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COMMISSION WORKING DOCUMENT

**on the feasibility of EU legislation in the area of protection of witnesses and
collaborators with justice**

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1. INTRODUCTION

This document is the result of the preparatory work required to assess the impact of any European legislative proposal in the area of protection of witnesses and collaborators with justice. This working paper sets out the state of play on legislation and general practice at national, European and international level. This is followed by an analysis of problems, objectives and possible policy options. It also outlines the key issues which need to be discussed in more depth before possibly leading to a harmonised European system for the protection of witnesses.

The Commission's Legislative and Work Programme for 2007¹ listed the protection of witnesses and individuals who cooperate with the judicial process as a priority initiative. However, the Impact Assessment procedure has led to the conclusion that at present it is not advisable to proceed with legislation at EU level.

2. BACKGROUND

Providing witnesses with adequate protection can play a crucial part in bringing offenders to justice since the successful conclusion of each stage in criminal proceedings often depends on the cooperation of witnesses. Offenders often try to prevent witnesses from testifying, even by means of threat. All persons have a civic duty to give testimony as witnesses, and states have a duty to protect witnesses against any interference.

Witness protection is the process in which witnesses who testify in criminal trials are provided with specific procedural and non-procedural protection measures aimed at effectively ensuring their - sometimes including their relatives'- safety before, during and after their testimony. Collaborators with justice can also be provided with protection measures available for witnesses. In organised crime cases a collaborator is a person holding valuable information being him/herself engaged in criminal activity and therefore subject to prosecution and punishment themselves.

The need to consider legislation at EU level in witness protection has been under consideration for years. Already in 1997, Recommendation 16 of the Action programme on the prevention and fight against organised crime² suggested to examine the needs on protection of witnesses and persons who collaborate in the action of justice. The Council Declaration of 25 March 2004 on combating terrorism and the Hague Action Plan³ also refers to a proposal on the protection of witnesses and collaborators.

3. PREPARATORY WORK

The preparatory work to develop a European binding legislation on the protection of witnesses goes back to 2004. The aim was to collect information on Member States'

¹ Communication COM(2006) 629 final (24.10.2006), p.22.

² OJ C 251, 15.08.1997., p.1.

³ Communication COM(2005) 184 final (10.05.2005) p.23.

legislation, administrative structures and practical experience in order to identify legal lacunas and operational weaknesses having an impact at EU level and to suggest solutions with a European added value. A comparative AGIS project on witness protection⁴ besides analysing legislation and practice, produced proposals for possible EU legislation. The Commission also participated in the joint Europol-ISISC-OPCO⁵ working group with the aim of exploring the possibilities for the harmonisation of the national legislation on witness protection⁶.

The Commission held meetings in 2006 and 2007⁷ to consult Member States representatives and witness protection experts that provided an important input for the Commission in considering the need for legislative work at EU level.

A Eurobarometer survey of 2006⁸ on EU citizens' views demonstrated support for dealing with witness protection at European Union level. 86% of the citizens supports the establishment of an EU policy dealing with cross-border and international cooperation on witness protection, 45% even strongly supports this idea⁹.

Efforts have been made to collect sound data and statistics (e.g. Europol information, national public documents, answers to the Council of Europe special working group's questionnaires, expert meetings). Due to the confidential treatment of individual cases, no exact statistical data is available about protection issues. In order to provide the highest safety of the persons, confidentiality of handling personal data and details of the protection programmes are of great importance. Nevertheless, most countries have experienced an increase in the need for witness protection over the past 5-10 years, both in the number of applications and of witnesses admitted to the protection programmes.

4. LEGISLATIVE AND OPERATIONAL ACTIONS AT EUROPEAN, NATIONAL AND INTERNATIONAL LEVEL

The current **European Union instruments**, the Resolution on the protection of witnesses in the fight against international organised crime (1995)¹⁰ and the Resolution on individuals who cooperate with the judicial process in the fight against international organised crime (1996)¹¹, have a limited scope by applying only to cases of fighting organised crime and take soft law form. In addition, the possibility to grant benefits in exchange for information is foreseen in binding legislation like the Framework Decision on terrorism¹², and the Council Framework Decision on the standing of victims in criminal proceedings¹³.

Most **EU Member States** have **legislation** on witness protection either in a separate act or as part of their code of criminal procedure. They usually provide for definitions (protected

⁴ ed. Gert Vermeulen, 'EU standards in witness protection and collaboration with justice', Principal: European Commission (JAI/2004/AGIS/077), IRCP-Ghent University

⁵ International Institute of Higher Studies in Criminal Sciences (ISISC) and Monitoring Centre on Organized Crimes (OPCO), both located in Italy/Siracusa

⁶ Meetings held in Siracusa 8-10 March 2005 and 26-29 October 2005 resulting in the document 'Proposed draft harmonised legislation on witness protection' and its 'Explanatory report',

⁷ Meetings were held in Brussels on 21 February 2006 - Workshop on the Protection of Witnesses and Collaborators of Justice and 5 March 2007 - Meeting of European Witness Protection Experts

⁸ Special Eurobarometer survey, No 264 – The role of the European Union in fighting against organised crime, http://ec.europa.eu/public_opinion/archives/ebs/ebs_264_en.pdf

⁹ Only 7% opposed to the launching of an EU policy and 7% replied "don't know".

¹⁰, OJ C 327, 07.12.1995, p.5.

¹¹, OJ C 010, 11.01.1997, p.1.

¹², OJ L 164, 22.06.2002, p.3., Article 6

¹³, OJ L 82, 22.03.2001, p.1., Article 8

witness, anonymous witness, collaborator with justice), procedural measures (arrangements for trial procedure, alternative methods of giving evidence), non-procedural measures (physical protection, relocation, change of identity), the necessary implementation structures with the role of the different law-enforcement bodies pre-, during and after-trial, rights and obligations of parties in the protection system. International co-operation in the area of witness protection is usually also mentioned, without great detail.

Some countries have specific legislation governing the **operation of their witness protection programmes** while others, have none; some view witness protection as largely a police function while others give a key role to the judiciary and government ministries; some have one national witness protection programme, while others have several regional or local programmes. Also, there are significant variations between countries in the types of measures they have introduced to facilitate witness co-operation, partly reflecting differences in the scale and nature of the crime and partly linked to differences in legal traditions and environments (see annex).

Although the words '**collaborator with justice**' will not often be found in the national penal codes, nearly all of the countries, provide the possibility for the court judge to give a lighter punishment to offenders who help the police/judicial authorities to clarify their or other crimes. Nevertheless, some Member States have chosen not to enact regulation on collaborators (either because they are seldom confronted with the types of crimes for which the figure is effective or because they have moral objections to the waiving/mitigating of punishment). Other Member States, on the contrary, make a very broad use of the figure.

Special attention was paid to the work of the **Council of Europe**. This international body has been dealing with witness protection since the mid-90s and has also carried out legislative activities: the variety of different situations in which witnesses may need protection in Recommendation (1997)¹³ on the intimidation of witnesses and the rights of the defence as well as in the Recommendation (2005)⁹ on the protection of witnesses and collaborators of justice. In relation to procedural protection a significant contribution has been made through the rulings of the European Court for Human Rights, specifically on Article 6 of the European Convention on Human Rights on the guarantee of a fair trial. Mention should also be made of other Council of Europe legal instruments¹⁴ that have provisions on protection issues.

There are also practical arrangements for co-operation in the area of witness protection across Europe. A **European Liaison Network**, co-ordinated by Europol - who does not have an actual mandate on the subject - and comprising the heads of specialist witness protection units on a voluntary basis, was created in 2000. Over the years the network has grown into global professional fora, reaching to all 5 continents¹⁵. The meetings of the network serve as the platform for exchanging information and developing instruments, guidelines but do not provide for operational activities. On the basis of the debates within the Europol network, two documents have been drafted and shared for use as 'EU guidelines': the 'Basic principles in the European Union police co-operation in the field of Witness Protection' focusing on the international relocation of witnesses while the 'Common Criteria for taking a witness into a

¹⁴ Rec (2001)11 guiding principles on the fight against organised crime; Rec (1997)1325 Trafficking in Women and Forced Prostitution in Council of Europe Member States; Rec (2000) 11 action against trafficking in human beings for the purpose of sexual exploitation; Criminal Law Convention on Corruption (No. 173, 27.01.1999.)

¹⁵ The network consists, at present, of the Heads of Specialised Units on witness protection/national contact points from all 27 EU countries, 10 non-EU countries from Europe, 7 overseas observers . and 12 international organisations active in this field.

Protection Programme', deals with the criteria for taking a witness into a protection programme.

As for **international co-operation on witness protection** – including intra-EU co-operation and cooperation with the international judiciary or third states - countries generally enter into bilateral agreements on an ad hoc basis. The only multilateral agreement at European level has been agreed by the three Baltic states¹⁶ in order to co-operate in criminal matters by ceasing further prosecution or reducing the punishment of persons who have rendered assistance to the law enforcement authorities of another party to this agreement.

Given that the rules of **international jurisdiction** and **international criminal procedure** have only begun to develop over recent years the International Criminal Tribunal of the Former Yugoslavia (ICTY, 1993) has been a vital source and the primary point of reference in both areas. The rules applied by the ICTY are equally applicable to a large extent to the International Criminal Court (ICC, 1998). However, while in international criminal law there is no definition of what a 'witness' is and of the level of protective measures that a witness should expect in criminal proceedings, it can be inferred from the rules of procedures and case law of these bodies that parties giving criminal testimony are subject to some rules and guidelines. The difficulties in providing assistance to Court witnesses mainly relate to the absence of a specific territory and thus jurisdiction, limited budget for these matters and lack of cooperation with other countries. As these courts play a crucial role in maintaining peace and justice, future EU legislation could benefit their functioning in regard to witness protection¹⁷.

While there is no specific **UN instrument** in binding or non-binding form that deals exclusively with witness protection, there has been a trend to include direct reference to witnesses in relevant Conventions adopted in recent years, such as UN Convention Against Transnational Organised Crime (UNTOC, 2001)¹⁸ and UN Convention Against Corruption (UNCAC, 2003)¹⁹. The Conventions call on State Parties to take appropriate measures in accordance with their domestic legal system and within their means to provide effective protection for witnesses who give testimony concerning offences established in accordance with the Convention. In order to assist UN Member States in their implementation, the United Nations Office on Drugs and Crimes (UNODC) started in 2005 the development of guidelines for witness protection.

5. PROBLEMS DUE TO THE CURRENT STATE OF PLAY

The analysis of the situation of witness protection legislation and practice confirms that despite certain achievements, in particular in the last few years, the framework is not sufficiently stabilised, meaning on the one hand that there are great varieties of legislative and administrative structures in Member States, and on the other hand it is an area of continuous development.

Various elements contribute to this situation, such as:

¹⁶ Agreement between the government of the Republic of Lithuania, both governments of the Republic of Estonia and of the Republic of Latvia on co-operation in protection of witnesses and victims (2000)

¹⁷ Agreement between the International Criminal Court and the European Union on co-operation and assistance (April 2006) –

¹⁸ Art. 24 Protection of witnesses

¹⁹ Art. 32 Protection of witnesses, experts and victims

- many different actions from international bodies touching upon issues related to witness protection (EU, including Europol, Council of Europe, ICTY/ICC, G8-level);
- the various degrees of implementation of the mostly non-binding instruments;
- the need for improved co-ordination among the relevant authorities of the Member States and EU bodies when elaborating policies and programmes related to witnesses, including the absence of a commonly agreed good practice to ensure effective protection;
- difficulties in operational cross-border cooperation and the need for enhanced use of existing networks;
- the absence of a comprehensive vision on what has been achieved so far by lack of data and analyses, mainly due to the confidential nature of information.

The substantial differences that exist between the penal laws of the Member States make the cooperation between them, in the fight against often highly sophisticated criminal groups, less effective. Cross-border co-operation in witness protection is particularly hampered with countries that do not have legislation and/or administrative structure on witnesses and protection programmes, even if within their borders they carry out such activities for their own citizens. Increasingly countries where practical difficulties arise from their own geographical (small territory) or demographic characteristics (densely populated) and countries that are highly affected by criminal organisations need to relocate protected persons to other countries.

6. JUSTIFICATION FOR ACTION BY THE EUROPEAN UNION

Although the primary responsibility for addressing many of the issues in witness protection is at national level, this analysis demonstrates the existence of a European dimension. Action at EU level would have added value in fighting organised crime by enhancing cross-border co-operation through encouraging witnesses to testify in return for protection. While respecting the different legal systems and administrative organisation of each Member State, a common approach in relation to the protection of witnesses, collaborators, and people close to them could lead to more conviction in cases of organised crime. Witness protection should eventually be made available in all the Member States, as it is a very powerful tool in the fight against organised crime and terrorism since the closed nature of such groups makes it difficult to use traditional investigative methods.

In order to avoid duplication and unnecessary costs, the best use of the existing networks of national bodies, such as the Europol network, has to be considered.

6.1 POLICY OPTIONS UNDER CONSIDERATION

Several policy options have been considered and analysed for their strengths and weaknesses. In the light of the Impact Assessment procedure, three policy options were identified: maintaining the status quo and two options setting possible basis for EU legal action in witness protection (one offers a general framework in the area and the other focuses on relocation).

In any case, duplication of efforts should be avoided: there are indeed already many documents available in the form of non-binding documents originating from different international players.

6.1.1. POLICY OPTION 1 - STATUS QUO BASED ON DEVELOPING CURRENT ARRANGEMENTS

If status quo is maintained, the existing legal and operational instruments should form the core of a European policy framework and be complemented by a wider co-ordination. A common EU policy should aim at strengthening consistency, effectiveness in legislative and practical activities and improve co-ordination.

6.1.2. POLICY OPTION 2 - HARMONISED WITNESS PROTECTION SYSTEM IN THE EU THROUGH MINIMUM STANDARDS IN A BINDING LEGISLATION

Using the work developed by Europol while also taking account of the Recommendations of the Council of Europe, EU legislation could be developed which would require all EU Member States to put in place a legislative framework and an institutional structure in the area of witness protection.

On the one hand, EU legislation on a harmonised witness protection system in all Member States could be achieved with the full respect of the different national legal systems and administrative organisation. This approach would result in an enhanced compatibility of national criminal justice systems (i.e. have basic legislation and an appointed authority responsible for witness protection).

Nevertheless, it should be recalled that the latest attempt was made at the Council of Europe recently (2005) on this particular issue and its special expert group on witness protection concluded in favour of a new recommendation. Although a study was undertaken to identify shortcomings in the existing system, it never led to the drafting of a convention. Taking on board the existing practices and documents, it is possible to envisage at EU level a harmonised witness protection system by introducing minimum standards in a binding legislation. But taking into account the difficulties set out in the analysis above, there is a need to explore the matter in more detail in this fast moving area.

6.1.3 POLICY OPTION 3 - INCREASED CO-OPERATION BETWEEN MEMBER STATES IN THE AREA OF RELOCATION THROUGH BINDING LEGISLATION

There is no multilateral agreement on the applicable rules concerning witness relocation and international cooperation in witness protection in general. States enter into bilateral agreements on a case by case basis with each other or/and the international judicial bodies in order to facilitate co-operation.

One of the main driving forces behind formalising the existing practice is that relocation of protected persons is by far the area that should enjoy the highest priority for action due to increased need (geographical concerns, widespread criminality etc.) for temporary or permanently locating people abroad in order to ensure their safety.

In order to have a functional system for relocation within the EU, certain obligatory legislative and administrative provisions would have to be implemented by Member States. European citizens would also directly benefit from a reassurance that they would be provided with the necessary safety measures, if needed even abroad, and for this reason likely to be more willing to testify.

Although the practical advantages of a harmonised approach to relocation cannot be disputed, the Commission's expert meetings led to the conclusion that Member States would not accept a centralised EU system for facilitating co-operation. Also, the experts agreed that Europol/Eurojust should not be equipped with an operational mandate. There is a need to

further examine what the role of these European bodies can be in an EU-wide co-operation regime in witness protection.

The proposal of the Europol-ISISC-OPCO working group on minimum requirements for potential legislation at European Union level provides a model bilateral agreement for relocation for witnesses. This approach is based on the present practice of state co-operation. Due to security and confidentiality considerations, these agreements are not published in the national official journals. Although it is legally possible to insert the model agreement into an EU legal instrument and encourage Member States to use it²⁰, in practice it would not bring the desired policy improvement at EU level.

Further studies should be carried out in order to identify an acceptable way forward for the creation of a European-wide co-operation in witness protection as it is complex area which touches on many other sensitive and complicated topics (e.g. change of identity). Furthermore, new developments, such as the use of biometrics, that affect protection of witnesses need to be looked at with care.

7. CONCLUSIONS

In the light of the Impact Assessment exercise, **time does not seem ripe for immediate legislative action at EU level in witness protection.** Earlier efforts at international level show the difficulties in adopting a binding instrument. Although there is legislation, priority policy areas and judicial decisions at the level of the Council of Europe that underpin the need for binding action in the area of witness protection, efforts have failed to reach binding legislation. The latest work made by the Council of Europe consisting of over 40 Member States including all EU Member States did not move towards binding legislation in the form of a convention as States were not ready to commit themselves, and agreement could therefore only be reached on a soft law instrument.

On the basis of the expert meetings held by the Commission and the written comments coming from the experts, the assessment is that at present Member States would be reluctant to accept binding legislation to regulate their ongoing informal cooperation.

Nevertheless, there are visible trends indicating the need for more co-operation among countries that could eventually lead to the acceptance of formalised rules and structures in the area of witness protection on due course. The oldest practice and legislation within Europe goes back only 16 years (Italy, 1991, on pentiti/collaborators with justice). Meanwhile, most EU Member States have issued either specific law or at least included reference to the protection to threatened witnesses in their criminal law. However, they have not done this in a uniform way. In recent years, on the other hand, countries exchange in an informal way 'lessons learned' when setting-up a witness protection system and also take into account the principles developed by Europol and the Council of Europe. For this reason, there are certain similarities in the witness protection regimes established during the last 2-3 years, in line with different legal systems and the fundamental principles of administrative organisation of each Member State.

Factual trends in criminality, i.e. the increase of activity in number and scale of cross-border organised criminal and terrorist groups, has led states to strengthen their cooperation. As not just criminals but ordinary citizens also enjoy the benefits of free movement within the EU, it is likely that the number of European citizens being asked to testify as witnesses in highly significant criminal cases will rise.

²⁰ Similarly to the practice of joint investigation teams

When elaborating an EU policy on the protection of witnesses the use of the latest technological and information-society developments (such as video-links) also need to be looked at in order to facilitate transborder co-operation. They should be used more widespread by law-enforcement agencies, including the protection of witnesses.

The recognition of the increased need for co-operation in fighting cross-border organised criminals via witnesses that need protection and the implementation efforts for developing witness protection systems required by the UN Conventions might lead to changes in attitude at political and at operational level.

On the basis of the above, the European Commission suggests putting on hold legislative activity in the area of witness protection for the time being while looking at the feasibility of EU level action, in the mid-term (4-5 years) period, with the elaboration of a paper. To that end, the specific financial programme on 'Prevention of and Fight against Crime' for 2007-2013²¹ could be used for further studies, collecting information; the 'protection and support to witnesses' is listed as a theme and as a specific objective, reflecting the importance of the issue at EU level.

²¹ Council Decision 2007/125/JHA (12.02.2007), OJ L 58, 24.02.2007., p.7.

Annex

Laws on witness protection in Member States and Norway

	Witness protection legislation	Witness protection unit	Identity change possible	Identity change possible by law	Law on collaborators with justice
AUSTRIA	NO	YES	YES	YES	NO
BELGIUM	YES	YES	NO	NO	NO
BULGARIA	YES	YES	YES	NO	NO
CZECH REPUBLIC	YES	YES	YES	YES	NO
CYPRUS	YES	YES	YES	YES	YES
DENMARK	NO	YES	YES	NO	NO
ESTONIA	YES	YES	YES	YES	NO SPECIAL LAW, SME ARTICLES IN THE SURVEILLANCE ACT
FINLAND	NO	YES	NO	NO	NO
FRANCE	NO	NO	NO	NO	
GERMANY	YES	YES	YES	YES	
GREECE	NO	NO	NO	NO	
HUNGARY	YES	YES	YES	YES	
IRELAND	NO	YES	YES	NO	
ITALY	YES	YES	YES	YES	YES
LATVIA	YES	YES	YES	YES/NO ²²	YES ²³
LITHUANIA	YES	YES	YES	YES	
LUXEMBOURG	NO	NO	YES	NO	
MALTA	YES	NO	NO	NO	
NETHERLANDS	NO	YES	YES	NO	NO

²² Law allows the creation of new identity but the old one cannot be deleted

²³ Project on law is tabled in front of the Parliament and likely to enter into force in 2008

NORWAY	NO	YES	NO	NO	NO
POLAND	YES	YES	YES	YES	YES
PORTUGAL	YES	YES	YES	YES	
ROMANIA	YES	YES	NO	YES	
SLOVAKIA	YES	YES	YES	YES	YES
SLOVENIA	YES	YES	YES	YES	NO
SPAIN	NO	NO	YES	NO	
SWEDEN	YES	YES	NO	NO	
UNITED KINGDOM ²⁴	YES	YES	YES	YES	YES

²⁴ Including the separate jurisdictions of England/Wales, Scotland and Northern Ireland