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EUROPEAN COMMITTEE ON CRIME PROBLEMS (CDPC)

**3rd meeting of the Working Group of Experts on
Artificial Intelligence and Criminal Law**

10 July 2020
10:00 - 13:00

Teleconference

Meeting Report

1. Opening of the meeting by Mr Jan Kleijssen, Director, Information Society and Action against Crime Directorate

The meeting was opened by Mr Jan Kleijssen, Director, Information Society and Action against Crime Directorate. He extended a warm welcome to everyone who was able to attend this virtual meeting. He congratulated Professor Gless on the preparation of the Feasibility Study on a future Council of Europe instrument on artificial intelligence and criminal law which is under consideration today and thanked the members of the group for having provided their comments on the text.

Mr Kleijssen underlined the urgent need for regulation on this topic with level 5 self-driving cars becoming a distinct possibility in the not too distant future. He highlighted the clear wish among most member States for a binding instrument in the field of AI and criminal law, with particular focus on automated vehicles, which once accomplished, would be a worldwide first.

Other international organisations are also working in the field, the recent UN regulation on Automated Lane Keeping Systems focussing on the safe introduction of automated vehicles in traffic being one such recent achievement.

Within the Council of Europe, the Ad hoc Committee on Artificial Intelligence (CAHAI) is currently working on establishing an overall legal framework in the field of AI with its proposals expected to be submitted to the Committee of Ministers by the end of this year. However, the necessity to develop specific instruments in specific fields remains.

Mr Kleijssen concluded by wishing the Group good progress in the current meeting and expressing his hope to bring the experts together in person in the near future.

2. Adoption of the draft agenda

The draft agenda was adopted without comments. The Secretariat underlined the high relevance of the work of this Group to the future work of the CDPC.

3. Information by the Secretariat and the Chair

Mr Chiaromonte, Head of the Criminal Law Division and Secretary to the CDPC, reminded the Group of the background to its work. In 2018, during the plenary meeting of the CDPC, a very successful thematic session on artificial intelligence and criminal law was held with speakers from all over the world. It was subsequently decided that the CDPC would begin work on this highly technical issue and set up a Working Group.

A questionnaire was prepared by this Working Group, sent to all member States and an assessment of the very detailed replies was then prepared by Professor Gless who the Group had elected general rapporteur. The Working Group was then instructed by the CDPC to prepare a feasibility study on the basis of this work.

Today's task is to finalise the feasibility study which will then be sent to the CDPC who will decide on the necessary follow up.

4. Examination of the comments made on the draft Feasibility Study of a Future Instrument on Artificial Intelligence and Criminal Law

Professor Gless was given the floor and began by thanking Mr Kleijssen and the CDPC for their support. She underlined the need to carry on with the current momentum.

She added that the feasibility study frames our understanding of AI and its impact on criminal justice and looks at the narrow area of criminal liability. The study tries to answer whether a binding instrument would be useful by using the example of driving automation.

Prof. Gless underlined that this is a cross-border issue. In this regard, AI can be disruptive in various fields, for instance in the banking and finance industries, however AI has the ability to cause real physical harm when used in the framework of self-driving cars/automated vehicles.

To finish Prof. Gless highlighted the following questions that should be borne in mind as the work progresses:

1. Should the question of criminal liability be at the centre? Should the work be limited to the narrow area of self driving?
2. Should the work be broadened to include the interests of victims?
3. Should data protection be included or are the provisions of the Budapest Convention sufficient?
4. How should socially-accepted risks be framed?
5. How should this work be linked to the work of the CAHAI?

The Secretariat thanked Prof. Gless for emphasising these issues.

The Group began its examination of the feasibility study and the comments received by looking at some general comments received from certain delegations concerning the scope of the future instrument. Although the title of the feasibility study refers to AI and criminal law, the document itself and indeed the work of the Group has concentrated on driving automation.

The Secretariat continued that the choice of the scope of the instrument could not be decided solely by the Working Group. The Group could make its views and position known, and then it is up to the CDPC to decide.

The same applies to the choice of future instrument. Although the title of the feasibility study refers to an instrument, the word convention is currently used throughout the text. The Group decided to change the word convention to instrument in order to leave the choice of instrument open, bearing in mind that the CDPC has already expressed its preference for a convention.

The Group agreed that the best way forward was to adapt the introduction and the conclusions to the feasibility study, setting out the choices to be made and leaving the final decision regarding scope and type of instrument to the CDPC.

The question of the instrument reaching an area broader than the area of criminal law was also discussed by the Group. It was agreed that although automatic driving issues, for example, might touch other areas such as administrative law, the provisions of the future instrument should remain limited to the field of criminal law.

On the subject of redress mechanisms (1.3), certain delegations pointed out that not only do the usual redress mechanisms cover intentional criminal offences, therefore would not apply in cases linked to AI, they also go beyond of the agreed upon scope of the future instrument. After some discussion, the Group decided to leave the mention of redress mechanisms in the text as a possibility to be considered by the CDPC.

Concerning 2.2. international initiatives on AI and criminal law, the Group decided to add mention of the work being carried out by the CAHAI.

Under 3.2 the potential of the Council of Europe to pave the way for the adoption of an international convention on AI and criminal law, it was agreed that the possibilities for international co-operation and 3rd States joining a future convention would be kept in mind and reflected upon should a convention result.

On point 4.1.2 certain delegations argued that issues relating to data protection and cybersecurity should not be excluded from the analysis. There is a need to avoid conflicting regulations and it was underlined that the work under discussion today should go hand in hand with the work of the T-CY (Budapest Convention) or the CAHAI for example.

The idea of socially-accepted risk (4.2) was mentioned by certain delegations who underlined that in their experience this notion is not widely known nor legally clear. In order to give a global understanding to this concept, the Group decided to introduce concrete examples into the text highlighting the link between this notion and the cases in the feasibility study.

Under 4.4 on preventive measures, it was agreed to take a cautious approach and soften the language as certain States may not deem it necessary to set up their own independent monitoring body.

5. Approval of the draft Feasibility Study

The Group agreed to redraft the conclusions of the feasibility study and that it would be up to the CDPC to decide if the future instrument would cover automated driving as a minimum or develop this issue further/take a broader approach.

It was recalled that the CAHAI is working on a possible convention on AI, which could be a general framework instrument to be supplemented by other more specific instruments, of which this possible future criminal law instrument could be one.

It was agreed that the feasibility study would be revised by Prof. Gless and the secretariat taking into account today's discussions. It would then be sent out to the Working Group for a final review by early September. Discussions on the text would, however, not be reopened and the text is now considered approved by the Group, should nobody oppose the amended text / subject to any final minor modifications.

The next step is for the text to be submitted to the CDPC at its plenary meeting in the 1st week of November for approval.