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92nd MEETING OF THE EUROPEAN COMMITTEE
ON LEGAL CO-OPERATION
(CDCJ)

Strasbourg, 22-24 November 2017

MEETING REPORT

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CONTENTS

Introduction	3
Gender representation	3
Decisions and items discussed	3
A. Completed activities	3
B. On-going activities	3
C. Future activities	5
D. Other items discussed	7

APPENDICES

APPENDIX I	Agenda	10
APPENDIX II	Digital evidence (practical guidelines): Terms of reference for a drafting group of CDCJ members.....	11
APPENDIX III	Parliamentary Assembly Recommendation 2106 (2017) on "Parliamentary scrutiny over corruption: parliamentary co-operation with the investigative media" – CDCJ pinion.....	14

Introduction

The European Committee on Legal Co-operation (CDCJ) held its 92nd meeting in Strasbourg on 22-24 November 2017. The meeting was chaired by Ms Zuzana Fišerová (Czech Republic), chairperson of CDCJ. The agenda, as adopted by the Committee, appears in Appendix I to this report. The list of participants is available from the Secretariat.

Items submitted to the Committee of Ministers for information

- i. CDCJ completed a review of member state follow-up action to Recommendation CM/Rec(2009)11 on principles concerning continuing powers of attorney and advance directives for incapacity and approved publication of the report.
- ii. CDCJ approved publication of the revised and updated 2nd edition of the Handbook, "The Administration and You" in principle, subject to a review of the final text by its Bureau in 2018.
- iii. CDCJ agreed unanimously to admit as observers to the committee the following organisations: the International Social Service (ISS) and the Office of the United Nations High Commissioner for Refugees (UNHCR).

GENDER REPRESENTATION

At this plenary meeting of CDCJ, the member States were represented by 20 women and 21 men, 48,8 % and 51,2 % respectively.

DECISIONS AND ITEMS DISCUSSED

A. Completed activities

- *Continuing powers of attorney and advance directives for incapacity*

1. CDCJ examined the follow-up given by member states to the Committee of Ministers' Recommendation CM/Rec(2009)11 on principles concerning continuing powers of attorney and advance directives for incapacity, on the basis of the review which appears in the report prepared by Mr Adrian D. Ward (consultant, United Kingdom) at the request of the committee.
2. CDCJ thanked Mr Ward for his work and agreed to publish the report under the responsibility of the committee while making it clear that the committee has not taken a position on the author's proposals and suggestions for future action by the Council of Europe and member states.
3. CDCJ took note that the report would be completed by the end of 2017 in light of the exchange of views held during the meeting and any additional information that might be submitted by its members no later than 1 December 2017.

B. On-going activities

- *Administrative detention of migrants*

4. In the presence of the Chair of the Committee of Experts on Administrative Detention of Migrants (CJ-DAM), Mr João Arsénio de Oliveira (Portugal) and the consultants (Professors Alberto Achermann and Joerg Künzli), CDCJ held a detailed exchange of views on the progress by the CJ-DAM in preparing a draft codifying instrument of existing international standards relating to the conditions in which migrants are held in administrative detention.

5. CDCJ took note of the reports of the 4th, 5th, 6th, 7th and 8th meetings of the CJ-DAM which had taken place since its last plenary meeting and the outcome of the consultation process (written and hearing) of civil society and key stakeholders on the 1st draft codifying instrument which took place in May and June 2017.

6. CDCJ welcomed and approved the general orientations agreed by the CJ-DAM for revising the 1st draft in order to reflect the results of the consultation process and the quality check prepared by the consultant and gave the following guidance:

- The codification process implies interpreting existing standards;
- Concerning the criteria to be taken into account in selecting the standards to be codified, there is no hierarchy; rather they should all be taken into account and considered as a whole. Nonetheless, standards that provide the highest level of protection to migrants should prevail as well as those that apply to all member States;
- Under no circumstance, should the draft instrument go below existing standards;
- The draft instrument should strike the right balance between detail and generality;
- Given the close links between the work of the CJ-DAM and the CDDH-MIG, the Committee should take into account in its codifying exercise the work prepared by the CDDH-MIG on alternatives to detention.

7. The Committee agreed that CJ-DAM should consult CDCJ on a regular basis on any issues that may arise in its future work.

8. CDCJ took note of the adoption by the Committee of Ministers at its 1300th meeting (21-23 November 2017) of the terms of reference of the CJ-DAM for 2018. In this respect, the CDCJ stressed the need for the CJ-DAM to complete its work by the end of 2018.

- *Online dispute resolution mechanisms*

9. CDCJ took note of the oral information provided by the Secretariat concerning the progress of this activity and agreed to extend the deadline for submitting replies to the questionnaire on online dispute resolution mechanisms sent to the delegations by the Secretariat to 31 January 2018.

- *Legal aid schemes*

10. CDCJ examined the proposal of the Bureau to develop policy guidance based on good practice in member states aimed at improving the efficiency and effectiveness of legal aid schemes. Before finalising this proposal, CDCJ instructed a working group of its members to assess the feasibility and scope of such an exercise and, for this purpose, to hold one or two meetings in 2018. The group should submit the results of its work to the Bureau and the next CDCJ plenary meeting.

11. In particular, the working group was instructed to assess the feasibility of the following task, namely to develop policy guidance based on good practice in member states aimed at improving the efficiency and effectiveness of legal aid schemes (including advice, assistance and representation) in the member states, in particular with reference to methods of quality control, operation, management and governance, and take up of legal aid by persons in a vulnerable situation, and access by the public to information on legal aid, and bearing in mind the financial consequences which such guidance may have for the member states.

12. CDCJ agreed that up to 10 members should have their travel and subsistence costs for participating in the meetings of the working group covered by the Council of Europe budget with other members entitled to participate at their own expense. The Bureau was instructed to determine the composition of the group on the basis of expressions of interest to be submitted to the Secretariat before 8 December 2017.

13. Furthermore, CDCJ agreed that the group should consult CEPEJ in order to draw on its experience in the field of legal aid. It may also consult the following organisations and involve them in its work: Open Society Justice Initiative (OSJI), International Commission of Jurists (ICJ), International Legal Aid Group (ILAG).

- *Administrative law handbook “The Administration and You”*

14. Ms Caroline Daly (Ireland), in her capacity as member of the drafting group and also chair of the former CDCJ Project Group on Administrative Law (CJ-DA), presented the revised version of the handbook as prepared by the drafting group. CDCJ welcomed the work done by the drafting group and took note of the reports of its four meetings.

15. CDCJ approved in principle the publication of the handbook and agreed that the finalised version should be submitted for approval to the Bureau at one of its next meetings with a view to its publication in 2018.

C. Future activities

- *Digital evidence (practical guidelines)*

16. CDCJ approved terms of reference (see Appendix II to this report) for a drafting group of CDCJ members to prepare guidelines giving practical advice on the impact of the internet and new technologies on rules of evidence and modes of proof, primarily in the areas of civil and administrative law proceedings. Two delegations expressed their concern that the inclusion of admissibility in the terms of reference should not lead to any interference in the principle of free assessment of evidence by courts in the member states.

17. CDCJ instructed the drafting group to hold three two-day meetings in 2018 and submit the results of its work to the Bureau and the next CDCJ plenary meeting.

18. CDCJ agreed that up to 10 members should have their travel and subsistence costs for participating in the meetings of the drafting group covered by the Council of Europe budget with other members entitled to participate at their own expense. The Bureau was instructed to determine the composition of the group on the basis of expressions of interest to be submitted to the Secretariat before 31 December 2017. The group will be assisted by a consultant.

19. Furthermore, CDCJ agreed that the following organisations may participate in the work of the group as observers: European Commission for the Efficiency of Justice (CEPEJ); Consultative Council of European Judges (CCJE); Consultative Council of the European Prosecutors (CCPE).

- *Continuing powers of attorney and advance directives for incapacity*

20. Following the exchange of views on the report (see paragraphs 1-3 above) the committee instructed its Bureau to make proposals for a range of standard-setting activities (particularly concerning advance directives), as well as awareness-raising and assistance activities. CDCJ agreed to examine these proposals at its next plenary meeting.

- *Practice on avoiding statelessness*

21. CDCJ took note of the statistical data and other information provided by Mr Gert Westerveen, UNHCR representative to the European institutions in Strasbourg and Mr Chris Nash, Director of the European Network on Statelessness (ENS), on the extent of the problem of statelessness in Europe, in particular on the number of stateless persons, and on the existing obstacles to acquiring nationality.

22. In light of this information and the Council of Europe Action plan on protecting refugee and migrant children for 2017-2019, CDCJ examined the possibility of undertaking an activity aiming at implementing in practice the principle of avoiding statelessness in relation to child migrants and identifying appropriate solutions in the form of practical guidance.

23. Before agreeing on a possible activity in this field, CDCJ instructed its Bureau to reflect, for consideration at the next plenary meeting, on an activity proposal, including the appropriate structure and working methods to undertake the work and, if necessary, prepare draft terms of reference.

- *Role of court clerks (in the framework of updating Recommendation No. R (86) 12 concerning the measures to prevent and reduce the excessive workload in the courts)*

24. CDCJ took note that its decision on the re-allocation of non-judicial tasks from judges to court clerks in the framework of updating Recommendation No. R (86) 12 concerning the measures to prevent and reduce the excessive workload in the courts had been communicated to the Secretariat of CEPEJ.

- *Gender equality mainstreaming*

25. CDCJ took note of the organisation in 2018 of an ad hoc meeting with CDCJ members (or other officials responsible for law reform and gender equality) on national experiences on mainstreaming gender equality issues in the process of law reform. CDCJ instructed its Bureau to finalize arrangements for this event (including programme and participants) at its next meeting in the light of proposals prepared by the Secretariat.

D. Other items discussed

- *CDCJ Opinions*

26. CDCJ adopted its opinion on Parliamentary Assembly's Recommendation 2106 (2017) on "Parliamentary scrutiny over corruption: parliamentary co-operation with the investigative media", as it appears in Appendix III to this report, and instructed the Secretariat to transmit it to the Committee of Ministers as soon as possible.

- *Judicial independence and impartiality*

27. CDCJ took note of the proposal of the Secretariat for the regular review of the Committee of Ministers regarding the Council of Europe Plan of action on strengthening judicial independence and impartiality, and in particular the preparation of an interim report in 2018 on actions taken by member States. The Committee instructed its Bureau to approve a questionnaire for this purpose.

28. The Secretariat informed CDCJ on several completed and ongoing co-operation projects, as well as future projects relating to the judicial independence and more generally the judiciary, and referred in particular to projects in Montenegro, Serbia, "The former Yugoslav Republic of Macedonia" and Turkey. The attention of CDCJ was drawn to the dedicated page on co-operation projects on the CDCJ website.

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

29. CDCJ took note of the information provided by Georgia, Latvia, Switzerland and Turkey on legislative developments in the areas of public and private law and thanked the respective delegations for this information.

- *Work of other Council of Europe bodies*

30. CDCJ took note of the reports of its representatives in the meetings of other Council of Europe bodies and committees whose work is of relevance to CDCJ, as well as other events, as posted on its website throughout the year, or in the meeting reports of these bodies and committees in the absence of CDCJ participation.

31. The Chair of the Ad Hoc Committee of Experts on Roma and Traveller Issues (CAHROM) presented the work of the CAHROM and the recently adopted Committee of Ministers Recommendation CM/Rec(2017)10 on Improving Access to Justice for Roma and Travellers in Europe.

32. The Secretariat of the Committee on Bioethics (DH-BIO) presented the work of the DH-BIO of particular relevance to CDCJ and reported on the conference which was organised on the occasion of the 20th Anniversary of the Oviedo Convention (Strasbourg, 24-25 October 2017).

- *External co-operation*

33. CDCJ took note of the outcomes of the international colloquy entitled "*La nationalité : enjeux et perspectives*" organised in Rouen, France, on 16-17 November 2017 on the occasion of the 20th Anniversary of the European Convention on Nationality.

34. CDCJ took note of the publication of the casebook on European fair trial standards in administrative justice co-published by the Council of Europe and the Folke Bernadotte Academy (Swedish Ministry of Foreign Affairs).

35. CDCJ confirmed its interest to follow more closely the work of the Hague Conference on Private International Law particularly in the area of family law, but also statelessness and for this purpose agreed on the need for a more structured approach to its co-operation. It instructed the Bureau to make proposals in this respect.

- *Elections and appointments*

36. Mr Lennart Houmann (Denmark) was unanimously elected as chairperson for a first term of office of one year.

37. Mr João Arsénio de Oliveira (Portugal) was unanimously elected as vice-chairperson for a first term of office of one year.

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

39. Ms Karine Gilberg (France) and Mr Nic Turner (United Kingdom) were unanimously elected as members of the Bureau for a first term of office of two years.

40. Ms Kai Härmand (Estonia) was unanimously elected as a member of the Bureau for a first term of office of one year (Article 13.d of the rules).

41. As a result of the above-mentioned elections¹, the Bureau of CDCJ is composed as follows:

Chairperson: Mr Lennart Houmann (Denmark)

Vice-chairperson: Mr João Arsénio de Oliveira (Portugal)

Bureau members: Ms Kai Härmand (Estonia), Ms Karine Gilberg (France), Mr Christoph Henrichs (Germany), Mr Rodrigo Rodriguez (Switzerland) and Mr Nic Turner (United Kingdom).

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 2018.

43. CDCJ confirmed Ms Karine Gilbert (France) as one of its two Gender Equality Rapporteurs. No nominations were received for the second position.

- *Requests for observer status*

44. CDCJ examined two requests for observer status in the committee from the International Social Service (ISS) and the Office of the United Nations High Commissioner for Refugees (UNHCR) which had been submitted to the Secretary General by letter, respectively on 19 October 2016 and 21 November 2017.

¹ The respective terms of office will take effect from 1st January 2018.

45. In light of the written information provided by ISS and the oral information provided by Mr Douglas Lewis (international president of ISS) and Mr Vito Bumbaca (legal advisor of ISS) CDCJ agreed by unanimous decision to grant ISS observer status. It also agreed by unanimous decision to grant observer status to UNHCR, in light of the oral information provided by Mr Gert Westerveen (UNHCR representative to the European institutions in Strasbourg).

- *Website of the Committee*

46. The new website of CDCJ, following the migration from Transit to Liferay platform, was presented to the committee. The significant improvements in terms of presentation and ease of use were very much welcomed.

- *Date and place of the next meeting*

47. CDCJ agreed to hold its next plenary meeting in Strasbourg on 14-16 November 2018.

APPENDIX I

AGENDA

- I. Opening of the meeting
- II. Adoption of the agenda
- III. Statement of the Chair and Secretariat
 - *Committee of Ministers*
 - *Meetings of the Bureau*
 - *New CDCJ website (presentation)*
- IV. Progress review of on-going activities
 - *Administrative detention of migrants (activity report & debate)*
 - *Continuing powers of attorney and advance directives for incapacity (presentation of draft report on the review of follow-up by member states to Recommendation CM/Rec(2009)11 & debate)*
 - *Online dispute resolution mechanisms (questionnaire)*
 - *Administrative law handbook "The Administration and You" (presentation of the revised version of the Handbook)*
- V. CDCJ work programme for 2018-2019
 - *Administrative detention of migrants (renewal of terms of reference)*
 - *Legal aid schemes (draft terms of reference)*
 - *Practical guidelines on digital evidence (terms of reference)*
 - *Advance directives for incapacity (possible new activity)*
 - *Practice on avoiding statelessness (possible new activity – see item VI)*
- VI. Conventions and Recommendations within the field of competence of CDCJ
 - *European Convention on Nationality (presentation & debate on statelessness in Europe)*
 - *Promotion of instruments recently prepared by CDCJ (written information)*
- VII. Legislative developments in member states in the areas of public and private law
- VIII. Work of other Council of Europe bodies
- IX. External co-operation
- X. Elections and appointments
- XI. CDCJ Opinions
- XII. Request for observer status: International Social Service (ISS), United Nations High Commissioner for Refugees (UNHCR)
- XIII. Any other business
- XIV. Date and place of next meeting

APPENDIX II**Impact of the internet and new technologies on rules of evidence and modes of proof
in areas of civil and administrative law****TERMS OF REFERENCE
FOR A DRAFTING GROUP OF CDCJ MEMBERS**

Task

Develop guidelines giving practical advice on the impact of the internet and new technologies on rules of evidence and modes of proof, primarily in the areas of civil and administrative law proceedings, addressing the issues indicated below.

The guidelines should seek to give practical advice to courts and legal practitioners related to electronic evidence and should not be aimed at harmonisation of the national legislation of Member States. The guidelines should be established at the level of principles general enough to accommodate the diversity of legal systems in the member states.

Oral evidence

- i. Issues to be addressed include:
 - possibility to receive testimony by means of live video link and use of pre-recorded testimony in certain circumstances provided that the court and the parties are provided with an adequate and proper opportunity to challenge and question the witness giving it (pre-recorded testimony may be appropriate in the case of children);
 - factors which might affect a judge's decision as to the appropriateness of taking witness testimony remotely include: a) significance of the testimony (if a person is a key witness it may be more appropriate to question him/her at court); b) status of person giving testimony (eyewitness, expert, etc); c) security and integrity of the video link through which testimony is being transmitted; d) costs of bringing the relevant witness to a court;
 - the possibility of receiving evidence via a connection, public or private, if the transmission is offering sufficient technical security and responding to procedural safeguards

Electronic evidence

- ii. Issues to be addressed include:
 - the establishment of a broad definition of "electronic record" in order to include all forms of electronic evidence;
 - the possibility for parties to submit electronic evidence in electronic form without the need to supply outprints;
 - the potential difference, depending on the particular legal system, in the evidential value between private and public documents should be noted.

Collection and seizure

- iii. Having regard to the higher risk of the destruction of electronic evidence, court and pre-court procedures are required which permit the preservation, safeguarding and seizure of electronic evidence, including in urgent cases.

Relevance

- iv. Issues to be addressed include:
 - relevance becomes more important in the electronic environment: provision or demand for documentation can be excessive or speculative;
 - in order to achieve efficiency, matters of relevance need to be identified in advance of proceedings, including determining the relevance of the electronic materials sought;
 - it will be for a judge to decide on the potential probative value of electronic materials sought having regard, inter alia, to the ease of retrieval and costs involved in obtaining them.

Reliability

- v. Issues to be addressed include:
 - ways to identify the source of evidence (i.e. mail server); courts should be aware of the potential probative value of metadata;
 - the scope for manipulation is greater with electronic evidence and ways to identify whether evidence has been tampered with are necessary;
 - the general reliability of evidence signed by a qualified electronic signature or other secure methods of identification;
 - the burden of establishing the reliability of electronic evidence carried by the party seeking to rely on it (for example, by providing expert affidavit);
 - updating judges and legal practitioners on the evolution of information technology and processes which may impact on the value of electronic evidence.

Admissibility

- vi. Issues to be addressed:
 - the admissibility of evidence obtained or received in breach of human rights (for example, seizure on private property without a court order, evidence obtained in breach of data protection laws);
 - the circumstances in which exceptions are permissible;
 - the factors to be taken into consideration;
 - allow gathering of evidence in line with rules of the requesting jurisdiction.

Storage and preservation

- vii. Issue to be addressed:
 - the appropriate safeguards for storage and preservation of electronic evidence including, in particular, metadata which may be required for purposes of review and appeal.

Other issues

- viii. Other issues include:
- specific questions which arise in relation to the determination of the law applicable to evidence obtained in relation to cross-border cases and the remedies available, for example in the case of failure to respect court authority and integrity of court proceedings (contempt of court) or perjury;
 - standards to be observed for transmission of electronic evidence between public authorities including courts as well as for the electronic submission of evidence to the court.

APPENDIX III

Parliamentary Assembly Recommendation 2106 (2017) on “Parliamentary scrutiny over corruption: parliamentary co-operation with the investigative media”

CDCJ opinion

adopted at its 92nd plenary meeting (22-24 November 2017)

1. The European Committee on Legal Co-operation has taken note of Recommendation 2106 (2017) of the Parliamentary Assembly on “Parliamentary scrutiny over corruption: parliamentary co-operation with the investigative media” and Resolution 2171 (2017) related thereto.
2. CDCJ welcomes the initiative of the Parliamentary Assembly in calling on member states to adopt a precise but broad definition of “whistle-blowers” and ensure that they are given protection which is at least equal to that provided for in the Committee of Ministers Recommendation CM/Rec(2014)7 on the protection of whistleblowers prepared by the CDCJ.
3. Regarding the Parliamentary Assembly’s recommendation to assess the conformity of national legal provisions on the protection of whistle-blowers with the principles laid down in Recommendation CM/Rec(2014)7, CDCJ considers that, given the relatively short period of time (approximately 3 years) which has elapsed since adoption of the recommendation, it is premature to review the follow-up given to it by member states.
4. The CDCJ recalls that, in the pursuit of its terms of reference, the committee is, in particular, responsible for (i) facilitation of co-operation and understanding between member States within its areas of competence; and (ii) provision of 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 respond to any request for technical assistance from member States, subject to available resources. Activities for promoting and supporting the implementation of Recommendation CM/Rec(2014)7 are undertaken by CDCJ, as part of its work and as far as possible.