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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

{SWD(2013) 19 final}
{SWD(2013) 20 final}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

1.1. General context

Counterfeiting of the euro and other currencies remains a concern throughout the European Union. It is of fundamental importance to ensure trust and confidence in the authenticity of notes and coins for citizens, companies and financial institutions. 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 due to the importance of the euro. The euro is the single currency shared by the 17 Member States of the euro area and in use for the 330 million people living in this area. It is also used at a large scale in international trading transactions and serves as important reserve currency for third countries. The value of euro notes circulating worldwide, that is to say almost 913 billion euro in January 2013, is roughly the same as that of US dollar bills. Around one quarter of that value circulates outside the euro area, notably in neighboring regions¹. Today the euro is the second most important international currency world-wide.

The euro continues to be a target of organised crime groups active in the forgery of money. Counterfeiting of the euro has led to a financial damage of at least EUR 500 million since the introduction of the euro in 2002. Data from the European Central Bank (ECB) show peaks in the number of counterfeit notes during the period 2009 – 2010 and two other peaks in the second half of 2011² and of 2012³. The ECB notes an increase of 11.6% as regards the quantity recovered in the second half of 2012 compared with the previous months. The Annual Report 2011⁴ of the European Technical and Scientific Centre (ETSC) points to a continuous discovery of new types of counterfeit euro coins and a sharp increase in the number of sophisticated counterfeit coins. Europol considers that there is a long-term trend towards an increase in the crime level and notes that the criminal threat remains serious⁵. Europol's assessment is confirmed by recent large-scale seizures of counterfeit euro notes and coins and the continuous dismantling of illegal print shops and mints each year⁶.

These developments show that the existing measures against counterfeiting have not reached the necessary level of dissuasion and therefore require improving the protection against counterfeiting. In particular, considerable differences exist with respect to the levels of sanctions which are applicable in the Member States to the main forms of counterfeiting, i.e. the production and distribution of counterfeit currency.⁷ Whereas the minimum level of maximum penalty for producing counterfeits was harmonised in the year 2000 at a level of eight years imprisonment, the situation concerning the minimum level of sanctions for

¹ See European Central Bank (ECB), <http://www.ecb.int/press/key/date/2013/html/sp130110.en.html>.

² ECB annual Report 2011.

³ ECB press release of 10 January 2013, http://www.ecb.int/press/pr/date/2013/html/pr130110_2.en.html.

⁴ 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.

⁵ Europol Organised Crime Threat Assessment 2011 (OCTA 2011).

⁶ See, for example, Europol press releases of 13 December 2011, 15 and 29 June 2012, 13 August 2012, 9 December 2012, https://www.europol.europa.eu/latest_press_releases.

⁷ Impact assessment Annex 6, table with sanctions in place in the Member States as of April 2011 of the German Bundesbank.

currency counterfeiting is different. There are no minimum sanctions in place in some of the Member States or legal provisions only provide for fines, whereas the minimum sanction in others is as high as ten years imprisonment. These differences impair cross-border law enforcement and judicial cooperation⁸. Furthermore, data collected in the framework of a study of the European Counterfeiting Experts Group⁹ indicate that a high number of illegal print shops were discovered in the last nine years in those Member States which have no minimum sanctions in place or only have fines for currency counterfeiting as their minimum sanctions which suggests that counterfeiters make use of forum shopping. Finally, the current lack of a minimum and maximum level of sanctions for distribution offences constitutes a dangerous threat with respect to the distribution within the European Union of counterfeit notes produced in third countries, as illustrated by the considerable number of print shops dismantled in third countries (e.g. Colombia and Peru) and the related seizure of large amounts of counterfeit euros and other currencies ready to be exported to or distributed in the European Union. It can therefore be concluded that the current size of differences in the sanction systems of the Member States have a negative impact on the protection of the euro and other currencies against counterfeiting by criminal law measures.

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. Since in practice the minimum standard for the maximum penalty is rarely imposed, a minimum penalty can be considered as more dissuasive and of great practical value for the protection of the euro. For those who are tempted to counterfeit the euro, it will be the knowledge of the possible sanctions which will deter them; the difference of being sentenced to imprisonment for a certain minimum duration instead of a fine, for example, is obvious. Thus, the minimum sanctions contribute to a consistent EU wide system for the protection of the euro.

The euro is the single currency of the economic and monetary union established by the European Union. It is thus a truly European common "good" that should be protected in a consistent manner across the European Union, in particular by setting a minimum level of penalties for serious cases of production and distribution offences.

The European Union and the Member States should provide for comprehensive protection of the euro and combat offences against the euro on a common basis. Following the International Convention for the Suppression of Counterfeiting Currency ('Geneva Convention')¹⁰ and its principle of non-discrimination of other currencies foreseen in Article 5, all currencies will profit from this increased protection of the euro.

1.2. Legal context

1.2.1. Criminal law

The Geneva Convention lays down rules to ensure that severe criminal penalties and other sanctions can be imposed for counterfeiting offences. It also contains rules on jurisdiction and cooperation. Following the ratification of the Geneva Convention agreed on 20 April 1929, a

⁸ See section 3.2.1.3 of the Impact assessment and its Annex 3.

⁹ The study focused on the following 15 Member States: Bulgaria, Denmark, Germany, Greece, Finland, France, Hungary, Italy, Latvia, Poland, Portugal, Romania, Spain, Sweden and The Netherlands.

¹⁰ No 2623, p. 372. League of Nations Treaty Series 1931. The Convention has been ratified by 26 Member States. Malta has not (yet) ratified.

certain degree of approximation of national legislation against counterfeiting of currency has since taken place.

Council Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro¹¹ aims at supplementing, on the territory of European Union, the provisions of the Geneva Convention of 1929. It identifies practices which are to be regarded as punishable in addition to the actual act of counterfeiting, such as distribution. For these offences, the Framework Decision requires effective, proportionate and dissuasive penalties. In addition, it contains provisions on jurisdiction and on the liability of legal persons. The Framework Decision was amended by Council Framework Decision 2001/888/JHA of 6 December 2001¹², which introduced a provision on mutual recognition of convictions for the purpose of recognizing "repeat offences".

Member States were obliged to transpose Council Framework Decision 2000/383/JHA by 29 May 2001 and Council Framework Decision 2001/888/JHA by 31 December 2002. The Commission has assessed their implementation in three reports¹³. Despite the development of an EU acquis in this area, certain shortcomings have become visible. Although all Member States have, with minor exceptions, formally implemented the Framework Decision correctly, Member States have adopted diverging rules and consequently often diverging levels of protection and practices within their national legal systems.

1.2.2. Further Union provisions in this area

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

- Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro¹⁴. It obliges the Member States of the euro area 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 counterfeiting¹⁵, updated through Council Regulation 44/2009 of 18 December 2008¹⁶. 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. Council Regulation (EC) No 1339/2001 of 28 June 2001¹⁷ extended the effects of Regulation (EC) No 1338/2001 to those Member States which have not adopted the euro as their single currency;

¹¹ OJ L 140 of 14 June 2000, p. 1.

¹² OJ L 329 of 14 December 2001, p. 3.

¹³ 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.

¹⁴ OJ L 139, 11.5.1998, p.1.

¹⁵ OJ L 181, 4.7.2001, p.6.

¹⁶ OJ L 17, 22.1.2009, p.1.

¹⁷ OJ L 181, 4.7.2001, p.11.

- Decision of the European Central Bank of 16 September 2010 on the authenticity and fitness checking and recirculation of euro notes (ECB/2010/14)¹⁸;
- 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 circulation¹⁹;
- Council Regulation (EC) No 2182/2004 of 6 December 2004 concerning medals and tokens similar to euro coins²⁰, amended by Council regulation (EC) No 46/2009 of 18 December 2008²¹;
- Council Decision 2005/511/JHA of 12 July 2005 on protecting the euro against counterfeiting, by designating Europol as the Central Office for combating euro counterfeiting²²;
- Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime²³ by stimulating and improving coordination and cooperation between competent judicial authorities of the Member States also in the field of counterfeiting of the euro;
- 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 2001²⁴.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

2.1. Consultations with interested parties

The Commission has consulted specialist stakeholders on a number of occasions.

The consultation of the stakeholders started at the 58th Euro Counterfeiting Expert Group²⁵ (ECEG) meeting on 10 November 2011 and continued during subsequent ECEG meetings. Experts and specialists²⁶ were further consulted at The Hague Conference which took place from 23 to 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

¹⁸ OJ L 267, 9.10.2010, p.1.

¹⁹ OJ L 339, 22.12.2010, p.1.

²⁰ OJ L 373, 21.12.2004, p.1.

²¹ OJ L 17, 22.1.2009, p.5.

²² OJ L 185, 17.7.2005, p. 35.

²³ OJ L 63, 6.3.2002, p.1.

²⁴ OJ L 339, 21.12.2001, p.50. 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.

²⁵ The ECEG is provided for in Regulation (EC) 1338/2001 and is composed of experts from Member States, ECB, Europol and OLAF/ETSC.

²⁶ Representatives from law enforcement agencies, judicial authorities, central banks and mints.

discussed at the 59th ECEG meeting on 14 March and the 60th meeting on 13 June 2012. The ECB as well as Europol participated in this process and provided their input, also through direct contributions to the Commission.

From the consultation it can be concluded that stakeholders consider it necessary to provide added value to the practitioners for the protection of the euro and other currencies by criminal law measures. Two concrete proposals were received in relation to the improvement of procedural criminal law: a proposal to align the investigative techniques such as controlled delivery, under-cover agents; and a proposal to introduce provisions obliging judicial authorities to transmit samples of seized counterfeit currency for technical analysis for the purpose of detecting further counterfeits in circulation.

The ECB expressed strong support for reinforcing the criminal law framework, in particular by strengthening and harmonising the penalties, including by setting standards for minimum penalties.

2.2. Impact Assessment

The Commission conducted an impact assessment of policy alternatives, taking into account the consultations of the interested parties. After considering the possible options, the impact assessment concludes that the following solution would be preferred:

- maintenance of most of the provisions from Council Framework Decision 2000/383/JHA in a new proposal, with minor modifications, taking into account the Treaty of Lisbon;
- modification of the provisions on penalties by introducing a minimum penalty of six months for production and distribution of counterfeit currency and by introducing a maximum penalty of at least eight years for distribution;
- introduction of a new provision obliging Member States to provide for the possibility to use certain investigative tools;
- introduction of a new provision obliging Member States to ensure that the National Analysis Centres and the National Coin Analysis Centres can analyse euro counterfeits also during on-going judicial proceedings for the purpose of detecting further counterfeits.

3. LEGAL ELEMENTS OF THE PROPOSAL

3.1. The legal basis

The EU's competence to establish "minimum rules concerning the definition of criminal offences and sanctions 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" is set out in Article 83 (1) of the Treaty on the Functioning of the European Union (TFEU).

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

3.2. Subsidiarity, proportionality and the respect for fundamental rights

It is considered that there is a need for EU action based on the following factors:

Counterfeiting of the euro poses a genuine problem for the Union and for its citizens, businesses and financial institutions. The fact that the euro is the single currency of the euro

area implies that the offence of euro counterfeiting must necessarily be considered to cause the same harm everywhere in the euro area irrespective of where it is committed. This pan-European dimension requires that counterfeiting is fought in a similar manner and that criminals encounter equivalent penalties, wherever in the European Union the crime is committed.

This particular position of the euro, which is the single currency of the economic and monetary union established by the European Union and therefore a truly European "good", requires that its protection must be ensured at EU level. As such, it is even more "EU-centred" than a field subject to harmonisation of rules in the Member States.

Only the EU is in a position to develop binding 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.

According to Article 5 of the Geneva Convention, no distinction shall be made in the scale of punishment between acts relating to domestic currency on the one hand and to foreign currency on the other. Therefore, the increased protection of the euro should be extended to all currencies.

The proposed penalties are proportionate to the seriousness of the offences and the considerable impact of counterfeiting of the euro and other currencies on citizens and businesses. They are in line with the penalties currently provided for in the law of a majority of Member States. Since many Member States already provide for the concept of minimum penalties, it is appropriate and consistent that the concept of minimum penalties be used at Union level. In order to guarantee that the severity of penalties is not disproportionate to the criminal offence, a specific safeguard for cases of lower amounts of counterfeits is being proposed, i.e. one threshold below which a lower penalty of imprisonment can be imposed and another one below which also a fine can be imposed, unless the case features particularly serious circumstances. This could for instance be the case where the counterfeit money is discovered in circumstances that clearly suggest that higher amounts have been or were to be produced. The chosen thresholds need to be high enough to take account of minor cases, but at the same time low enough to guarantee a deterrent effect of the sanction and to take account of the importance of genuineness of banknotes and coins and the trust citizens have in them.

This Directive requires Member States to provide for, in their national law, the scale of penalties foreseen in Article 5, not going below the requested minimum levels. However, the general rules and principles of national criminal law on the application and execution of sentences in accordance with the concrete circumstances remain applicable. This includes general rules on the application of sentences to juveniles, in cases of attempt, of only supporting participation or where the perpetrator contributes to the discovery or to the prevention of serious offences. Concerning the execution of sentences, general principles as e.g. on suspended imprisonment, on alternatives to imprisonment (electronic surveillance) or on early release would continue to apply. In the individual cases, the courts will exercise their discretion taking into account all aggravating and mitigating circumstances within the applicable legal framework.

Any of the proposed criminal law measure was carefully assessed and designed in view of its possible effects on the protection of fundamental rights.

The proposal is relevant to the following rights and principles of the EU Charter of Fundamental Rights (hereafter the Charter): the rights to liberty and family life (by possible imprisonment of convicted perpetrators), the freedom to choose an occupation and to conduct a business (by possible disqualifications of convicted perpetrators), the right to property (by

possible shutting down of businesses having committed offences), the principle of legality and proportionality of criminal offences and penalties (because definitions for offences and the scale of penalties are set out), the right not to be tried twice (because of the possible interplay with administrative punitive sanctions). These interferences are justified because they serve to meet objectives of general interest recognised by the Union (see paragraph 1 of Article 52 of the Charter), and in particular to provide effective and deterring measures for the protection of the euro and other currencies. It has been carefully insured that the measures do not go beyond what is necessary to achieve this objective and are thus proportionate. In particular explicit safeguards in the instrument itself have been laid down, specifying the right to an effective remedy and to a fair trial, including the rights of the defence, ensuring an equivalent level of effective judicial protection by national courts. The requested penalties are proportionate in relation to the offences committed.

3.3. Choice of instruments

In order to set out criminal law provisions on the basis of paragraph 1 of Article 83 TFEU, a directive is the correct instrument.

3.4. Specific provisions

Article 1: Subject matter – this provision gives a description of the scope and purpose of the proposal.

Article 2: Definitions – this provision sets out definitions which apply throughout the instrument.

Article 3: Offences – this provision defines the main offences to be criminalised by Member States and clarifies that certain circumstances of the perpetration of the offence fall under the scope.

Article 4: Incitement, Aiding and Abetting, Attempt – this provision is applicable to all offences mentioned above and requires Member States to criminalise all forms of preparation and participation. Criminal responsibility for attempt is included for the majority of offences.

Article 5: Penalties – this provision is applicable to all offences mentioned above in Article 3 and 4. It requires Member States to apply effective, proportionate and dissuasive penalties in line with jurisprudence of the Court of Justice. For more serious cases of the offences of production and distribution of counterfeit currency, it sets out a sanction of imprisonment within a range of at least six months and eight years for natural persons. The upper minimum ceiling of eight years is already provided for in the Framework Decision 2000/383/JHA for the offence of production.

Articles 6 and 7: Liability of and sanction types for legal persons – these provisions are applicable to all offences mentioned in Article 3 and 4. They require Member States to ensure liability of legal persons, while excluding that such liability is alternative to that of natural persons, and to apply effective, proportionate and dissuasive sanctions on legal persons, and they outline the possible sanctions.

Article 8: Jurisdiction – this provision is based on the principles of territoriality and personality. It is applicable to all offences mentioned in Articles 3 and 4. It requires jurisdiction of the judicial authorities which allow them to initiate investigations, pursue prosecutions and bring to judgment cases relating to currency counterfeiting. It obliges Member States whose currency is the euro to exercise universal jurisdiction on euro

counterfeiting offences under certain conditions. In case of parallel proceedings, Council Framework Decision 2009/948/JHA²⁷ of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings promotes closer cooperation between the competent authorities. Following Council Decision 2002/187/JHA of 28 February 2002, the national member of Eurojust has to be informed of any case where conflicts of jurisdiction have arisen or are likely to arise. In addition, Article 8 of this Directive requests that Member States concentrate criminal proceedings in one Member State unless not appropriate.

Article 9: Investigative tools – the provision aims at ensuring that investigative tools which are provided for in national law for organised crime or other serious crime cases can also be used in cases of counterfeiting of currency.

Article 10: Obligation to transmit counterfeit euro notes and coins for analysis and detection of counterfeits – the provision requires from Member States to ensure that the National Analysis Centres and the National Coin Analysis Centres can analyse euro counterfeits also during on-going judicial proceedings for the purpose of detecting further counterfeits.

Article 11: Relation to the Geneva Convention – the provision requests that Member States are contracting parties of the International Geneva Convention of 20 April 1929.

Article 12: Replacement of Council Framework Decision 2000/383/JHA – this provision replaces the current provisions in the area of counterfeiting of currency in relation to Member States participating in this Directive.

Article 13: Transposition – the provision requires that the Member States transpose the Directive within 18 months after its entry into force. Member States have to communicate to the Commission the text of these provisions as well as future provisions in the field covered by this Directive. Member States are not required to transmit explanatory documents, because the Directive contains a limited number of legal obligations and concerns a delimited domain at national level.

Articles 14, 15 and 16 – contain further provisions on reporting by the Commission and review; entry into force and addressees.

4. BUDGETARY IMPLICATION

This proposal has no budgetary implications for the budget of the European Union.

²⁷ OJ L 328, 15.12.2009, p. 42.

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

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty on the Functioning of the European Union, and in particular Article 83(1) thereof,

Having regard to the proposal from the European Commission,

After having consulted the European Central Bank,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee²⁸,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) As the single currency shared by the Member States of the euro area, the euro has become an important factor in the Union's economy and the every-day-life of its citizens. It is in the interest of the Union as a whole to oppose and pursue any activity that is likely to jeopardise the authenticity of the euro by counterfeiting.
- (2) Counterfeit money has a considerable ill-effect on society. It harms citizens and businesses that are not reimbursed for counterfeits even if received in good faith. It is of fundamental importance to ensure trust and confidence in the authenticity of notes and coins for citizens, companies and financial institutions.
- (3) 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.
- (4) Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro²⁹ obliges the Member States whose currency is the euro to ensure adequate sanctions against counterfeiting and falsification of euro notes and coins.
- (5) Council Regulations (EC) No 1338/2001³⁰ and No 1339/2001³¹ of 28 June 2001 lay down measures necessary for the protection of the euro against counterfeiting, in particular measures to withdraw counterfeit euros from circulation.

²⁸ OJ C [] p.[] .

²⁹ OJ L 139, 11.5.1998, p.1.

³⁰ OJ L 181, 4.7.2001, p.6.

³¹ OJ L 181, 4.7.2001, p. 11.

- (6) The International Convention for the Suppression of Counterfeiting Currency signed at Geneva on 20 April 1929 and its Protocol ('Geneva Convention')³² lays down rules to effectively prevent, prosecute and punish the offence of counterfeiting currency. In particular, it aims at ensuring that severe criminal penalties and other sanctions can be imposed for offences of counterfeiting currency. All contracting parties of the Geneva Convention have to apply the principle of non-discrimination to currencies other than their domestic currency.
- (7) The purpose of this Directive is to supplement the provisions and to facilitate the application of the Geneva Convention by the Member States.
- (8) This Directive builds on and updates Council Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro³³. This Directive complements the Framework Decision with further provisions on the level of penalties, on investigative tools and on the analysis, identification and detection of counterfeits during judicial proceedings. The Framework Decision should be replaced by this Directive in relation to those Member States participating in the adoption of this Directive.
- (9) The Directive should protect any banknote and coin whose circulation is legally authorised, irrespective of whether it is made of paper, metal or any other material.
- (10) The protection of the euro and other currencies calls for a common definition of the offences related to the currency counterfeiting as well as for common sanction types both for natural and legal persons. In order to ensure coherence with the Geneva Convention, this Directive should provide for the same offences to be punishable as in the Convention. Therefore, the production of counterfeit notes and coins and their distribution should be a criminal offence. Important preparatory work to those offences, for example the production of counterfeiting instruments and components, should be punished independently. The common aim of those definitions of offences should be to act as a deterrent from any handling with counterfeit notes and coins, instruments and tools for counterfeiting.
- (11) The misuse of legal facilities or material of authorised printers or mints for the production of unauthorised notes and coins for fraudulent use should also be regarded as counterfeiting. This covers situations where a national central bank or mint or other authorised industry produces notes or coins exceeding the quota authorised by the European Central Bank. It also covers situations where an employee of a legal printer or mint abuses the facilities for his or her own purposes. That conduct should be punishable as a counterfeiting offence even if the authorised quantities have not been exceeded, because the produced counterfeits would, once circulated, not be distinguishable from authorised notes and coins.
- (12) Notes and coins which the European Central Bank or the national central banks and mints have not yet formally issued should also fall under the protection of this Directive. Thus, for instance, euro coins with new national sides or new series of euro notes should be protected before they have officially been put into circulation.
- (13) Incitement, aiding and abetting and attempt to commit the main counterfeiting offences, including misuse of legal facilities or material and including counterfeiting

³² No 2623, p. 372 League of Nations – Treaty Series 1931.

³³ OJ L 140, 14.6.2000, p. 1.

of notes and coins not yet issued but designated for circulation, should also be penalised where appropriate. This Directive does not require Member States to render attempt to commit an offence related to an instrument or component for counterfeiting punishable.

- (14) The sanctions for counterfeiting offences should be effective, proportionate and dissuasive throughout the Union.
- (15) Currency counterfeiting is traditionally a crime subject to a high level of sanctions in the Member States. This is due to the serious nature and the impact of the crime on citizens and businesses and due to the need to ensure the trust of Union citizens in the genuine character of the euro and other currencies. This holds particularly true for the euro, which is the single currency of 330 million people in the euro area and which is the second most important international currency.
- (16) Therefore, Member States should provide for certain minimum types and levels of sanctions. The concept of minimum penalties is currently provided for in a majority of Member States. It is consistent and appropriate to adopt this approach at Union level.
- (17) The levels of the sanctions should be effective and dissuasive but should not go beyond what is proportionate to the offences. The penalty for natural persons in serious cases, that is to say, for the main offences of production and distribution of counterfeit currency involving a large amount of counterfeit notes and coins or involving particularly serious circumstances, should therefore be a minimum penalty of at least six months and a maximum penalty of at least eight years of imprisonment.
- (18) The minimum penalty of six months helps to ensure that equal priority is given by law-enforcement and judicial authorities to the offences of counterfeiting of the euro and other currencies and, in turn, facilitates cross-border cooperation. It contributes to mitigating the risk of forum-shopping. Moreover, it allows that sentenced perpetrators can be surrendered with the help of a European Arrest Warrant so that the custodial sentence or detention order can be executed.
- (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.
- (20) This Directive is without prejudice to the general rules and principles of national criminal law on the application and execution of sentences in accordance with the concrete circumstances in each individual case.
- (21) Since confidence in the genuine character of notes and coins can also be harmed or threatened by the conduct of legal persons, legal persons should be liable for the criminal offences committed on their behalf.
- (22) To ensure the success of investigations and prosecution of currency counterfeiting offences, those responsible for investigating and prosecuting such offences should have access to the investigative tools used in combating organised crime or other serious crime. Such tools include, for example, the interception of communications, covert surveillance including electronic surveillance, the monitoring of bank accounts and other financial investigations, taking into account, inter alia, the principle of proportionality and the nature and seriousness of the offences under investigation.

- (23) Member States should establish their jurisdiction in coherence with the Geneva Convention and the provisions on jurisdiction in other Union criminal law legislation, that is to say, for offences committed on their territory and for offences committed by their nationals. The pre-eminent role of the euro for the economy and society of the European Union as well as the specific threat to the euro as a currency of world-wide importance calls for an additional measure to protect it. Therefore, each Member State whose currency is the euro should exercise universal jurisdiction, for offences related to the euro committed outside the European Union, if either the offender is in its territory or counterfeit euros related to the offence are detected in that Member State. When exercising universal jurisdiction, Member States should respect the principle of proportionality, in particular with regard to convictions by a third country for the same conduct.
- (24) Counterfeiting often concerns several Member States in parallel, with for instance production taking part in one Member State and distribution in one or more others. In line with the mechanisms set up in Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings³⁴, Member States should concentrate the criminal proceedings including the prosecution in one Member State in such cross-border cases unless not appropriate. This is in particular the situation where this concentration can streamline the investigation such as the seizure of evidence or where it allows the court to take into account the whole scale of the offence in one conviction. Following Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime³⁵, the national member of Eurojust has to be informed of any case where conflicts of jurisdiction have arisen or are likely to arise.
- (25) For the euro, the identification of counterfeit notes and coins is centralised at the National Analysis Centres and, respectively, the Coin National Analysis Centres which are designated or established in accordance with Regulation (EC) No 1338/2001. The analysis, identification and detection of counterfeit euro notes and coins should also be possible during on-going judicial proceedings in order to avoid and stop such types of counterfeits from further circulating, with due respect for the principle of a fair and effective trial. In general, the judicial authorities should authorise the physical transmission of the counterfeits to the National Analysis Centres and Coin National Analysis Centres. In certain circumstances, for example where only a few counterfeit notes or coins constitute the evidence for the criminal proceedings or where physical transmission would result in the risk of destruction of evidence such as fingerprints, the judicial authorities should instead be able to decide to give access to the notes and coins.
- (26) This Directive respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union and notably the right to liberty and security, the respect for private and family life, the freedom to choose an occupation and right to engage in work, the freedom to conduct a business, the right to property, the right to an effective remedy and to a fair trial, the presumption of innocence and the right to defence, the principles of the legality and proportionality of criminal offences and penalties, as well as the prohibition of being tried or punished twice in criminal proceedings for the same criminal offence. This

³⁴ OJ L 328, 15.12.2009, p. 42–47.

³⁵ OJ L 63, 6.3.2002, p. 1.

Directive seeks to ensure full respect for those rights and principles and must be implemented accordingly.

- (27) Since the objective of this Directive cannot be sufficiently achieved by the Member States alone and can therefore, by reasons of the scale and effects, better achieved at Union level, the Union may adopt the measures laid down in this Directive, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve the objective.
- (28) [In accordance with Article 3 of the Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on the European Union and to the Treaty on the Functioning of the European Union, the United Kingdom and Ireland have notified their wish to take part in the adoption and application of this Directive.

AND/OR

- (29) In accordance with Articles 1 and 2 of the Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on the European Union and to the Treaty on the Functioning of the European Union, and without prejudice to Article 4 of that Protocol, the United Kingdom and Ireland are not taking part in the adoption and application of this Directive and are not bound by it or subject to its application.]
- (30) In accordance with Articles 1 and 2 of the Protocol (No 22) on the position of Denmark annexed to the Treaty on the European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Subject matter

This Directive establishes minimum rules concerning the definition of criminal offences and sanctions in the area of counterfeiting of the euro and other currencies. It also introduces common provisions to strengthen the fight against those offences and to improve their investigation.

Article 2

Definitions

For the purposes of this Directive the following definitions shall apply:

- (a) 'currency' means notes and coins, the circulation of which is legally authorised, including euro notes and euro coins, the circulation of which is legally authorised pursuant to Regulation (EC) No 974/98;
- (b) 'legal person' means any entity having legal personality under the applicable law, except for States or public bodies in the exercise of State authority and for public international organisations;
- (c) 'Geneva Convention' means the International Convention for the Suppression of Counterfeiting Currency signed at Geneva on 20 April 1929 and its Protocol.

Article 3

Offences

1. Member States shall take the necessary measures to ensure that the following conduct is punishable as a criminal offence, when committed intentionally:
 - (a) any fraudulent making or altering of currency, whatever means are employed;
 - (b) the fraudulent uttering of counterfeit currency;
 - (c) the import, export, transport, receiving or obtaining of counterfeit currency with a view to uttering the same and with knowledge that it is counterfeit;
 - (d) the fraudulent making, receiving, obtaining or possession of
 - (i) instruments, articles, computer programs and any other means peculiarly adapted for the counterfeiting or altering of currency; or
 - (ii) holograms or other components of currency which serve to protect against counterfeiting.
2. The conduct referred to in paragraph 1 includes a conduct with respect to notes or coins being manufactured or having been manufactured by use of legal facilities or materials in violation of the rights or the conditions under which competent authorities may issue notes or coins.
3. The conduct referred to in paragraph 1 includes conduct in relation to notes and coins which are not yet issued, but are designed for circulation and are of a currency which is legal tender.

Article 4

Incitement, aiding and abetting, and attempt

1. Member States shall take the necessary measures to ensure that inciting or aiding and abetting an offence referred to in Article 3 is punishable as a criminal offence.
2. Member States shall take the necessary measures to ensure that an attempt to commit an offence referred to in points (a), (b) or (c) of Article 3 (1) is punishable as a criminal offence.

Article 5

Penalties

1. Member States shall take the necessary measures to ensure that the conduct referred to in Articles 3 and 4 is punishable by effective, proportionate and dissuasive criminal penalties, including fines and imprisonment.
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.
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.

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
 - (a) a minimum penalty of at least six months of imprisonment;
 - (b) a maximum penalty of at least eight years of imprisonment.

Article 6

Liability of legal persons

1. Member States shall take the necessary measures to ensure that legal persons can be held liable for the offences referred to in Articles 3 and 4 committed for their benefit by any person acting either individually or as part of an organ of the legal person who has a leading position within the legal person based on
 - (a) a power of representation of the legal person; or
 - (b) an authority to take decisions on behalf of the legal person; or
 - (c) an authority to exercise control within the legal person.
2. Member States shall ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of an offence referred to in Articles 3 and 4 for the benefit of that legal person by a person under its authority.
3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in the offences referred to in Articles 3 and 4.

Article 7

Sanction types for legal persons

Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 6 is subject to effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such as

- (a) exclusion from entitlement to public benefits or aid;
- (b) temporary or permanent disqualification from the practice of commercial activities;
- (c) placing under judicial supervision;
- (d) judicial winding-up order;
- (e) temporary or permanent closure of establishments which have been used for committing the offence.

Article 8

Jurisdiction

1. Each Member State shall take the necessary measures to establish its jurisdiction over the offences referred to in Articles 3 and 4, where
 - (a) the offence is committed in whole or in part within its territory; or
 - (b) the offender is one of its nationals.

2. Each Member State whose currency is the euro shall take the necessary measures to establish its jurisdiction over the offences referred to in Articles 3 and 4 committed outside the European Union, at least where they relate to the euro and where
 - (a) the offender is in the territory of the Member State; or
 - (b) counterfeit euro notes or coins related to the offence have been detected in the Member State.

For the purpose of prosecution of any of the offences, each Member State shall take the necessary measures to ensure that its jurisdiction is not subordinated to the condition that the acts are a criminal offence at the place where they were committed.

3. Member States shall concentrate the criminal proceedings in one Member State, unless not appropriate.

Article 9

Investigative tools

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 referred to in Articles 3 to 4.

Article 10

Obligation to transmit counterfeit euro notes and coins for analysis and detection of counterfeits

1. Member States shall ensure that judicial authorities permit the examination of suspected counterfeit euro notes and coins for analysis, identification and detection of further counterfeits. For this purpose, the judicial authorities shall transmit the 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 without delay.
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 access to them without delay.

Article 11

Relation to the Geneva Convention

The Member States shall accede or remain parties to the Geneva Convention.

Article 12

Replacement of Council Framework Decision 2000/383/JHA

Council Framework Decision 2000/383/JHA is hereby replaced in relation to Member States participating in the adoption of this Directive without prejudice to the obligations of those Member States relating to the time limit for transposition of the Framework Decision into national law.

In relation to Member States participating in the adoption of this Directive, references to Council Framework Decision 2000/383/JHA shall be construed also as references to this Directive.

Article 13

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [18 months after the entry into force of this Directive] at the latest. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 14

Reporting by the Commission and review

The Commission shall, by [5 years after its entry into force], submit a report on the application of this Directive to the European Parliament and the Council. The report shall assess the extent to which the Member States have taken the necessary measures to comply with this Directive. The report shall be accompanied, if necessary, by a legislative proposal.

Article 15

Entry into force

This Directive shall enter into force on the [twentieth] day following its publication in the *Official Journal of the European Union*.

Article 16

Addressees

This Directive is addressed to the Member States in accordance with the Treaties.

Done at Strasbourg,

For the European Parliament
The President

For the Council
The President