



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 7 June 2013

10518/13

**Interinstitutional File:
2013/0023 (COD)**

**DROIPEN 71
JAI 462
ECOFIN 468
UEM 164
GAF 26
CODEC 1330**

COVER NOTE

from: Mario DRAGHI, President of the European Central Bank
date of receipt: 28 May 2013
to: Mr Uwe CORSEPIUS, Secretary-General of the Council of the European Union

Subject: OPINION OF THE EUROPEAN CENTRAL BANK
on a 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 (CON/2013/37)

Delegations will find attached the above mentioned opinion.

Encl.:



OPINION OF THE EUROPEAN CENTRAL BANK

of 28 May 2013

on a 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

(CON/2013/37)

Introduction and legal basis

On 5 February 2013, the European Central Bank (ECB) received a request from the European Commission for an opinion on a 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/JHA¹ (hereinafter the ‘proposed directive’). On 20 February and 2 April 2013, the ECB received requests from the Council of the European Union and the European Parliament, respectively, for an opinion on the same proposed directive.

The ECB’s competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union, which provide that the ECB shall be consulted on all proposed Union acts in its fields of competence. In addition, the ECB’s competence to deliver an opinion is based on Article 128(1) of the Treaty and Article 16 of the Statute of the European System of Central Banks and of the European Central Bank, as the proposed directive contains provisions which have implications for certain tasks of the European System of Central Banks. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

1. Purpose and content of the proposed directive

The proposed directive will replace Council Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro² for those Member States participating in its adoption. It maintains most of the provisions of Council Framework Decision 2000/383/JHA, with minor modifications, taking into account the Treaty of Lisbon. In addition, the proposed directive complements Council Framework Decision 2000/383/JHA, by introducing a minimum penalty of six months imprisonment for production and distribution of counterfeit

¹ COM(2013) 42 final.

² OJ L 140, 14.6.2000, p. 1.

currency and a maximum penalty of at least eight years imprisonment for distribution of counterfeit currency. It also introduces new provisions requiring Member States to: (a) provide for the possibility to use certain investigative tools; and (b) ensure that the National Analysis Centres (NACs) and the National Coin Analysis Centres (NCACs) are permitted to examine suspected euro counterfeits for analysis, identification and detection of further counterfeits also during on-going judicial proceedings.

2. General observations

The ECB welcomes the proposed directive, whose purpose is to supplement the provisions and to facilitate the application of the International Convention for the Suppression of Counterfeiting Currency signed at Geneva on 20 April 1929 and its Protocol³ (hereinafter the ‘Geneva Convention’) by the Member States⁴. The ECB further welcomes the fact that the proposed directive takes into account the ECB’s view that the criminal law framework should be reinforced by strengthening and harmonising the penalty regime, including by setting standards for minimum penalties. At the same time, the ECB notes that the proposed directive largely maintains the provisions of Council Framework Decision 2000/383/JHA, which will ensure legal certainty following transition to the new protection regime established under the proposed directive.

The ECB understands that the provision on mutual recognition of convictions for the purpose of recognising ‘repeat offences’ under Article 9a of Council Framework Decision 2000/383/JHA would not be prejudiced following adoption of the proposed directive for the Member States that have already transposed this provision into national law. As regards those Member States that have not yet done so, their obligation to lay down national rules on such mutual recognition of convictions under Article 9a would appear to continue to exist in accordance with Article 12 of the proposed directive. Nevertheless, in order to make this clear, the ECB suggests inserting the content of Article 9a of Council Framework Decision 2000/383/JHA into the proposed directive.

In accordance with recitals 28, 29 and 30 of the proposed directive, the ECB notes that, while Denmark is not taking part in the adoption of the proposed directive, the United Kingdom and Ireland may decide whether or not to take part in its adoption and application. The ECB understands that, if Denmark, the United Kingdom and Ireland do not participate in the adoption and application of the proposed directive, they will continue to be subject to the obligations relating to the time limit for transposition of Council Framework Decision 2000/383/JHA in accordance with Article 12 of the proposed directive. As a result, Denmark, the United Kingdom and Ireland would not be subject to the new rules under the proposed directive. Therefore, it would be beneficial to invite the competent authorities of Denmark, the United Kingdom and Ireland (if the latter two do not participate in the adoption of the proposed directive), to commit to apply the minimum and maximum standards for penalties, ensure the availability of effective investigative tools and the transmission of counterfeit notes and coins to NACs and CNACs by judicial

³ No 2623, p. 372 League of Nations – Treaty Series 1931.

⁴ The Geneva Convention has been ratified by all Member States, except, to date, Malta.

authorities in accordance with Articles 5, 9 and 10 , respectively, of the proposed directive. Otherwise, cross-border cooperation and the mitigation of the risk of forum-shopping, as referred to in recital 18 of the proposed directive, would be undermined.

3. Specific observations

3.1. Potential nominal value of counterfeit notes and coins

In relation to the references to the nominal value of the counterfeit notes and coins in recital 19 and Article 5 of the proposed directive, the ECB notes that, from a production perspective, this value can only be identified as regards finished counterfeit notes or coins.

Nevertheless, the ECB notes that the concept of counterfeit notes and coins is not necessarily limited only to finished counterfeit notes and coins, but may also cover unfinished counterfeit notes and coins which are in the process of being produced. The ECB highlights that, in the context of the fraudulent making or altering of notes and coins denominated in euro or other currencies⁵, the law-enforcement authorities may discover unfinished counterfeits. The ECB notes that the standard technique employed by police when seizing a clandestine counterfeit currency workshop is to try to intervene while the crime is actually in progress. This will be a matter of judgement, and in some cases there may be few completed products but much work in progress. The ECB notes that such unfinished counterfeits would not have a nominal value but a potential nominal value, which should be taken into account for the determination of a proportionate penalty under Article 5 of the proposed directive. Therefore, recital 19 and Article 5 should be amended to include references to the potential nominal value in relation to unfinished counterfeits. The potential nominal value should be considered as a further criterion when applying a proportionate penalty to any offence under Article 3(1)(a) to (c) of the proposed directive.

In addition, counterfeit notes and coins detected by competent national authorities may be denominated in, or have the appearance of, a currency other than the euro. In such case, the competent judicial authorities should be allowed to identify the relevant nominal or potential nominal value of such counterfeit notes and coins. Therefore, the ECB considers that it would be beneficial to further amend recital 19 and Article 5 to provide that the minimum and maximum standards for penalties take into account the relevant nominal or potential nominal value of the detected counterfeit notes or coins, which are not euro counterfeit notes and coins.

3.2. Counterfeit offences in relation to production tools and raw materials of banknotes and coins

The ECB is of the view that the standards for minimum and maximum penalties should apply to all types of offences under Article 3(1) of the proposed directive. This approach would increase significantly the efficiency and deterrent effects of the penalties. In this respect, given that the most sophisticated counterfeit notes and coins are produced using components from multiple sources, for example fraudulent

⁵ See Article 3(1)(a) of the proposed directive.

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holograms from non-Union countries, the ECB would support the inclusion of offences under Article 3(1)(d) of the proposed directive, where they involve particularly serious circumstances, within the scope of the penalty regime under Article 5(4) of the proposed directive.

3.3. Obligation to transmit counterfeit notes and coins for analysis

The ECB welcomes the fact that the proposed directive recognises the importance of NACs and NCACs being permitted by judicial authorities to examine counterfeit euro notes and coins for analysis, identification and detection of further counterfeits. Nevertheless, the ECB recommends that where samples of suspected counterfeit notes and coins cannot be transmitted because it is necessary to retain them as evidence, these samples of counterfeit notes and coins should be transmitted to the NAC or CNAC without delay after the relevant proceedings have concluded.

Where the ECB recommends that the proposed directive is amended, specific drafting proposals are set out in the Annex accompanied by explanatory text to this effect.

Done at Frankfurt am Main, 28 May 2013.

The President of the ECB

Mario DRAGHI

Drafting proposals

Text proposed by the Commission	Amendments proposed by the ECB⁶
Amendment 1	
Recital 19	
<p>‘(19) Member States should have the possibility to impose a short term of imprisonment or to refrain from imprisonment in cases where the total nominal value of the counterfeited notes and coins is not significant or does not involve particularly serious circumstances. That value should be below EUR 5 000, that is to say ten times the highest denomination of the euro, for cases calling for a penalty other than imprisonment, and below EUR 10 000 for cases calling for imprisonment for a shorter term than six months.’</p>	<p>‘(19) Member States should have the possibility to impose a short term of imprisonment or to refrain from imprisonment in cases where the total nominal or potential nominal value of the counterfeited notes and coins is not significant or does not involve particularly serious circumstances. That value should be below EUR 5 000 or the equivalent amount in the currency of the relevant counterfeited notes and coins, that is to say ten times the highest denomination of the euro, for cases calling for a penalty other than imprisonment, and below EUR 10 000 or the equivalent amount in the currency of the relevant counterfeited notes and coins for cases calling for imprisonment for a shorter term than six months.’</p>
<p><i><u>Explanation</u></i></p> <p><i>Recital 19 should be amended to allow for the possibility for Member States to apply a proportionate penalty in relation to unfinished counterfeited notes and coins, which may only have a potential nominal value. The potential nominal value should be considered as a further criterion when applying a proportionate penalty to any offence under Article 3(1)(a) to (c) of the proposed directive.</i></p> <p><i>In addition, as counterfeited notes and coins detected by competent national authorities may be denominated in, or have the appearance of, currencies other than the euro, the competent national authorities of the Member States should be allowed to identify the relevant nominal or potential nominal value of such counterfeit notes and coins. Therefore, recital 19 should be further amended to provide that the minimum and maximum standards for penalties would take into account the relevant nominal or</i></p>	

⁶ Bold in the body of the text indicates where the ECB proposes inserting new text. Strikethrough in the body of the text indicates where the ECB proposes deleting text.

Text proposed by the Commission	Amendments proposed by the ECB ⁶
potential nominal value <i>of non-euro counterfeit notes and coins</i> .	
Amendment 2 Article 5	
<p style="text-align: center;">‘Article 5 Penalties</p> <p>[...]</p> <p>2. For offences referred to in points (a), (b) and (c) of Article 3(1) involving notes and coins of a total nominal value of less than EUR 5 000 and not involving particularly serious circumstances, Member States may provide for a penalty other than imprisonment.</p> <p>3. Offences referred to in points (a), (b) and (c) of Article 3(1) involving notes and coins of a total nominal value of at least EUR 5 000 shall be punishable by imprisonment with a maximum penalty of at least eight years.</p> <p>4. Offences referred to in points (a), (b) and (c) of Article 3(1) involving notes and coins of a total nominal value of at least EUR 10 000 or involving particularly serious circumstances shall be punishable by</p> <p>(a) a minimum penalty of at least six months of imprisonment;</p> <p>(b) a maximum penalty of at least eight</p>	<p style="text-align: center;">‘Article 5 Penalties</p> <p>[...]</p> <p>2. For offences referred to in points (a), (b) and (c) of Article 3(1) involving notes and coins of a total nominal or potential nominal value of less than EUR 5 000 or the equivalent amount in the currency of the relevant counterfeited notes or coins, and not involving particularly serious circumstances, Member States may provide for a penalty other than imprisonment.</p> <p>3. Offences referred to in points (a), (b) and (c) of Article 3(1) involving notes and coins of a total nominal or potential nominal value of at least EUR 5 000 or the equivalent amount in the currency of the relevant counterfeited notes or coins, shall be punishable by imprisonment with a maximum penalty of at least eight years.</p> <p>4. Offences referred to in points (a), (b) and (c) of Article 3(1) involving notes and coins of a total nominal or potential nominal value of at least EUR 10 000 or the equivalent amount in the currency of the relevant counterfeited notes or coins, or involving particularly serious circumstances shall be punishable by</p> <p>(a) a minimum penalty of at least six</p>

Text proposed by the Commission	Amendments proposed by the ECB ⁶
<p>years of imprisonment.’</p> <p>[No text]</p>	<p>months of imprisonment;</p> <p>(b) a maximum penalty of at least eight years of imprisonment.</p> <p>5. The penalties under paragraph 4 shall also apply to the offences referred to in point (d) of Article 3(1) involving particularly serious circumstances.’</p>
<p><i>Explanation</i></p> <p><i>Article 5(2) to (4) should be amended to allow for the application of a proportionate penalty in relation to unfinished counterfeit notes and coins, which may only have a potential nominal value. The potential nominal value should be considered as a further criterion when applying a proportionate penalty to any offence under Article 3(1)(a) to (c) of the proposed directive.</i></p> <p><i>In addition, as counterfeit notes or coins detected by competent national authorities may be denominated in, or have the appearance of, currencies other than the euro, the competent national authorities of the Member States should be allowed to identify the relevant nominal or potential nominal value of such counterfeit notes or coins. Therefore, Article 5(2) to (4) should be further amended to provide that the minimum and maximum standards for penalties would take into account the relevant nominal or potential nominal value of non-euro counterfeit notes and coins.</i></p> <p><i>Finally, to increase the efficiency and deterrent effects of the penalties, it is suggested including the criminal offences set out in Article 3(1)(d) of the proposed directive involving particularly serious circumstances into the scope of the penalty regime under Article 5(4) by the addition of a new paragraph 5.</i></p>	
<p>Amendment 3</p> <p>Article 10(2)</p>	
<p>‘2. If the necessary samples of suspected counterfeit notes and coins cannot be transmitted because it is necessary to retain them as evidence in criminal proceedings in order to guarantee a fair and effective trial and the right of defence of the suspected perpetrator, the National Analysis Centre and Coin National Analysis Centre shall be given</p>	<p>‘2. If the necessary samples of suspected counterfeit notes and coins cannot be transmitted because it is necessary to retain them as evidence in criminal proceedings in order to guarantee a fair and effective trial and the right of defence of the suspected perpetrator, the National Analysis Centre and Coin National Analysis Centre shall be given</p>

Text proposed by the Commission	Amendments proposed by the ECB ⁶
<p>access to them without delay.’</p>	<p>access to them without delay. Immediately after the proceedings have concluded, the judicial authorities shall transmit these necessary samples of each type of suspected counterfeit note to the National Analysis Centre and each type of suspected counterfeit coin to the Coin National Analysis Centre.’</p>
<p style="text-align: center;"><i>Explanation</i></p> <p><i>The ECB recommends that, where samples of suspected counterfeit notes and coins cannot be transmitted because it is necessary to retain them as evidence, these samples of counterfeit notes and coins should be transmitted to NACs or CNACs without delay after the relevant proceedings are over.</i></p>	