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**NOTE**

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From: Presidency

To: Working Party on Substantive Criminal Law (DROIPEN) - Proposal for a Directive on combating fraud and counterfeiting of non-cash means of payment

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Subject: Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA - Presidency document

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Delegations will find in annex a new provisional version of the text of the Directive, which will be examined at the DROIPEN meeting of 19 December 2017. The new version includes a number of modifications, which are indicated in **bold underlined** or **~~bold strikethrough~~** in relation to the text set out in document 14868/17.

The attention of delegations is brought to the fact that the footnotes indicating reservations have been reduced to a minimum in this document; namely to reservations that have been explicitly confirmed by delegations. Delegations are therefore requested to indicate if they wish to be added to any such footnote at the upcoming DROIPEN meeting. The Estonian Presidency plans to issue a consolidated version of the draft text before the end of the year.

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA**

**TITLE I: SUBJECT MATTER AND DEFINITIONS**

*Article 1*

*Subject matter*

This Directive establishes minimum rules concerning the definition of criminal offences and sanctions in the area of fraud and counterfeiting of non-cash means of payment.

*Article 2*

*Definitions<sup>1</sup>*

For the purpose of this Directive, the following definitions shall apply:

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<sup>1</sup> Some delegations have suggested that some of these definitions, in particular the one in point (a), may need to be reformulated, in particular to render them more clear. It has also been noted that ~~the definitions in points (a), (b), (c) and (d) need to be carefully assessed, and that~~ the definitions in general should mirror the language of definitions in other Directives. ~~Some consider that this should be done by cross-references.~~ On the other hand, a number of delegations have suggested that autonomous criminal law definitions should be introduced in the Directive instead of the references to other Directives.

- (a) ‘means of payment’<sup>2</sup> means a **non-corporeal digital** or corporeal protected device, object or record, other than legal tender, which, alone or in conjunction with a procedure or a set of procedures, enables, by its specific nature, the holder or user to transfer money or monetary value, including by means of digital mediums of exchange<sup>3</sup>;
- (b) ‘protected device, object or record’ means a device, object or record safeguarded against imitation or fraudulent use, for example through design, coding or signature<sup>4</sup>;
- (c) ‘digital medium of exchange’<sup>5</sup> means any electronic money as defined in point (2) of Article 2 of Directive 2009/110/EC of the European Parliament and of the Council<sup>6</sup>, and virtual currencies;

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<sup>2</sup> The Presidency has tentatively replaced the notion of 'payment instrument' with 'means of payment' throughout the text. The purpose is to ensure that there is not any risk for confusion with the definition of 'payment instrument' given in Directive 2015/2366 on payment services in the internal market. **In particular NL has objected to this new notion, and has suggested that the terms "medium of exchange" should be used instead. The Presidency considers that the choice of correct notion will have to be considered further; one option could be to use the terms "non-cash payment instrument" or "non-cash means of payment".**

<sup>3</sup> The Commission, **supported by CY and MT,** has insisted on the deletion of the words '*by its specific nature*' and, **supported by FR, on** the reintroduction of the words '*or to initiate a payment order*' after 'monetary value'. **CZ and** other delegations have insisted on the importance to ensure coherence and clarification in relation to the terminology used in Directive 2015/2366.

<sup>4</sup> ~~**One delegation has suggested that point (b) should be deleted.**~~

<sup>5</sup> ~~**One delegations**~~**DE** has questioned **the need for** this definition.

<sup>6</sup> Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC (OJ L 267, 10.10.2009, p. 7).

(d) ‘virtual currencies’<sup>7</sup> means a digital representation of value that is neither issued or guaranteed by a central bank or a public authority, is not nor necessarily attached to a legally established fiat-currency, but is accepted by natural or legal persons, as a means of exchange, payment and which can be transferred, stored or traded electronically;

[...]

(e) ‘information system’ means information system as defined in point (a) of Article 2 of Directive 2013/40/EU<sup>8</sup>;

(f) ‘computer data’ computer data as defined in point (b) of Article 2 of Directive 2013/40/EU.

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<sup>7</sup> **CZ, FI and a few other** delegations have argued that the term 'virtual currency' is already covered by the term 'monetary value'. In this vein, the notion of virtual currency should, according to some, not be included in Article 5. It has also been argued that virtual currency has been defined in case-law as well as in an EBA opinion. **SE and SI have argued that the scope of the definition needs to be reduced, for example by the introduction of a 'generally available' criterion. A few delegations have suggested that ECB should be consulted.**

**In the current document, the Presidency has modified the definition to be in line with the definition used in the current draft of the proposal for a fourth anti-money laundering Directive (the text is currently under negotiations with EP). If this definition - which is based on suggestions made by ECB in the frame of the 4th money laundering Directive - is maintained in the current Directive, the explanations given in the draft recitals to the anti-money laundering Directive should also be 'imported' to this Directive.**

<sup>8</sup> **CZ** ~~One~~ delegations has questioned this definition as being too extensive.

## TITLE II: OFFENCES<sup>9</sup>

### Article 3

#### *Fraudulent use of means of payment*

Member States shall take the necessary measures to ensure that, when committed intentionally, the following are punishable as a criminal offence:

- (a) fraudulent use of a stolen or otherwise unlawfully appropriated [OR **unlawfully obtained**] means of payment;
- (b) fraudulent use of a counterfeited or falsified means of payment.

### Article 4

#### *Offences related to the fraudulent use of means of payment<sup>10</sup>*

Member States shall take the necessary measures to ensure that, when committed intentionally, the following conduct is punishable as a criminal offence:

- (a) theft or other unlawful appropriation [OR **unlawful obtention**] of a corporeal means of payment<sup>11</sup>;
- (b) unlawful obtention of a **non-corporeal digital** means of payment, **especially such as** where the access to it has involved the infringement of a security measure<sup>12</sup>.

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<sup>9</sup> ~~One delegation has suggested that minor or less serious cases of offences should be excluded from the scope of the Directive, in line with comparable Union criminal law instruments.~~

<sup>10</sup> A number of delegations have questioned how a concept of 'attempt to prepare', which would follow from a reading of this provision in conjunction with Article 7, should be construed and applied. The question of a possible overlap between Articles 4 and 6 has also been raised.

<sup>11</sup> ~~One delegation has suggested that point (a) should be deleted, or that a new provision based on Article 7 in the Budapest Convention could replace this provision. A few delegations have suggested that a criterion "where committed by infringing a security measure" should be added to this provision. A few delegations have suggested that the words 'for it to be used fraudulently' could be deleted, whereas other have suggested that an enrichment criterion could be added instead.~~

<sup>12</sup> The concept of 'infringement of a security measure' should be explained in a recital. **DE wishes to replace "such as" with "at least".**

- (c) counterfeiting or falsification of a means of payment ~~in order for it to be used fraudulently~~<sup>13</sup>.

*Article 4a*

*Offences related to unlawful appropriation [OR **unlawful obtention**] and counterfeiting of means of payment*

1. Member States shall take the necessary measures to ensure that, when committed intentionally, the following conduct is punishable as a criminal offence: possession, procurement for oneself or another, including import, export, sale, **transport** and distribution, or making available of a means of payment, if it has been stolen or otherwise unlawfully appropriated [OR **unlawfully obtained**], or counterfeited or falsified.<sup>14</sup>
2. Member States may require ~~a dishonest intent, including~~ an intent to **defraud, or similar dishonest intent, make an unlawful gain for the perpetrator or a third party, or an intent to defraud**, before imposing criminal liability.
3. ~~When an offence under Article 4 has been committed in conjunction with the conduct referred to in Article 4a, a Member State may provide that such conduct is regarded as an aggravating circumstance~~<sup>15</sup>.

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<sup>13</sup> DE, FI and MT have insisted on the maintaining of the words "in order for ... used fraudulently".

<sup>14</sup> DE and some other delegations oppose the inclusion of the words 'possession' and 'transport' in this provision. In addition, DE wishes to see the words 'by another' reintroduced in point (a). ES, FR IT and a number of other delegations have insisted on keeping the said terms, and have also objected to the inclusion of point 2 in this Article. On the basis of an analysis of this discussion, the Presidency considers that a balanced compromise between the positions expressed by delegations would consist in keeping point 2 in the text, while maintaining the wording of point 1 as indicated in this document.

<sup>15</sup> A few delegations have objected against this wording. The following recital should be introduced in the preamble instead of the previously suggested paragraph 3:

'When an offence of fraudulent use of a means of payment has been committed, by the same person, in conjunction with an offence which de facto constitutes a necessary preparation of the first offence, a Member State may, in accordance with general principles of national law, provide that such conduct is regarded as an aggravating circumstance'

Article 5

*Fraud related to information systems*<sup>16</sup>

Member States shall take the necessary measures to ensure that performing or causing a transfer of money, monetary value or virtual currencies and thereby causing an unlawful loss of property for another person in order to make an unlawful gain for the perpetrator or a third party is punishable as a criminal offence, when committed intentionally by:

- (a) without right hindering or interfering with the functioning of an information system;
- (b) without right introducing, altering, deleting, transmitting or suppressing computer data.

Article 6

*Tools used for committing offences*<sup>17</sup>

Member States shall take the necessary measures to ensure that, when committed intentionally, the production, procurement for oneself or another, including import, export, sale, and distribution, or making available of a device or an instrument, computer data or any other means specifically designed or adapted for the purpose of committing any of the offences referred to in Article 4(c**b**)<sup>18</sup> or Article 5, is punishable as a criminal offence.

Member States may require ~~a dishonest intent, including~~ an intent to **defraud, or similar dishonest intent, make an unlawful gain for the perpetrator or a third party, or an intent to defraud,** before imposing criminal liability.<sup>19</sup>

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<sup>16</sup> ~~A number of delegations have questioned whether this provision would add any value in relation to the corresponding provisions in the Directive on attacks against information systems. Some would prefer to return to the corresponding wording of the FD on non-cash means of payment (and the Budapest convention).~~ An explanatory recital will be considered.

<sup>17</sup> A few delegations have questioned the practical implication of parts of this provision. Some delegations have suggested that the words '*when committed intentionally*' could be deleted.

<sup>18</sup> ~~DE~~ ~~A few delegations~~ wishes to delete the reference to Article 4(c). ~~One delegation has asked for the reintroduction of the reference to Article 4(a).~~

<sup>19</sup> **EL, ES, FR and IT oppose the inclusion of the second paragraph of Article 6.**

## Article 7

### *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 Articles 3 to 6 ~~is shall be~~ punishable as a criminal offence.
2. Member States shall take the necessary measures to ensure that the attempt to commit an offence referred to in Articles 3 to ~~6~~5 is punishable as a criminal offence<sup>20</sup>.

## Article 8

### *Penalties for natural persons*

1. Member States shall take the necessary measures to ensure that the offences referred to in Articles 3 to 7 are punishable by effective, proportionate and dissuasive criminal penalties.
2. Member States shall take the necessary measures to ensure that the offences referred to in Articles 3, 4 and 5 are punishable by a maximum term of imprisonment of at least three years, at least in cases which are not minor<sup>21</sup>.
3. Member States shall take the necessary measures to ensure that the offences referred to in Articles 4a and 6 are punishable by a maximum term of imprisonment of at least two years, at least in cases which are not minor.

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<sup>20</sup> **DE, FI, LV, SE and some other** ~~Some delegations~~ have questioned whether it is appropriate to criminalize attempt in relation to all the offences of the Directive. In particular, Articles 4(a) and (b) **and 6** have been highlighted in this sense. One delegation wishes to exclude Article 3 from the scope. ~~It has also been suggested that the wording of the provision should be adapted to other Union instruments, such as the Directive on combating terrorism.~~ **AT, BE, CY, EL, ES, FR, IT, RO, PT and some other delegations** ~~Other delegations~~ have called for the inclusion of a reference to all the offences indicated in Articles 3 to 6.

<sup>21</sup> **AT, CZ, FI and** some **other** delegations have argued that the three years penalty in this provision, and other penalties in the Article, are too severe. **FR, IT and RO some other delegations have argued that the words 'at least in cases which are not minor' should be deleted from subparagraphs 2 and 3.** A recital explaining the notion of 'minor offence' in this context will be added. ~~For example, in particular, recidives and~~ offences referred to in Article 8(4) shall not be considered to be minor.



4. Member States shall take the necessary measures to ensure that offences referred to in Articles 3, 4 and 5 are punishable by a maximum term of imprisonment of at least five years if:
- (a) they are committed within the framework of a criminal organisation, as defined in Framework Decision 2008/841/JHA, irrespective of the penalty provided for in that Decision <sup>22</sup>;
  - (b) they involve extensive or considerable damage or advantage, ~~including aggregate damage or advantage~~<sup>23</sup>.

#### *Article 9*

#### *Liability of legal persons*

1. Member States shall take the necessary measures to ensure that legal persons can be held liable for offences referred to in Articles 3 to 7 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person, based on one of the following:
- (a) a power of representation of the legal person;
  - (b) an authority to take decisions on behalf of the legal person;
  - (c) an authority to exercise control within the legal person.
2. Member States shall take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission, by a person under its authority, of any of the offences referred to in Articles 3 to 7 for the benefit of that legal person <sup>24</sup>.

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<sup>22</sup> ~~Some delegations have requested that this provision and its wording should be clarified. SE~~ One delegation proposed that the content of the provision in paragraph 4 should be turned into a separate Article on aggravating circumstances, such as is the case in other criminal law instruments of the Union.

<sup>23</sup> Many delegations have called for a definition of 'extensive or considerable damage or advantage' to be included in the provision or in the recitals. DE has suggested that the scope of paragraph (b) should be limited to the most serious types of offences. BE, MT, NL and some others favour a deletion of paragraph (b).

<sup>24</sup> A few delegations have asked for a clarification of this provision and have suggested that the reference to Article 7 in this paragraph should be deleted.

3. Liability of legal persons under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators ~~or inciters of~~ [1, or accessories to], any of the offences referred to in Articles 3 to [7] <sup>25</sup>.

*Article 10*

*Sanctions for legal persons*

Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 9(1) or 9(2) is subject to effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and which 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;
- (e) temporary or permanent closure of establishments which have been used for committing the offence.

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<sup>25</sup> Three delegations have argued that the reference to Article 7 should be deleted, to avoid introducing too far reaching liabilities.

## TITLE III: JURISDICTION AND INVESTIGATION

### Article 11

#### Jurisdiction<sup>26</sup>

1. Each Member State shall take the necessary measures to establish its jurisdiction over the offences referred to in Articles 3 to 7 where:
  - (a) the offence is committed in whole or in part in its territory;
  - (b) the offender is one of its nationals<sup>27</sup>;
  - (c) ~~the offence causes damage in its territory~~<sup>28</sup>.
2. When establishing jurisdiction in accordance with point (a) of paragraph 1, a Member State shall ensure that it has jurisdiction where:
  - (a) the offender commits the offence when physically present on its territory<sup>29</sup>, whether or not the offence is committed using computers or an information system on its territory;
  - (b) the offence is committed using computers or an information system on its territory, whether or not the offender commits the offence when physically present on its territory<sup>30</sup>.

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<sup>26</sup> Some delegations have called for the inclusion of a rule with criteria on how to solve positive conflicts of jurisdiction. In this context, it was suggested that a reference to Framework Decision 2009/848/JHA should be added to the recitals. In addition, it was argued that it was important to ensure the coherence of the jurisdiction provisions in the various Union criminal law Directives.

<sup>27</sup> **FI** has requested that this ground for jurisdiction may be linked to a requirement of double criminalisation.

<sup>28</sup> ~~Several Member States noted that this provision is problematic, in particular the interpretation of the notion of 'damage'. This notion will need to be explained in a recital. One delegation has asked for the deletion of this point. IT and possibly some other delegations would like to see paragraph 1(c) from previous documents kept in the text.~~

<sup>29</sup> A few delegations have asked for a clarification of the concept '*present on its territory*'.

<sup>30</sup> **DE, supported by other delegations**, has suggested that point 2(b) should be deleted, others have suggested that the said provision should be moved to Article 11(3).

3. A Member State shall inform the Commission if it decides to establish jurisdiction over an offence referred to in Articles 3 to 7 committed outside its territory, including where:
- (c) the offender has his or her habitual residence in its territory;
  - (d) the offence is committed for the benefit of a legal person established in its territory;
  - (e) the offence is committed against one of its nationals or a person who is an habitual resident in its territory.

*Article 12*

*Effective investigations<sup>31</sup>*

~~*Option 1:*~~

1. ~~Member States shall take the necessary measures to ensure that effective investigative tools, such as those which are used in countering organised crime or other serious crime cases, are available to persons, units or services responsible for investigating or prosecuting serious cases of the offences referred to in Articles 3 to 7<sup>32</sup>.~~

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<sup>31</sup> ~~Many Member States noted that a differentiation between organised crime related offences and other offences may be needed in the context of this provision, as the investigative tools may not be appropriate to use in all cases covered by the Directive. A few delegations advocate a solution in the sense that only offences committed in the context of organised crime should be encompassed by the provision. The Presidency has chosen to keep only an adapted version of the previous option 2 in this document. This option appear to have the strongest support among delegations, while not meeting any strong opposition.~~

<sup>32</sup> ~~Many Member States noted that a differentiation between organised crime related offences and other offences may be needed in the context of this provision, as the investigative tools may not be appropriate to use in all cases covered by the Directive. A few delegations advocate a solution in the sense that only offences committed in the context of organised crime should be encompassed by the provision.~~

1. Member States shall take the necessary measures to ensure that effective investigative tools, such as those which are used in countering organised crime or other serious crime cases, are available to persons, units or services responsible for investigating or prosecuting the offences referred to in Articles 3 to 7, **if and** to the extent that the use of those tools is **appropriate and** commensurate with the nature and gravity of the offences under investigation.
2. Member States shall take the necessary measures to ensure that, where national law obliges natural and legal persons to submit information regarding offences referred to in Articles 3 to 7, such information reaches the authorities investigating or prosecuting those offences without undue delay.

## **TITLE IV: EXCHANGE OF INFORMATION AND REPORTING OF CRIME**

### *Article 13*

#### *Exchange of information<sup>33</sup>*

1. For the purpose of exchanging information relating to the offences referred to in Articles 3 to 7, Member States shall ensure that they have an operational national point of contact available 24 hours a day and seven days a week. Member States shall also ensure that they have procedures in place so that urgent requests for assistance are promptly dealt with and the competent authority replies within eight hours<sup>34</sup> of receipt, at least indicating whether the request will be answered, and the form and estimated time of such an answer. Member States may decide to make use of the existing networks of operational points of contact.
2. Member States shall inform the Commission, Europol and Eurojust of their appointed point of contact referred to in paragraph 1. The Commission shall forward that information to the other Member States.

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<sup>33</sup> Some Member States asked for this provision to be clarified.

<sup>34</sup> ~~UK It~~ has ~~been~~ questioned whether this time frame is too narrow, and if a 24/7 capacity is necessary.

*Article 14*  
*Reporting of crime*<sup>35</sup>

1. Member States shall take the necessary measures to ensure that appropriate reporting channels are made available in order to facilitate reporting of the offences referred to in Articles 3 to 7 to law enforcement and other competent national authorities without undue delay.
2. Member States shall take the necessary measures to encourage financial institutions and other legal persons operating in their territory to report without undue delay suspected fraud to law enforcement and other competent authorities, for the purpose of detecting, preventing, investigating or prosecuting offences referred to in Articles 3 to 7.

**TITLE V: PREVENTION**

[..]

*Article 16*  
*Prevention*<sup>36</sup>

Member States shall take appropriate action, including through the Internet, such as information and awareness-raising campaigns, research and education programmes, where appropriate in cooperation with stakeholders, aimed at reducing overall fraud, raising awareness and reducing the risk of becoming a victim of fraud.

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<sup>35</sup> ~~UK One-delegation~~ has questioned whether a binding provision in the Directive is the best means for improving reporting. Others have questioned whether in particular the second paragraph would not fit better in the preamble.

<sup>36</sup> Some delegations questioned the need for this Article. Some suggested that the text of the provision rather belongs to the recitals.

## TITLE VI: FINAL PROVISIONS

### Article 17

#### Monitoring and statistics<sup>37</sup>

1. By [3 months after entry into force of this Directive] at the latest, the Commission shall establish a detailed programme for monitoring the outputs, results and impacts of this Directive <sup>38</sup>.
2. Member States shall ensure that a system is in place for the recording, production and provision of available statistical data measuring the reporting, investigative and judicial phases concerning the offences referred to in Articles 3 to 7.
- [...]
4. Member States shall transmit the data collected pursuant to paragraphs 1 and 2 to the Commission on an annual basis. The Commission shall ensure that a consolidated review of the statistical reports is published each year and submitted to the competent specialised Union agencies and bodies.

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<sup>37</sup> ~~A number of delegations underlined that the burden of these statistical obligations would be too heavy for national administrations. It has therefore been suggested that the obligation should be limited to available data. A few delegations also questioned the concrete wording of paragraph 1, as it appears not to give any role to the Member States as regards the establishment of the monitoring programme.~~

<sup>38</sup> A recital will be drafted, where the details of this program would be outlined, as far as appropriate in line with the indications given in Article 17(1) of the original Commission proposal. The recital could, tentatively, have the following wording:

*It is necessary to collect statistical data on fraud and counterfeiting of non-cash means of payment, and Member States should therefore be obliged to ensure that an adequate system is in place for the recording, production and provision of statistical data on the offences referred to in the proposed directive. The Commission should establish a detailed monitoring programme, which should in particular suggest the means by which the data and other necessary evidence will be collected.*

### *Article 18*

#### *Replacement of Framework Decision 2001/413/JHA*

Framework Decision 2001/413/JHA is replaced with regard to Member States bound by this Directive, without prejudice to the obligations of those Member States with regard to the date for transposition of that Framework Decision into national law.

With regard to Member States bound by this Directive, references to Framework Decision 2001/413/JHA shall be construed as references to this Directive.

### *Article 19*

#### *Transposition*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [24 months after entry into force]. They shall immediately inform the Commission thereof.
2. When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.
3. Member States shall communicate to the Commission the text of measures that they adopt in the field covered by this Directive.

### *Article 20*

#### *Evaluation and reporting*

1. The Commission shall, by [48 months after entry into force], submit a report to the European Parliament and the Council, assessing the extent to which the Member States have taken the necessary measures in order to comply with this Directive. Member States shall provide the Commission with necessary information for the preparation of the report.



2. The Commission shall, by [96 months after entry into force], carry out an evaluation of this Directive on combating fraud and counterfeiting of non-cash means of payment and submit a report to the European Parliament and to the Council.

*Article 21*

*Entry into force*

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

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

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