new provision obliging Member States to foresee for the possibility to transmit the seized euro counterfeits also during judicial proceedings will be introduced.</i></li> </ul> |  |

Non-legislative actions related to training, exchange of information best practices in the same areas will continue and be strengthened.

## **8. MONITORING AND EVALUATION**

Providing for a robust monitoring and evaluation mechanism is crucial to ensure that the rights envisaged in the Directive are complied with in practice as well as in legislation. The Directive should stipulate that Member States should report on the effective implementation. Besides quantitative data provided by Member States, other possible sources of qualitative information on compliance will be gathered from the Justice Forum, OLAF and Eurojust.

Moreover, the Commission envisages carrying out a specific empirical study with emphasis on data collection one to three years after the transposition of the Directive. In order to gain

in-depth quantitative and qualitative insights into the effectiveness of the proposal, this study will analyse the following relevant indicators corresponding to the specific objectives:

- For the objective A: change in the number of sentences of imprisonment issued;
- For the objective B : change in the number of cross-border investigations;
- For the objective C: number of EAW executed;
- For the objective D: change in the number of counterfeited notes and coins seized in circulation.

The data would enable the Commission to evaluate the actual compliance in Member States not only with this legislation, but also in relation to the respect for the rights, freedoms and principles enshrined in the EU Charter of Fundamental Rights.

The Commission will use the platform of the ECEG experts meetings to monitor on a regular basis the implementation of the Directive.

Once the transposition period of the Directive has expired, the Commission would perform the necessary transposition checks and, if need be, launch infringement procedures in accordance with the TFEU.