



## Witness protection programmes EU experiences in the international context

**SUMMARY** *Witness testimony has critical value in investigating and prosecuting crime. For this reason many witnesses – in particular those who testify against organised crime – are intimidated and threatened.*

*The state protects witnesses in various ways, sometimes going as far as to relocate them and give them new identity through participation in witness protection programmes (WPPs). This tool is however used only in exceptional cases, with admittance governed by strict, objective criteria.*

*The US Federal Witness Security Programme was the first such scheme, and has served as a model for other countries. UN conventions, the practice of international criminal tribunals, Council of Europe recommendations and the case law of the European Court of Human Rights are among other sources of inspiration for countries building their own programmes.*

*There is a growing number of WPPs in the EU Member States. Differences between them have been linked to the variety in legal traditions and experiences with organised crime.*

*The EU has given some guidance to MS regarding witness protection in the context of organised crime and has considered harmonising national legislation in this area. The idea was put on hold, however, following the Commission's impact assessment of 2007.*

In this briefing:

- Context
- Witness protection programmes
- The American model
- International instruments
- EU Member States
- EU policy
- Main references

### Context

Whereas effective investigation and prosecution of crime is not possible without witness testimony, making full use of such evidence is a real challenge to criminal justice systems. This is because many witnesses are intimidated by those against whom they are called to testify. While in most cases this does not lead to them facing life-threatening situations, the lives of some may actually be in danger, in particular in cases involving organised crime.

States respond to this by granting witnesses various forms of protection; its scope depends on the type of witness and crime, as well as on the level of threat or intimidation. This response is arguably not only a practical necessity, but also an obligation of the state towards its citizens.

Procedural measures (including video-conferencing, voice and face distortion and *in camera* sessions or even anonymous testimony) are thus used to conceal a witness's identity in pre-trial investigation and during the court trial. If this is not enough, threatened witnesses may also benefit from non-procedural protection. In this respect basic police measures, such as patrolling around the witness's residence, are often sufficient to guarantee the physical safety of the witness.



© (GoodMood Photo) / Fotolia

However, such measures have turned out to be inadequate when prosecuting members of powerful mafia-type syndicates and terrorist organisations. This has led some states to introduce fully-fledged witness protection programmes (WPPs), providing for relocation and identity change of witnesses. Over time such programmes have come to cover witnesses in cases related to other forms of serious crime.

The number of jurisdictions operating such programmes has grown exponentially in recent years, which has been linked to the increase in activities involving organised crime. EU Member States (MS) are part of this trend, with some countries having established sophisticated programmes in this area, which is not harmonised at EU level.

## Witness protection programmes

The United Nations Office on Drugs and Crime ([UNODC](#)) has defined WPPs as "formally established covert programme(s) subject to strict admission criteria that (provide) for the relocation and change of identity of witnesses whose lives are threatened by a criminal group because of their cooperation with law enforcement authorities".<sup>1</sup> Given the financial impact for the state and drastic changes in the life of the persons concerned, such programmes are considered a last resort. They are thus reserved for very important cases in which the witness's testimony is crucial to the prosecution and there is no alternative way of ensuring the security of the witness.

### Witness protection units

While in some countries witness protection is based on legislation, in others it has evolved naturally as part of police activities. WPPs are run by covert units, staffed by specially trained officers, whose operations are highly confidential. Such units operate within various institutional structures. In some countries they are part of the police force, while in others they are organisationally separate from the police. In this

case they may be located within a ministry (e.g. Ministry of Justice) or the State Prosecutor's Office or else operated by an independent multidisciplinary body.

It is argued that a WPP can function well within any of those structures, as long as protection remains separate from investigation to ensure objectivity and minimise the risk of admission to the programme becoming an incentive for witnesses to give false testimony.<sup>2</sup>

### Admittance criteria

Protection may be given to different types of person – victim-witnesses, collaborators with justice, and other participants in a criminal case (e.g. innocent bystanders, prosecutors or undercover agents). The extent of protection for each group varies between countries.

#### Collaborators with justice

The testimony of persons engaged in a criminal activity and closely connected to the offender may have crucial value in the prosecution of organised crime. This explains why these so-called "collaborators with justice" or "*pentiti*" are a sizeable part, if not a majority, of persons admitted to WPPs. However, in many jurisdictions *pentiti* are also subjected to specific regulation concerning *inter alia* benefits granted in exchange for information.

WPPs are based on the principle of neutrality, which means that participation should never be seen as a reward for testimony. Witnesses are admitted according to a set of predetermined criteria, including:

- The level of threat to the witness's life (the key element)
- The importance of the case
- The decisive relevance of the testimony for the prosecution
- The impossibility of obtaining the information from another source

- The personality of the witness and their potential to adjust to a new life
- The family situation of the person (in particular the number of family members to be covered by the programme).

### Life within the programme

On entering a WPP, the witness signs a memorandum of understanding with the protection authority, enumerating a series of agreed actions. Non-compliance may result in being excluded from the programme, which in practice seems to be limited to serious violations of the programme's conditions.

Witnesses are relocated (mostly within the country, but in exceptional cases also abroad) and kept in secure locations. When necessary, they are repeatedly moved to avoid their whereabouts being tracked down. Once settled, they are discouraged from travelling outside the new home area.

They are supposed to cut all ties with their past. This involves getting rid of all belongings and avoiding direct contact with any individuals they knew in their pre-WPP life including family members who are not part of the programme (WPPs increasingly admit a limited number of family members, especially in societies characterised by strong family ties). Any contact with the witness – including by law enforcement authorities – must be arranged by the protection unit and is undertaken through secure communication channels.

Many witnesses are given a new identity, with the number of personal details changed varying from country to country (e.g. in the UK and the Netherlands only essential elements are modified, while in Italy changes are more far-reaching). As a consequence some or all personal documents, such as driving licences, birth certificates, diplomas etc. must be modified. However, the old identity continues to exist, enabling the witness to return to it if the programme is terminated. It has been noted that the growing use of electronic databases

and biometrics adds to the challenge of dissociating the new from the old identity.

Witnesses benefit from financial assistance, which in most cases is temporary (on average 1-2 years). The level of such support is normally at the protection authority's discretion. It should not surpass, however, the witness's previous legal income, as it should not serve as reward for testimony. In addition, witnesses are provided education and professional training and are assisted in finding new jobs (and even subsidised loans, e.g. in Italy). In many cases they are not allowed to practice their original professions – especially registered ones like lawyers or accountants – to avoid being tracked down through this channel.<sup>3</sup>

Despite various forms of support from the state, participation in a WPP means a drastic and often permanent change in the witness's life, which for some is too difficult to handle. As a consequence there are cases of witnesses withdrawing from the programme, regardless of the danger it may entail.

### The American model

The Federal [Witness Security Programme](#) (WITSEC) is the world's longest-established programme of this kind. It has been operated for more than 30 years by the [US Marshals Service](#). Its core element is the secret and permanent relocation, often coupled with identity change, offered to witnesses and their families.

WITSEC came to life as a new tool in the up-to-then unsuccessful fight against Italian-American Mafia persistently intimidating and murdering witnesses. Between 1971 and April 2011 more than 8 300 witnesses (mostly collaborators with justice) and 9 800 of their family members took part in the programme.

Although it had been initially viewed as very effective it soon became subject to criticism concerning *inter alia* security issues and non-recognition of rights of persons "victimised" by the programme (such as

local communities hosting protected witnesses with criminal convictions and persons whose debts were left unpaid following relocation). This led to the programme being reviewed by Congress, which resulted in more attention given to interests of the public when they clashed with the purpose of WITSEC, stricter admission criteria and the establishment of procedures and penalties for disclosure of information concerning the programme.<sup>4</sup>

WITSEC has become a model for numerous jurisdictions around the world. For example Canada and Australia operate similar federal programmes, coexisting with those set up by individual states, which is also the case for several US states.<sup>5</sup>

### International tribunals

Witness protection has been granted high profile in the practice and jurisprudence of international tribunals dealing with serious violations of humanitarian law. The Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC) all provide for setting up witness and victim support units. These tribunals however have neither their own protection force nor territorial jurisdiction to keep or relocate witnesses. The situation is further complicated through many witnesses originating from conflict zones, for whom relocation abroad may be the only effective measure. Therefore for non-procedural protection the three tribunals have to rely on governments which are not always willing to cooperate. Very few countries have signed relevant agreements with the tribunals.

### The Council of Europe

The Council of Europe (CoE) has recognised the need for witness protection in its recommendations to member states.

[Recommendation \(97\)13 on the Intimidation of Witnesses and the Rights of the Defence](#) set out basic definitions and principles to guide CoE members in their formulation of relevant policy and legislation. It went beyond the context of organised crime,

stating that the measures proposed may be applicable to other serious offences. Moreover, it dealt with vulnerable witnesses, especially in cases of crime within the family. It was followed by [Recommendation \(2005\)9 on the protection of witnesses and collaborators of justice](#) which contained more detailed guidance on WPPs. It stated that such programmes should be applied *inter alia* to all terrorism-related crimes. Both recommendations stressed the need to balance the procedural protection of witnesses and the rights of the defence.

The latter issue has been analysed extensively by the European Court of Human Rights (ECtHR) when interpreting Article 6 of the [European Convention on Human Rights](#) (ECHR) concerning the right to a fair trial.

## International instruments

The development of witness protection programmes in various parts of the world has highlighted the need for mutual legal assistance (e.g. for relocating witnesses abroad) and best practice sharing among countries concerned. Some basic principles have been enshrined in international law, influencing programmes under construction.

### United Nations

Legal instruments elaborated by the UN are prominent among international texts dealing with witness protection. The almost identical provisions of UNTOC ([UN Convention against Transnational Organised Crime](#)) and UNCAC ([UN Convention against Corruption](#)) oblige states parties to take appropriate measures to provide protection for witnesses testifying with respect to offences covered by the Conventions,

### Article 6(3) d ECHR

Everyone charged with a criminal offence has the following minimum rights: (...) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (...)

In the case *Kostovski vs the Netherlands* the ECtHR ruled that "the right to fair administration of justice holds so prominent a place that it cannot be sacrificed to expedience". However, the ECtHR considered measures such as physical separation of the accused from the witness or anonymous testimony to be compliant with the ECHR.<sup>6</sup> In its case law the Court has refrained from judging the admissibility of specific measures as such seeking instead to determine whether the trial as a whole was fair.<sup>7</sup>

### EU Member States

More and more countries in Europe have established WPPs. This has been linked to the increasing impact of organised crime and terrorist groups.<sup>8</sup> There is some variety in the way those schemes are organised, arguably due to differences in MS' legal systems and traditions, as well as in the extent of organised criminal activities.

The range of crimes in relation to which witness protection is applicable also varies from country to country. In Belgium and Italy protection measures can only be used in case of specific crimes, while under Lithuanian legislation they may be used for "serious crimes".<sup>9</sup>

Whereas most MS have established one national or federal programme, some (e.g. Germany and the UK) run several regional or local programmes. As to the number of participants, there are few estimates

available. For example, in 2005 there were about 5 000 participants in the Italian WPP (more than 1 000 witnesses, together with almost 4 000 of their relatives), representing 91 people per million inhabitants. It is unlikely that any other MS comes close to this figure, since in Germany and the Netherlands, for instance, the number of participants in the same year was estimated to be between one and three people per million inhabitants (with about 650 people a year admitted to such programmes in Germany).<sup>10</sup>

### Legal basis and institutional structure

In some countries, including Germany, Italy, the Czech Republic and Lithuania, witness protection is regulated by specific legislation. This is not the case in Austria, Denmark, Finland, France, Greece, Ireland, Luxemburg, the Netherlands and Spain. In the UK, witness protection evolved out of police practice, but was given statutory footing in 2005.

While in some countries, including Austria, Slovakia and the UK, witness protection is associated with the police, in others (e.g. the Netherlands) the programmes operate within the executive or the judiciary. In Italy and Belgium WPPs are implemented by multidisciplinary bodies: respectively the Central Commission, composed of the Under-Secretary of State at the Ministry of the Interior, two judges or prosecutors and five experts in organised crime, and the Witness Protection Commission, composed of prosecutors, high-level police officers and representatives of the Ministries of Justice and the Interior.<sup>11</sup>

In 2005, Estonia, Latvia and Lithuania signed an [agreement](#) on cooperation in protection of witnesses and victims, the only such regional initiative in the EU. The agreement guarantees equal protection of persons originating from the Baltic States, who can be temporary or permanently relocated between those three states.

### EU policy

Whereas the [Directive](#) on the protection of victims of crime has recently been adopted, so far there have been no EU binding texts on witness protection. This is despite the

fact that for almost two decades the area has been of interest to the EU institutions. Furthermore, MS cooperate informally with each other in this field.

In 1995 and 1996 the Council adopted two resolutions. [One](#) established guidelines on the protection of witnesses and their close relatives in cases involving organised crime. It also called on MS to facilitate judicial assistance in this field. The [other](#) concerned collaborators with justice.

In 2000 the so-called "[Millennium Strategy](#)" was adopted which outlined planned EU action in prevention and control of organised crime. The strategy mentioned a proposal to be prepared for an instrument on the position and protection of witnesses and collaborators with justice. It further stated that an EU model agreement should be developed, taking into account the experiences of Europol, and used on a bilateral basis.

Witness protection was also evoked in the context of combating terrorism. After the 2004 Madrid train bombings, the European Council [invited](#) the Commission to bring forward a proposal for a European programme for the protection of witnesses in terrorist cases. The programme was then mentioned in the revised [EU Plan of Action on Combating Terrorism](#) as part of the relevant legislative framework. However, no such programme has seen the light of day.

In 2007 the Commission [assessed](#) the feasibility of EU legislation on witness protection, concluding that the time was not ripe for this and further studies needed to be carried out to identify an acceptable way forward.<sup>12</sup> In 2009, answering a [parliamentary question](#), the Commission [confirmed](#) that it did not intend to legislate in this field.

### Europol's role

Some practical cooperation and best practice sharing has taken place through Europol. As of 2000 the Agency has coordinated the European Liaison Network,

comprising the heads of national witness protection units on a voluntary basis. Over the years the network has become a global professional platform for exchanging information and developing guidelines.

In this vein Europol published the 2000 [Basic principles of European Union police cooperation in the field of witness protection](#) and [Common Criteria for taking a witness into a Protection Programme](#) of 2002.

### EU financing

Through the [Prevention of and Fight against Crime programme](#) – with a budget of €600 million for the period 2007-13 – financial support is provided to projects that prevent and combat crime. Witness protection and support are among the programme's four key strands.

### Main references

[Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime](#) / UNODC, 2008.

[Facilitating witness cooperation in organised crime cases: an international review](#) / N Fyfe and J Sheptycki, 2005.

[EU standards in witness protection and collaboration with justice](#) / G Vermeulen (ed.), 2005.

[Protection of witnesses and "pentiti" in member and observer States](#) / Council of Europe.

### Disclaimer and Copyright

This briefing is a summary of published information and does not necessarily represent the views of the author or the European Parliament. The document is exclusively addressed to the Members and staff of the European Parliament for their parliamentary work. Links to information sources within this document may be inaccessible from locations outside the European Parliament network. © European Union, 2013. All rights reserved.



<http://www.library.ep.ec>

<http://libraryeuroparl.wordpress.com>

## Endnotes

- <sup>1</sup> [Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organised Crime](#) / UNODC, 2008. p. 5.
- <sup>2</sup> [Witness protection as a key tool in addressing serious and organised crime](#) / K Kramer, p. 11.
- <sup>3</sup> UNODC, [op. cit.](#) pp 67–70.
- <sup>4</sup> UNODC, [op. cit.](#) p. 8. See also [Facilitating witness cooperation in organised crime cases: an international review](#) / N Fyfe and J Sheptycki, 2005. p. 3–5.
- <sup>5</sup> For more information about these two countries which have developed sophisticated WPPs see N Fyfe and J Sheptycki [op. cit.](#) table 2.2, pp 14–15; UNODC [op. cit.](#) p. 9; [A Review of Selected Witness Protection Programs](#) / Y Dandurand and K Farr, 2010; and [Review of the Witness Protection Program: Report of the Standing Committee on Public Safety and National Security](#) / House of Commons, Canada, March 2008.
- <sup>6</sup> [EU standards in witness protection and collaboration with justice](#) / G Vermeulen (ed.), 2005, pp 37–50.
- <sup>7</sup> The ECtHR has dealt extensively with related problems, including the following [cases](#): Doorson, Visser, Kok, Windisch and Lüdi.
- <sup>8</sup> K Kramer, [op. cit.](#) p. 11.
- <sup>9</sup> G Vermeulen (ed.) [op. cit.](#) p. 235.
- <sup>10</sup> N Fyfe and J Sheptycki, [op. cit.](#) p. 12.
- <sup>11</sup> [Ibid.](#) pp 5–11. See also [Protection of witnesses and “pentiti” in member and observer states](#) / Council of Europe.
- <sup>12</sup> [Commission working document on the feasibility of EU legislation in the area of protection of witnesses and collaborators with justice](#) (COM(2007) 693 final). The impact assessment followed the publication of a study funded by the Commission under the AGIS programme (JHA). The study included the text of draft EU Framework Decisions concerning anonymous witnesses, protected witnesses and collaborators with justice. It was published in 2005 as [“EU standards in witness protection and collaboration with justice”](#) / G Vermeulen (ed.), 2005.  
A 2006 Eurobarometer [survey](#) on the EU's role in combating organised crime revealed that 86% of EU citizens would support the establishment of an EU policy dealing with cross-border and international cooperation on witness protection. Whereas 45% would even strongly support the idea, 7% were opposed to it and 7% replied “don't know” to this question.