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COVER NOTE

from: Mr Henri Malosse, President of the European Economic and Social Committee
date of receipt: 23 May 2013
to: Mr Uwe CORSEPIUS, Secretary-General of the Council of the European Union

Subject: Opinion of the European Economic and Social Committee on the 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 - 2013/0023 (COD)

Delegations will find attached Opinion of the European Economic and Social Committee on the 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.

Encl.:



European Economic and Social Committee

ECO/346
Protection of the euro
against counterfeiting by
criminal law

Brussels, 23 May 2013

OPINION

of the

European Economic and Social Committee

on the

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 - 2013/0023 (COD)

Rapporteur-general: **Mr de Lamaze**

On 20 February 2013 and 12 March 2013, respectively, the Council and the Parliament decided to consult the European Economic and Social Committee, under Article 304 of the Treaty on the Functioning of the European Union, on the

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 - 2013/0023 (COD).

On 19 March 2013, the Committee Bureau instructed the Section for Economic and Monetary Union and Economic and Social Cohesion to prepare the Committee's work on the subject.

Given the urgent nature of the work, the European Economic and Social Committee appointed Mr de Lamaze as rapporteur-general at its 490th plenary session, held on 22 and 23 May 2013 (meeting of 23 May), and adopted the following opinion by 130 votes to 1 with 3 abstentions.

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1. **Conclusions and recommendations**

- 1.1 The EESC does not agree with the arguments put forward by the Commission to justify this proposal. In the absence of scientific data to back up the assertion that disparities in sanctions for currency counterfeiting encourage "forum shopping" on the part of counterfeiters, the Committee believes that revision of the 2000 framework decision to set a minimum penalty within the EU is not entirely justified, and feels that the expected "deterrent effect" of such a measure is debatable.
- 1.2 The EESC would point out that the proposal for a directive actually establishes a comprehensive arsenal for enforcing legislation against counterfeiting, in the guise of minimum rules; this would appear to go beyond that which is authorised under Article 83(1) of the Treaty on the Functioning of the European Union (TFEU), particularly given that it also relates to jurisdiction and procedure.
- 1.3 The EESC questions the need for such an approach to law enforcement, which, by definition, runs the risk of prejudicing people's fundamental rights and freedoms; it also doubts that it would be effective inasmuch as, even if a minimum penalty were set, sentencing would still be subject to differences of interpretation depending on the legal traditions of Member States and judges' discretion.

- 1.4 In general, the EESC finds it regrettable that the proposal for a directive does not take sufficient account – as required under Article 82(2) TFEU – of the differences between legal traditions and systems, not least in terms of its impact on individual rights and freedoms.
- 1.5 The EESC, as the institutional representative of European civil society, would highlight the fact that offenders may be essentially law-abiding individuals who find themselves in the position of needing to get rid of counterfeit currency that they have unknowingly received. Given the risk of imposing disproportionate sanctions on such people who have turned from victims into unwilling "criminals", the EESC feels that the intent behind the action is a key consideration that the proposal for a directive does not properly highlight in its recitals.
- 1.6 The EESC is concerned that, with regard to procedure, the draft directive does not provide for any graduation in the tools used by the investigating services according to the severity of the offence, as it does in the penalties imposed. The Committee therefore feels that the draft directive needs to specify that the investigative tools used for organised crime should be used only for the most serious offences.

2. **Content of the proposal**

- 2.1 The proposal for a directive strengthens the current framework for criminal prosecution for counterfeiting of the euro or other currencies. It supplements the provisions of the 1929 Geneva Convention – which it requires the Member States to be party to – within the EU, and replaces Council Framework Decision 2000/383/JHA, as amended by Council Framework Decision 2001/888/JHA, to which it adds certain key provisions.
- 2.2 It aims, among other things, to combat the phenomenon of forum shopping, which, according to the impact assessment, criminal gangs use to find the most lenient legislation. To this end, and on the basis of Article 83(1) TFEU, it establishes a common minimum penalty of six months of imprisonment for the production and distribution of counterfeit currency (with a value of at least EUR 10 000). In parallel, the maximum penalty of at least eight years of imprisonment already laid down for production is also extended to distribution (for a value of at least EUR 5 000).
- 2.3 Legal persons may be held liable for offences committed for their benefit, with penalties ranging from exclusion from entitlement to public benefits or aid to a winding-up order.
- 2.4 The proposal is also more severe than the current framework in terms of procedural law. Investigation and prosecution services may make use of investigative tools used in fighting organised crime or other forms of serious crime. The judicial authorities will also be required, in the course of proceedings, to send samples of counterfeit currency for technical analysis to aid the detection of counterfeits in circulation.

2.5 Finally, the proposal requires each Member State whose currency is the euro to exercise universal jurisdiction for offences related to the euro committed outside the European Union, if either the offender is on its territory or counterfeit euros related to the offence are detected there.

3. **General comments**

3.1 While the EESC acknowledges that counterfeiting of the euro, which is becoming increasingly complex and sophisticated, is a worrying phenomenon that needs to be combated effectively, it has serious concerns regarding the substance and even the basic premise of this initiative.

3.2 Given the lack of scientific data in the impact assessment, the EESC is unconvinced by the claim of "forum shopping" that the Commission uses as an argument for drafting this proposal for a directive. In the Committee's view, it is not certain that disparities in levels of sanctions within the EU in any way explain the rise in counterfeiting, or that counterfeiters focus on national legislation regarding criminal enforcement when choosing where to operate. Other physical or logistical factors need to be taken into account to explain the location of illegal print shops.

3.3 Moreover, given the lack of a detailed analysis to substantiate the claim that disparities in enforcement within the EU are detrimental to judicial and law enforcement cooperation and to the effectiveness of efforts to combat counterfeiting in non-EU countries, the EESC even questions the grounds for this proposal for a directive.

3.4 The EESC is also keen to stress that the provisions laid down on the basis of these arguments result in a particularly onerous law enforcement tool. As well as defining all counterfeiting offences and setting minimum penalties – and also maximum penalties for distribution – the proposal for a directive also relates to aspects of jurisdiction and procedure.

3.5 The EESC has particular doubts about the inclusion of these provisions on jurisdiction and procedure, which go further than is claimed in the explanatory memorandum or permitted under Article 83(1) TFEU, i.e. establishing "minimum rules concerning the definition of criminal offences and sanctions". This is especially worrying given that these provisions allowing for exceptional measures are very wide in scope with regard to enforcement, as they result in the establishment of universal jurisdiction – which by definition overrides general solutions – for counterfeiting offences involving the euro, and in the use of investigative tools applicable to organised crime.

3.6 In the EESC's view, it is the latter issue that is the most problematic: the proposal makes no distinction according to the severity of the offences defined in the proposal that would justify the use of investigative tools applicable to organised crime. The Committee feels that such

provisions are liable to constitute a serious breach of the proportionality principle and of fundamental rights¹.

- 3.7 In the interests of avoiding certain abuses, the EESC would, indeed, remind the European legislator of the need to take account of all the Member States and their democratic traditions (whether long established or of more recent vintage) and sensitivity to respect for individual freedoms.
- 3.8 In more general terms, the EESC would point out that the creation of a European criminal law-enforcement area needs to go hand in hand with a strengthening of rights of defence, not least with respect to Eurojust and Europol, in order to satisfy the Treaty requirement that fundamental rights be upheld (Articles 67(1) and 83(3) TFEU).
- 3.9 The EESC, as the institutional representative of European civil society, would highlight the fact that offenders may be essentially law-abiding individuals who find themselves in the position of needing to get rid of counterfeit currency that they have unknowingly received. Given the risk of imposing disproportionate sanctions on such people who have turned from victims into unwilling "criminals", the EESC feels that the intent behind the action is a key consideration that the proposal for a directive does not properly highlight in its recitals.
- 3.10 The EESC acknowledges that the sliding scale of penalties laid down in the proposal depending on the amount of money involved (cf. in particular Article 5(2)) allows for such cases to be taken into account in part. Nonetheless, the fact remains, in its view, that the proposal for a directive runs the risk of seriously jeopardising individual freedoms, as it does not appear to take account of the diversity of legal traditions and systems within the EU or, in particular, of the nature of inquisitorial systems in which the accused may be held by the police for a not insignificant length of time before appearing before a judge, even for minor offences.

4. **Specific comments**

- 4.1 With regard to the establishment of a minimum penalty of six months of imprisonment (Article 5(4) of the proposal), which is the proposal's key measure in response to the claim of "forum shopping", the EESC questions how useful it will be given that a directive – which is, by definition, addressed to the legislator, not to the judge – cannot require this penalty to be imposed in practice. In this connection, the EESC is pleased to note that the explanatory memorandum refers to the principles that sentences must be tailored to individual circumstances – a principle enshrined by the Court of Justice of the European Union – and that the judge has full discretion.

¹

This was also true of the European arrest warrant (in this regard, cf. D Rebut, *Droit pénal international* [International Criminal Law], Dalloz, coll. "Précis", 2012, No 516, p. 311).

- 4.2 The EESC would also add that setting a minimum penalty, even a voluntary one, is contrary to the legal traditions of certain Member States that do not set minimum sentences unless they are mandatory.
- 4.3 The wording of Article 9 of the proposal should be amended as follows: "For the most serious counterfeiting offences referred to in Articles 3 and 4, Member States shall take the necessary measures to ensure that effective investigative tools, such as those which are used in organised crime or other serious crime cases, are available to persons, units or services responsible for investigating or prosecuting offences".

Brussels, 23 May 2013

The President
of the
European Economic and Social Committee

Henri Malosse
