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signed by Mr Jordi AYET PUIGARNAU, Director

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

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Executive summary of the Impact Assessment  
Accompanying the document  
Proposal for a Directive of the European Parliament and of the Council on the  
protection of the euro and other currencies against counterfeiting by criminal  
law, and replacing Council Framework Decision 2000/383/JHA

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Delegations will find attached Commission document SWD(2013) 20 final.

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**COMMISSION STAFF WORKING DOCUMENT**

**Executive summary of the Impact Assessment**

*Accompanying the document*

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

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

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## 1. PROBLEM DEFINITION AND THE LEGAL CONTEXT

Counterfeiting of currencies remains a concern throughout the European Union. Counterfeiting of the euro is of special concern due to its importance. Today the euro is the second most important international currency world-wide. The worldwide importance of the euro makes it particularly open to the risk of counterfeiting. According to data from the European Central Bank, 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.

The Impact Assessment therefore concentrates on the euro mainly. However the counterfeiting is equally a major problem for other currencies circulated in Europe. The problems identified in relation to the euro can be therefore considered of a general nature and valid also for other currencies.

The EU already has instruments specifically designed to protect the euro, such as the legal framework on authentication of euro notes and coins and an EU programme for awareness raising and training (Pericles programme<sup>1</sup>). In particular the Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, requires Member States to ensure that certain conduct is made punishable and penalties can be imposed for offences involving the counterfeiting of the euro or other currencies. This Framework Decision is protecting also other currencies on an equal footing with the euro.

The framework for the protection of the euro and other currencies by criminal law has been shown to have some weaknesses in achieving an adequate and efficient level of protection. It does not create a sufficient basis to prevent, investigate and sanction euro counterfeiting in a consistent manner throughout the Union. This also 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.

Taking into account the evaluation of the Commission on the basis of three Commission reports and a dedicated questionnaire on the state of implementation of the Framework Decision and a consultation of stakeholders at different experts' meetings, the following weaknesses in the legal framework on the protection of the European single currency against counterfeiting were identified:

- ***The level of penalties for currency counterfeiting is not sufficiently dissuasive and effective***
  - Insufficient deterrence

There are important differences between the sanctions foreseen in Member States, which is one of the reasons for insufficient deterrence and uneven protection of the euro and other currencies across the European Union. 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. In practice, it is the knowledge of the possible minimum sanctions which

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<sup>1</sup> Council Decision 2001/923/EC of 17 December 2001

will deter those who are tempted to begin counterfeiting. The difference of being sentenced to imprisonment for a certain minimum duration instead of, for example, getting away with a fine is obvious.

- Risk of forum shopping

As organised crime groups with substantial resources are often strongly involved in currency counterfeiting, it is easy for them to move their activities across the borders through organised distribution networks. 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). The figures seem to suggest that Member States with low levels of sanctions tend to attract counterfeiters.

- Reduced effectiveness of judicial cooperation.

The divergent level of sanctions may have a negative impact on judicial cooperation. If a Member State has low minimum sanctions in its criminal code, this can lead to low priority given by law enforcement and judicial authorities to investigate and prosecute currency counterfeiting cases. In practice, it can have a negative impact for the cross border cooperation when another Member State asks for assistance, in terms of timely processing of the request. Moreover, the lack of a minimum level of sanctions in some Member States may result in sentences of less than four months or a fine which means that not all sentences for counterfeit production or distribution make it possible to request a European Arrest Warrant.

- ***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 (telephone interceptions, tracking devices, controlled deliveries and undercover agents). 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. Once investigations on counterfeiting cases are started abroad with particular investigative techniques, it is not possible to continue them in another 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.

- ***Delay in adjustment of machines for detecting counterfeits resulting from deficiencies in transmission of seized counterfeits for analysis to competent authorities during judicial proceedings***

Currently there is no obligation to transmit seized counterfeits during judicial proceedings. 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 considerable delays, sometimes years, before the note handling and coin processing machines used by financial institutions can be adjusted to detect the counterfeits to prevent such types of counterfeits to further circulate.

## **2. 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. The prevention and detection of counterfeits coming into or already in circulation could be enhanced by the recently improved legal instruments on authentication<sup>2</sup> as well as by awareness raising and training through the Pericles programme. In the long run there could be an improvement in terms of deterrence following the adoption of a horizontal initiative in preparation on confiscation of assets in relation to the proceeds of several offences, including counterfeiting.

The improvements mentioned above would not impact the problems described in this report. In particular the problem of deterrence would not sufficiently be addressed due to a lack of sufficient levels of sanctions. The continuous threat of counterfeiting underpinned by the statistics of the ECB would probably remain constant or would likely increase. 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. Neither would a solution 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. LEGAL BASIS FOR THE NEED TO ACT**

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 in the areas of particularly 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. Counterfeiting of means of payment is explicitly mentioned in Article 83 (1) TFEU as such an area of particularly serious crime.

## **4. ANALYSIS OF THE SUBSIDIARITY PRINCIPLE**

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.

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<sup>2</sup> See Regulations 1338/2001, 1210/2010 and the ECB decision of 16.09.2010, mentioned in section 2.1.

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.

## **5. MAIN POLICY OBJECTIVES**

Based on the problems identified, a series of general and specific objectives were identified:

### General objectives:

- 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;
- To keep and strengthen the trust in the genuine character of the single European currency and other currencies

### Specific objectives:

- To appropriately increase effectiveness and deterrence in relation to counterfeiting (production and distribution) and eliminate incentives for forum shopping in some Member States;
- To facilitate the proportionate application of the European Arrest Warrant in relation to currency counterfeiting (production and distribution);
- To facilitate cross-border investigations in relation to the currency counterfeiting offences and to reduce delays in processing cooperation requests;
- To strengthen the prevention of counterfeiting offences by increasing the possibility of detecting notes and coins by a timely application of authentication procedures.

## **6. POLICY OPTIONS**

Three options have been considered:

### ***Policy option 1: Retention of the 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.

### ***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 addresses the investigative tools and transmission of seized counterfeits, in response to problems 2 and 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***

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). A minimum level of at least 6 months of imprisonment and a maximum level of at least 8 years of imprisonment is introduced.

## **6.1. Assessment of the policy options' impacts**

### ***Impact of policy option 1: Retention of the status quo***

The effectiveness of this option in meeting the objectives is, very low, if not inexistent. The monitoring and enforcement powers of the Commission on the implementation of the provisions currently contained in the Framework Decision 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 general commerce negatively. These benefits would, however, be limited, as the weaknesses identified above in the legal framework would remain. The problem of deterrence would not be addressed due to a lack of sufficient 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 either for the problem of the transmission of counterfeits during judicial proceedings and therefore the risk of counterfeits remaining in circulation due to a lack of timely authentication might increase. This policy option is not expected to impact any more than the current legal framework upon fundamental rights, the domestic justice systems, or the economic and financial fields.

### ***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***

This policy option would facilitate cross-border investigations of the counterfeiting offences and will strengthen the prevention of counterfeiting by a timely transmission of seized counterfeits for technical analysis and detection during judicial proceedings which increases the possibility of detecting counterfeit notes and coins in circulation. To a certain degree it will respond to a persistent threat of euro counterfeiting and especially to the recent improvements in quality of counterfeits. However, its added value for the protection of the euro is limited.

The option would have a low to medium impact on fundamental rights, as the extension of existing investigative tools to currency counterfeiting and the transfer of counterfeits for examination during the trial may have a direct effect on certain fundamental rights.



Financial benefits resulting from avoided damages caused by counterfeiters can be expected as a result of the measure proposed. Costs will be low because they are limited to modification of national law and some modest technical equipment costs for special investigative tools and for the transmission of counterfeits in some Member States.

***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***

In addition to the benefits achieved under policy option 2, it would contribute to a better protection of the euro against counterfeiting by increased deterrence, reduced forum shopping, and increased possibility to use the European Arrest Warrant (EAW) in relation to the main counterfeiting offences (production and distribution). Adding minimum level of sanction for offences of production and distribution and extending the existing maximum level of sanction for production also to distribution of counterfeit currency will mean that deterrence from such acts is likely to be very high. These common minimum sanction rules also improve coherence of the sanctioning across the EU and thus mutual trust between the judiciaries. This facilitates enforcement in cross-border cases. As this policy option considerably impacts on deterrence and enforcement capabilities, it is deemed to have medium to high effectiveness.

The option would have a medium impact on fundamental rights, because harmonisation of minimum and maximum sanctions, new investigative tools and preventive measures may have a direct effect on certain fundamental rights. These measures serve to meet objectives of general interest recognised by the Union (see Article 52 para. 1 of the Charter), and in particular to provide effective and deterring measures for the protection of the euro and do not go beyond what is necessary to achieve this objective.

Additional financial benefits compared to option 2 can be expected due to better deterrence and enforcement and thus less damage caused by counterfeiters. Some costs should be expected for Member States, in particular with regards to changing the legislation.

**6.2. The preferred option**

**Option 3 is the preferred option.**

<b>Summary of the preferred policy option</b>	
The preferred policy option would involve a combination of the following elements.	
•	<i>The provisions of 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>
•	<i>The provisions on sanctions will be modified compared 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>
•	<i>A new provision obliging Member States to provide for the possibility to use certain</i>

*investigative tools in currency counterfeiting investigations will be introduced.*

- *A new provision obliging Member States to provide for the possibility to transmit the seized euro counterfeits also during judicial proceedings will be introduced.*

## **7. MONITORING AND EVALUATION**

The Directive will 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.

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

The Commission furthermore envisages carrying out a specific empirical study with emphasis on data collection one to three years into the implementation of the proposal. The data would enable the Commission to evaluate the actual compliance by 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.

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.