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**90<sup>th</sup> MEETING OF THE EUROPEAN COMMITTEE**  
**ON LEGAL CO-OPERATION**  
**(CDCJ)**

**Strasbourg, 28-30 October 2015**

**MEETING REPORT**

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## **Introduction**

The European Committee on Legal Co-operation (CDCJ) held its 90<sup>th</sup> meeting in Strasbourg on 28-30 October 2015. The meeting was chaired by Mr Francesco Crisafulli (Italy), chairperson of CDCJ. The agenda, as adopted by the committee, appears in Appendix I. The list of participants is available from the Secretariat.

## **Items submitted to the Committee of Ministers for decision**

- *2016-2017 Programme and Budget*
  - (i) The draft terms of reference for the committee of experts on administrative detention of migrants (see paragraph 18);
  - (ii) The revised specific tasks to be included in the CDCJ draft terms of reference for 2016-2017 (see paragraph 16).
- *Opinions*
  - (iii) The opinion of CDCJ on Parliamentary Assembly Recommendation 2073 (2015) on “Improving the protection of whistleblowers” (paragraph 29).

## **Items submitted to the Committee of Ministers for information**

### **GENDER REPRESENTATION**

At this plenary meeting of CDCJ, the member states were represented by 23 women and 19 men, 55% and 45% respectively.

### **DECISIONS AND ITEMS DISCUSSED**

#### **A. Completed activities**

1. No activities completed in 2015.

#### **B. On-going activities**

- *Rule of law review – free legal aid*
2. Reflecting the importance of legal aid as recognized by the Secretary General in his 2<sup>nd</sup> report on the State of Democracy, Human Rights and the Rule of Law in Europe, CDCJ held a debate on the challenges facing free legal aid schemes in Europe with a focus on Council of Europe standard-setting, monitoring and co-operation activities in this area, and with a view to promoting synergies between them.

3. The debate included presentations on the current challenges to legal aid schemes by Peter van den Biggelaar (Chief Executive Officer of the Legal Aid Board, Netherlands) and by Stéphane Leyenberger (Executive Secretary, CEPEJ); on member state initiatives on the role of NGOs and civil society in Bulgaria and Romania by Maria Marinova-Alkalay (consultant) and on the Federal Law on Free Civil Legal Aid of the Russian Federation by Yury Zudov (Ministry of Justice, Russian Federation); and on Council of Europe co-operation projects in the area of legal aid in Bulgaria, Romania, the Russian Federation and Ukraine, presented by their respective project co-ordinators.

4. CDCJ welcomed the debate and, in particular, the opportunity to receive information on the practical implementation of legal aid schemes within the context of the co-operation projects, and underlined its importance in deciding upon the direction of the committee's future work.

- *Impact of internet and new technologies on rules of evidence and modes of proof*

5. CDCJ took note of the draft study prepared and presented by the consultants, Mr Stephen Mason (United Kingdom) and Mr Uwe Rasmussen (Denmark/France) on the impact of the internet and new technologies on rules of evidence and modes of proof, primarily in areas of civil and administrative law proceedings (document CDCJ(2015)14).

6. CDCJ took note that the report would be completed by the end of 2015 in light of the exchange of views held during the meeting and any additional information that might be submitted by its members, and agreed to instruct the Bureau to advise it on the action to be taken as a follow-up to the report's conclusions. In particular, the committee instructed the Bureau to advise on the issues for courts, judges and lawyers raised by electronic evidence that might benefit from guidance from the Council of Europe, and to consider how such guidance might be developed in co-operation with other Council of Europe bodies (European Committee on Crime Problems (CDPC), European Commission for the Efficiency of Justice (CEPEJ), Consultative Council of European Judges (CCJE) and Consultative Council of European Prosecutors ( CCPE)).

7. CDCJ confirmed that at this stage it did not consider that the preparation of a binding instrument was appropriate.

- *Legal regulation of lobbying activities*

8. CDCJ took note of the progress in the work of preparing the draft recommendation on legal regulation of lobbying activities, assigned to it by the Committee of Ministers in accordance with its decision taken at its 1219<sup>th</sup> meeting (11-12 February 2015). It took note in particular of the reports of the ad hoc meeting of CDCJ members (document DCJ-AH-LOB(2014)2) and of the drafting group's meetings (documents CDCJ-GT-LOB(2015)4 and CDCJ-GT-LOB(2015)9), and of the related decisions taken by the Bureau during the meetings which it had held in 2015.

9. CDCJ examined the 2nd version of the draft recommendation of the Committee of Ministers prepared by the drafting group (Appendix III to document CDCJ-GT-LOB(2015)9) in the light of the comments received from the CDCJ delegations (documents CDCJ(2015)21 and CDCJ(2015)23), and provided observations to the drafting group, as they appear in Appendix II to this report.

10. CDCJ agreed on the value of organising a consultation of civil society and other key stakeholders (in both public and private sectors) in 2016 before completing the draft instrument and, for this purpose, instructed its Bureau to determine the practical arrangements for the organisation of the consultation, in co-operation with the Conference of INGOs.

11. CDCJ agreed to organise a written consultation (via the CDCJ website) and also, timetable and resources allowing, a conference in Strasbourg with the key stakeholders.

12. CDCJ recalled that it had agreed, at its 89th meeting, to consider the possible publication of the feasibility study (CDCJ(2014)4) only once the work on the draft legal instrument was completed.

- *Review of conventions*

13. CDCJ took note of the replies that had been received by the Secretariat to the questionnaire on the review of the European Agreement on the Transmission of Applications for Legal Aid (ETS 92) and its additional protocol (ETS 179), the European Convention on the Service Abroad of Documents relating to Administrative Matters (ETS 94), and the European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters (ETS 100), and decided to take no further action in this respect.

14. The committee decided not to undertake a convention review in 2016 in light of the large number of activities planned for the year.

15. CDCJ took note of the information set out in the annotated draft agenda (document CDCJ(2015)13) in relation to the following activities:

- Protection of whistleblowers (promotion)
- Child-friendly justice guidelines (promotion)
- Administrative law handbook "The Administration and You".

**C. Future activities**

16. CDCJ held a detailed exchange of views on the proposals for its activities during 2016-2017 and their implementation and, in the light of this discussion, agreed on the changes to the specific tasks indicated in the Secretary General's proposals for its terms of reference for 2016-2017 (document CM(2015)131ADD) as they appear in Appendix III, but otherwise confirmed its agreement to the draft terms of reference.

- *Free legal aid*

17. CDCJ approved the terms of reference for a comparative analysis of existing data on free civil legal aid schemes in the member states with particular attention to the key challenges facing them and possible solutions, as they appear in Appendix IV.

- *Administrative detention of migrants*

18. CDCJ agreed to undertake a codifying exercise on existing international standards relating to the conditions in which migrants are held. It approved the draft terms of reference for the committee of experts (CJ-DAM) as they appear in document CM(2015)131ADD and agreed to submit them to the Committee of Ministers for adoption.

19. CDCJ considered that this exercise would have an added value and not duplicate the work carried out by other bodies. In this respect, it recalled that this activity proposal implements one of the recommendations in the 1<sup>st</sup> report of the Secretary General of the Council of Europe on the state of democracy, human rights and the rule of law in Europe (2014) and that this recommendation itself followed on from similar calls made by the Parliamentary Assembly<sup>1</sup> and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), and support from the European Commission<sup>2</sup>.

20. The committee confirmed that the objective of this exercise was limited to the codification of existing international standards in the field. It would not create new standards.

21. The committee agreed to maintain the term “administrative” in the title “administrative detention of migrants” in order to avoid any confusion with detention in criminal matters. In this respect, it noted that the scope of this exercise is described in a sufficiently precise manner in the draft terms of reference.

- *Council of Europe Action plan on judicial independence and impartiality*

22. CDCJ took note of the Secretary General’s initiative to prioritise the strengthening of judicial independence and impartiality in the member states as a follow-up to his 2nd report on the State of Democracy, Human Rights and the Rule of Law in Europe and, in particular, the preparation of a Council of Europe Action Plan drawing upon, *inter alia*, an analysis of the replies submitted by member states on their follow-up to Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities.

23. CDCJ welcomed the initiative and indicated its willingness to contribute to its success. Noting the Secretary General’s wish to accelerate the process, CDCJ stressed its wish that it be fully involved in the process of preparing the Action Plan and in its follow-up in order to help ensure that its objectives are relevant and supported by the member states. CDCJ recalled that it is the principal intergovernmental structure of the Council of Europe with responsibility for the proper functioning of the judiciary, and that its members as representatives of the Ministry of Justice are, therefore, particularly well-placed within the Council of Europe to ensure, at national level, the necessary communication between government and judiciary.

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<sup>1</sup> See, for example, Resolution 1707 (2010) of the Parliamentary Assembly on detention of asylum seekers and irregular migrants in Europe.

<sup>2</sup> Communication from the Commission to the Council and the European Parliament on EU Return Policy (COM(2014) 199 final), 28 March 2014 – “Codified Council of Europe detention standards: The Commission supports the declaration of the European National Preventative [sic] Mechanisms against torture issued during the Conference on Immigration Detention in Europe (Strasbourg 21-22 November 2013) to call on the Council of Europe to codify a set of detailed immigration detention rules based on existing international and regional human rights standards applicable to deprivation of liberty on the grounds of immigration status” (page 9).

- *Online dispute resolution mechanisms*

24. CDCJ approved the terms of reference for a preliminary feasibility study on online dispute resolution mechanisms, as they appear in Appendix V and instructed its Bureau to make proposals for a future activity on the basis of the study.

- *Powers of attorney and advance directives for incapacity*

25. CDCJ approved the terms of reference for a review of follow-up by member states to Committee of Ministers Recommendation CM/Rec(2009)11 on principles concerning continuing powers of attorney and advance directives for incapacity, as they appear in Appendix VI.

- *Other possible activities*

26. In the event time and resources allow, CDCJ agreed to undertake work on updating Committee of Ministers Recommendation No. R (86) 12 concerning the measures to prevent and reduce the excessive workload in the courts in order to give a role to court clerks in reducing the workload of the courts.

27. CDCJ agreed to request the opinion of the Consultative Council of European Judges (CCJE) on the communication between judges of different member states and particularly on whether there exist any issues that might merit an activity by CDCJ or other Council of Europe body.

28. CDCJ indicated an interest in reviewing follow-up by member states to Committee of Ministers Recommendation CM/Rec(2007)14 on the legal status of non-governmental organisations in Europe. Before deciding what future action it might take, CDCJ decided to await the outcome of the planned consultation on this topic by the Expert Council on NGO Law of the Council of Europe Conference of INGOs.

#### **D. Other items discussed**

- *CDCJ opinions*

29. CDCJ adopted its opinion on Parliamentary Assembly Recommendation 2073 (2015) on “Improving the protection of whistleblowers”, as it appears in Appendix VII and agreed to submit it to the Committee of Ministers.

30. Following a request from the Steering Committee on Media and Information Society (CDMSI) regarding the new draft Council of Europe strategy on Internet governance for 2016-2019 which is being prepared, CDCJ endorsed the comments submitted by Switzerland already communicated to the Secretariat of CDMSI prior to the meeting.

- *Legislative developments in member states in the areas of public and private law*

31. CDCJ took note of the written information provided by Bulgaria, Croatia, Poland and Spain on legislative developments in the areas of public and private law (document CDCJ(2015)20), as well as the oral information provided by Armenia, and thanked the respective delegations for this information.

- *Gender mainstreaming*

32. Ms Herdis Thorgeirsdóttir (Iceland, Vice-President of the Venice Commission and one of its gender equality rapporteurs) gave a presentation on the relevance of gender mainstreaming for the work of CDCJ on law reform and standard-setting. CDCJ invited Ms Thorgeirsdóttir to prepare a written briefing note on the topic which it instructed the Bureau to consider at its first meeting in 2016 with a view to submitting a text for adoption by CDCJ either by written procedure or at its next plenary meeting.

33. CDCJ agreed that, subject to resources, its new Gender Equality Rapporteur (see paragraph 43) should be invited to participate in the meetings of its Bureau.

- *Work of other Council of Europe bodies*

34. CDCJ took note of the information set out in the annotated draft agenda (document CDCJ(2015)13).

- *External co-operation*

35. The CDCJ took note of the information set out in the annotated draft agenda (document CDCJ(2015)13) as well as the additional information circulated by the representative of OSCE/ODIHR on its work in the area of rule of law and legislative support.

- *Elections and appointments*

36. Ms Zuzana Fišerová (Czech Republic) was unanimously elected as chairperson for a first term of one year.

37. Mr Lennart Houmann (Denmark) was unanimously elected as vice-chairperson for a first term of one year.

38. Mr Francisco Javier Forcada Miranda (Spain) and Mr Mikhail Vinogradov (Russian Federation) were each unanimously elected for a second two-year term.

39. Mr Christoph Henrichs (Germany) and Mr Rodrigo Rodriguez (Switzerland) were each unanimously elected as members of the Bureau for a first term of two years.

40. Ms Irma Gabriadze (Georgia) was unanimously elected as a member of the Bureau for a first term of one year (Article 13.d of the rules).



41. As a result of the above-mentioned elections<sup>3</sup>, the Bureau of CDCJ is composed as follows:

Chairperson: Ms Zuzana Fišerová (Czech Republic)

Vice-chairperson: Mr Lennart Houmann (Denmark)

Bureau members: Ms Irma Gabriadze (Georgia), Mr Christoph Henrichs (Germany), Mr Mikhail Vinogradov (Russian Federation), Mr Francisco Javier Forcada Miranda (Spain) and Mr Rodrigo Rodriguez (Switzerland).

42. CDCJ instructed the Bureau to confirm or make such new appointments as necessary for the representatives of the committee in the work and meetings of other Council of Europe bodies in 2016.

43. CDCJ appointed Ms Vlasta Kovačević (Croatia) as the Gender Equality Rapporteur of the CDCJ.

- *Date and place of next meeting*

44. CDCJ agreed to hold its next plenary meeting in Strasbourg from Wednesday 16 to Friday 18 November 2016.

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<sup>3</sup> The respective terms of reference will take effect from 1<sup>st</sup> January 2016.

## APPENDIX I

### AGENDA

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- I. Opening of the meeting
- II. Adoption of the agenda
- III. Statement of the Chair and Secretariat
- IV. Impact of internet and new technologies on rules of evidence and modes of proof (draft report)
- V. Legal regulation of lobbying activities (interim reading of the draft recommendation)
- VI. Child-friendly justice guidelines and CM/Rec(2014)7 on the protection of whistleblowers (update on promotion)
- VII. Convention Review ETS 92, 179, 94, 100
- VIII. Rule of law debate: free legal aid
- IX. CDCJ work programme for 2016-2017 (structures, working methods and terms of references)
- X. Legislative developments in member states in the areas of public and private law
- XI. CDCJ opinions
- XII. Work of other Council of Europe bodies
- XIII. External co-operation
- XIV. Elections and appointments
- XV. Any other business
- XVI. Date and place of next meeting

## APPENDIX II

### LEGAL REGULATION OF LOBBYING ACTIVITIES

#### OBSERVATIONS BY CDCJ

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These observations by CDCJ relate to the 2<sup>nd</sup> draft recommendation as it appears in the report of the 2<sup>nd</sup> meeting of the drafting group (Appendix III to document CDCJ-GT-LOB(2015)9).

The committee notes that it was unable to reach a consensus on certain aspects of the draft recommendation, and instructs the drafting group to consider, and make clarifications on, the following points:

1) *Nature of regulation and of the degree of flexibility given to member states*

- The CDCJ perceives a lack of clarity as regards the norms to which a self-regulation system may apply. The committee instructs the drafting group to clarify, in the draft recommendation and in the explanatory memorandum thereto, the norms which should be subject to legislative or regulatory control (keeping of registers of lobbyists; provisions concerning penalties and governing relations between public officials and lobbyists, for example), and those which could also be subject to a system of self-regulation, such as norms relating to lobbyists' ethical behaviour.
- The committee also considers it appropriate in this connection to include the following definition of the term "legal regulation" in the draft text:

*"Legal regulation" means statutory regulation or a system of voluntary self-regulation.*

- In order to allow member states some flexibility, the committee also stresses the importance of specifying in the draft legal instrument that it rests with the member states to decide the manner of applying these principles.

2) *Mandatory character of registration of lobbyists*

- The CDCJ is agreed on the importance of the compulsory keeping of a register of lobbyists. However, the committee instructs the drafting group to formulate this principle in such a way that it may be accepted by those member states which consider that they have already equivalent measures such that they do not consider for themselves appropriate the requirement to maintain a register.
- The drafting group should also place emphasis on the main purpose of the future legal instrument, namely to increase transparency in the public decision-making process and not fighting corruption – which should also be stated in the explanatory memorandum.

3) Oversight

- The committee invites the drafting group to discuss the possibility of deleting the phrase “*with adequate resources*” in principle 18.
- The committee agrees as to the importance of the various tasks mentioned in principle 19, although opinions on their relative importance are divided. However, it wonders about the expediency of collecting them all together in the part on “oversight”. It invites the drafting group to think about a possible reformulation in this respect, or even dealing with the various tasks separately via the draft recommendation.
- The committee wishes the drafting group to reflect on the way of applying oversight to self-regulation systems. In particular, on lobbyists’ ethical behaviour.

**APPENDIX III**

## CDCJ – DRAFT TERMS OF REFERENCE 2016-2017

## REVISED SPECIFIC TASKS

The draft terms of reference for CDCJ as set out in document CM(2015)131ADD, should be replaced by the text set out below.

## Specific Tasks

- (i) Complete preparation of the draft legal instrument on the regulation of lobbying activities and publish after adoption by the Committee of Ministers.
- (ii) Prepare a comparative analysis of existing data on free legal aid schemes in the member states with particular attention to the key challenges facing them and possible solutions
- (iii) Contribute to the preparation of a Council of Europe Action Plan on judicial independence and impartiality as well as to its follow-up, in co-operation with other Council of Europe bodies, including the analysis of the replies submitted by member states on their follow-up to Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities.
- (iv) Codify existing international standards on the administrative detention of migrants.
- (v) Continue its review on the impact of the internet and information and communication technologies (ICTs) on the rules of evidence and modes of proof with a view to the possible development of guidance for courts, the judiciary and lawyers in co-operation with CDPC, CCJE, CCPE and CEPEJ.
- (vi) Undertake a study on online dispute resolution mechanisms as a preliminary step to possible future work, with reference to Articles 6 and 13 of the European Convention on Human Rights (follow-up to Recommendation CM/Rec(2014)6 on a Guide to human rights for Internet users).
- (vii) Publish the revised handbook “The Administration and You”.
- (viii) Review selected conventions and recommendations of the Committee of Ministers.
- (ix) Provide legislative advice, training and awareness-raising to national authorities and other relevant bodies on Council of Europe public and private law standards, relating in particular to (a) the protection of whistleblowers, (b) the prevention and resolution of disputes on child relocation and (c) child-friendly justice.

## APPENDIX IV

### FREE LEGAL AID - COMPARATIVE ANALYSIS

#### TERMS OF REFERENCE

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The consultant shall:

- Analyse existing data on free civil legal aid schemes in the member states of the Council of Europe
- Identify the key obstacles to the effective working of these schemes, and conduct a gap analysis.
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The structure of the comparative analysis shall be as follows:

- Executive summary
- Introduction
- Sources of information
- Comparative assessment of existing data on civil legal aid schemes in member states
- Gap analysis
- Conclusions

The draft comparative analysis will be presented to the CDCJ at its plenary meeting in 2016 and revised in light of the discussion.

**APPENDIX V**

## ONLINE DISPUTE RESOLUTION MECHANISMS

## PRELIMINARY FEASIBILITY STUDY

## TERMS OF REFERENCE

With a view to advising on the feasibility of the CDCJ conducting a preparatory study on the development of online dispute resolution mechanisms (private and public) including the extent to which they might facilitate effective access to justice whilst avoiding formal court proceedings, at the same time complying with fair trial guarantees and the right to an effective remedy as contained in Articles 6 and 13 of the European Convention on Human Rights (ECHR), the consultant shall:

- Advise on the scope of the proposed preparatory technical study in terms of its practicality, (e.g. timeframe, required resources), and relevance with reference to:
  - o disputes arising from online interaction and online commercial transactions
  - o disputes arising between internet users and internet service providers
  - o disputes arising offline but resolved through online mechanisms.
- Advise on the likelihood of achieving the desired outcome of the activity, namely the development of technical solutions in order to guarantee a fair trial and an effective remedy.
- Advise on the design of the two stages of the activity, firstly, preparation of the study and, subsequently, preparation of the technical Article 6 and Article 13 solutions.

## APPENDIX VI

### RECOMMENDATION CM/REC(2009)11 ON PRINCIPLES CONCERNING CONTINUING POWERS OF ATTORNEY AND ADVANCE DIRECTIVES FOR INCAPACITY

#### REVIEW OF FOLLOW-UP BY MEMBER STATES

#### TERMS OF REFERENCE

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The review will be carried out by a consultant who shall:

- Prepare, in collaboration with the Secretariat, a questionnaire for member states requesting information on how they have implemented Recommendation CM/Rec(2009)11.
- Analyse the replies and examine the extent to which the aspirations in the recommendation have been achieved in the member states, including aspirations to enhance the effective application of principles of autonomy, self-determination and non-discrimination for the practical benefit of the citizens of member states.
- Prepare a draft review to be submitted to the CDCJ including recommendations for follow-up action.

The consultant appointed for the task shall involve the CDCJ members closely in his/her work and present the preliminary conclusions to the CDCJ Bureau for consideration before submission at the CDCJ plenary meeting.



## APPENDIX VII

### RECOMMENDATION 2073 (2015) OF THE PARLIAMENTARY ASSEMBLY “IMPROVING THE PROTECTION OF WHISTLE-BLOWERS”

#### OPINION OF CDCJ *adopted at its 90<sup>th</sup> plenary meeting (28-30 October 2015)*

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1. The European Committee on Legal Co-operation took note of Recommendation 2073 (2015) of the Parliamentary Assembly on “Improving the protection of whistleblowers” and Resolution 2060 (2015) related thereto.
2. Regarding the Parliamentary Assembly’s recommendation to draft a framework convention, CDCJ wishes to reiterate its opinion issued in 2010 on Recommendation 1916 (2010) of the Parliamentary Assembly on “the protection of “Whistleblowers”” in which it considered it to be preferable to initially draft a non-binding legal instrument, given the complexity of the subject, the flexibility which such an instrument would offer and also its potential impact (possibly greater than that of a convention ratified by only a small number of member states, for instance).
3. CDCJ recalls also the conclusions of the study undertaken in 2012 on the feasibility of drafting a legal instrument on the protection of employees who make disclosures in the public interest, which was in the same vein as the CDCJ opinion in 2010.
4. Although the protection of whistleblowers has become a matter of concern in many member states which implement - or plan to implement - measures in this area, CDCJ considers that, given the range of solutions adopted by the member states in this field, the negotiation of a framework convention would be time consuming without any certainty to its outcome.
5. Without ruling out the possible preparation of a convention in the longer term, the committee considers it more appropriate, at this stage, to continue its work on supporting the promotion and implementation of Recommendation CM/Rec(2014)7, prepared by the CDCJ.
6. Furthermore, CDCJ wishes to draw the Committee of Ministers attention to the fact that Recommendation CM/Rec(2014)7 already includes a principle on information relating to national security, defence, intelligence, public order or international relations of the State.
7. The committee indicates that it adopted, in 2014, an action plan aiming at promoting Recommendation CM/Rec(2014)7. Since then, a series of actions have been taken, namely, the publication, including on the CDCJ website, of (i) the Recommendation with its explanatory memorandum; (ii) a leaflet to raise awareness among the civil society about the recommendation and whistleblowing, and (iii) information on the development of some initiatives, activities or legislative programmes at national and international level to promote and protect whistleblowing. Preparation of a guide to facilitate the implementation of the recommendation by member states is on-going.

8. The CDCJ recalls that, in the pursuit of its terms of reference, the committee is, in particular, responsible for providing legislative advice, training and awareness-raising to national authorities and other relevant bodies relating to public interest disclosures and the protection of whistleblowers. In this perspective, the committee is ready to continue its work on implementing its action plan and to respond to any request for technical assistance from member States, subject to available resources.