
LEGAL REGULATION OF WITNESS PROTECTION IN THE EUROPEAN UNION

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Summary. To effectively fight organized crime and terrorism, law enforcement agencies have to rely more and more on witness statements, since traditional investigative measures have proven less effective. As a result this has generated an increased need for international witness protection. This article gives an oversight in the legal regulations of witness protection on the level of the European Union (EU). Since international police cooperation is a key aspect of witness protection, Europol's role in the cooperation between the EU member states is included in this article. It concludes with recommendations for future international cooperation regarding witness protection in the EU.

Keywords: legal regulations, witness protection, European Union, Europol, police.

INTRODUCTION

An area that deserves a closer look regarding European police cooperation might be witness protection in the European Union (EU). Or more specific the form in which witness protection is legally embedded on the level of the European Union. More and more it is recognized that the closed nature of criminal and terrorist groups urge to rely on witnesses that are close to the groups they are incriminating since traditional investigative methods have proven to be less successful. In particular when it comes to more serious and organized crimes¹. Organized crime groups (OCG) often try to prevent incriminating witness statements by threatening the witnesses. These threatened witnesses can be granted the status of protected witnesses. In that case the dedicated (police) units or specially trained officials step in. Especially for the smaller and more densely populated member states of the EU, it is paramount to cooperate with the responsible units and authorities of the other member states to ensure functioning and efficient witness protection programmes. In particular when endangered witnesses need to be relocated and are forced to build new lives away from the people against

¹ Enikö, F. (2006). *The rising importance on the protection of witnesses in the European Union*. In: International Review of Penal Law, vol. 77, 2006. p. 314.

whom they have made incriminating statements². This might call for some regulation on EU level.

The **aim** of this article is to appraise the witness protection concept and to evaluate how it is regulated within the EU and what is the possible improvement for legal regulation. In order to answer these questions a literature study has been conducted in addition to personal conversations with members of the Dutch witness protection unit. On their request their names are not mentioned in this article. The information gathered in these personal conversations therefore merely function as a background on the phenomenon of witness protection. The **object** of this article is to give an insight in the legal regulation of witness protection in the EU. Due to its restricted volume this article will do no complete justice to detailed case studies. Furthermore, since international police cooperation is a key aspect of witness protection, Europol's role in cooperation between the member states of the EU will be addressed as well. It will conclude with personal recommendations.

WITNESS PROTECTION

The way witness protection is globally designed is not homogeneous. Even within the EU these differences are found as well³. In some of the individual EU member states this responsibility is embedded within the police forces while in others it is i.e. part of the ministry of interior. Some member states have a specialized unit dedicated to witness protection. Other member states might consider witness protection as a part of basic police work⁴. Despite the institutional differences all the responsible units are concerned with protecting citizens who are cooperating with police and justice in a criminal case and because of which their lives are being threatened. Even the partners and families of endangered witnesses can be protected as part of the witness protection programmes. Or as the Commission of the European Communities defined it : "*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*"⁵

2 Council of Europe (2014). *Witness protection as an indispensable tool in the fight against organised crime and terrorism in Europe*. p. 2.

3 Fyfe, N.R. and Sheptycki J. (2005) *Facilitating witness co-operation in organised crime cases: an international review*. Home Office Online Report 27/2005. p. 5.

4 Enikö, F., p. 318.

5 Commission of the European Communities. (2007). *Commission working document on the feasibility of EU legislation in the area of protection of witnesses and collaborators with justice*. Brussels. p. 2

In the above mentioned definition by the Commission of the European Communities a distinction has been made between procedural and non-procedural protection measures. The difference between the two measures is that procedural protective measures operate within the scope of criminal procedure and affect its rules. Non-procedural protective measures can be described as measures which do not affect the rules of criminal procedure and have no influence on the rights of the defence. Witness protection programmes in which witnesses or collaborators of justice are being protected can be called non-procedural protective measure⁶.

There are many forms in which witnesses can be protected. The level and means of protection depend on the threat that is posed on the witness⁷. These measures of protection can include i.e. electronic surveillance and protecting of the homes of the witness, changing the identity of the witness temporarily, close protection measures of the witness but also relocating and changing the identity of the witness for good. In that case the witness has to build his or her live from scratch in a sometimes remote and often unfamiliar environment abroad. This is the most comprehensive form of witness protection, namely the entry into a witness protection programme in which the witness who requires protection comes under the control of members of the witness protection unit⁸. This article will mainly focus on the latter kind of witness protection since international police cooperation is more often than not needed in these cases. This counts especially for the smaller and densely populated EU member states. The risk for the witnesses to encounter the persons or their contacts against whom they have made their incriminating statements is more substantial in i.e. The Netherlands than in the scarcely inhabited parts of Finland as was mentioned by a member of the Dutch witness protection unit⁹. Adding that, sometimes it is necessary that a witness has to be relocated in another member state after being exposed in the member state initially chosen by the witness protection unit. In such a case efficient and rapid relocation is paramount.

As in many situations transborder (police) cooperation comes with difficulties. This is also the case regarding cooperation in the field of witness protection. A dedicated unit tasked with the protection of witnesses and in particular with witness protection programmes, is bound by secrecy. In order to ensure the safety of the witness, according to a member of the Dutch

6 Council of Europe, 2014, p. 8.

7 Dandurand, Y. (2010). *A Review of Selected Witness Protection Programs*. Report No. 001, 2010. Canada: University of the Fraser Valley. p. 17-18.

8 Kortten, M. (2015). *Getuigenbescherming in Nederland*. Rotterdam: Erasmus Universiteit Rotterdam. p. 336.

9 Personal communication, June 2018.

witness protection unit¹⁰, it is necessary to share as little information about the programme or the witness as possible. International cooperation on the other hand requires the sharing of relevant information. Especially when there is the need to build a new life for a witness abroad. These opposing interests result in a situation where legal regulations on EU level could be convenient.

LEGAL REGULATIONS IN THE EUROPEAN UNION

In the EU there is no primary legislation on witness protection. However this doesn't mean that witness protection isn't regulated at all in the EU. The Council of the European Union (hereafter "The Council") has drawn up several Council Resolutions (secondary legislation) on witness protection. In particular in the fight against organized crime and terrorism. The reason that there is no primary legislation on witness protection in the EU is due to the fact that there are considerable differences in legislation and execution of witness protection in the individual EU member states. The resolutions and documents of The Council encourage the EU member states to create measures which ensure the protection of witnesses and at the same time respecting the rights of the defence¹¹.

In that context The Council endorsed the "Resolution on the protection of witnesses in the fight against international organized crime"¹² in 1995 in which the EU member states are requested to implement guarantees for the protection of witnesses regarding organized crime. It offered an oversight on the definitions of witnesses and persons who are possible subject to a witness protection programme as well as several possible measures for the protection of the witnesses.

A year later, in 1996, The Council endorsed the resolution on individuals who cooperate with the judicial process in the fight against international organized crime¹³. In this resolution The Council requested the EU member states to implement fitting measures of protection for those who cooperate with the police and justice system and who might be in danger because of that cooperation as well as their families and close relatives. This regulation was especially

10 Idem.

11 Enikő, F., p.313-322.

12 Council Resolution of 23 November 1995 on the protection of witnesses in the fight against international organized crime, OJ C 327, 07/12/1995.

13 Council Resolution of 20 December 1996 on individuals who cooperate with the judicial process in the fight against international organized crime, OJ C 010, 11/01/1997.

aimed at the “crown witnesses” who possibly were themselves part of an OCG and were offered the possibility to be granted benefits in exchange for information¹⁴.

After these two resolutions, in 2000, a recommendation was proposed by the EU to further elaborate the possibilities mentioned in the resolution of 1996. In particular the possibility to reduce the sentences for crown witnesses when they cooperate with justice. Although this is in itself not a witness protection measure it catalysed the use of crown witnesses with the need for protection that comes with it. This recommendation led in 2006 to a Legislative proposal¹⁵ in which the Commission of the European Communities stated: *“In some areas of criminality, such as organised crime and terrorism, there is an increasing risk that witnesses will be subjected to intimidation. All persons have a civic duty to give sincere testimony as witnesses, if so required by the criminal justice system, there should also be greater recognition given to their rights and needs, including the right not to be subject to any undue interference or be placed at personal risk. Member States have a duty to protect witnesses against such interference by providing them with specific measures of protection aimed at effectively ensure their safety.” (p.24)*

In 2007 the European Commission (EC) drafted a working document on the feasibility of EU-legislation in the field of protection for those who collaborated with police and justice authorities in the EU member states. On the one hand this working document focussed on the elaboration of already existing regulations and on improving the coordination and efficiency of existing practices. On the other hand the document consisted of a recommendation to develop a binding harmonized EU witness protection system based on minimal rules. The final recommendation of the EC was that more studies on the topic should be conducted before such a harmonized system could be developed due to the already encountered difficulties in harmonizing the differences¹⁶.

In the EU Drugs Action Plan for 2009-2012 the Council has mentioned the importance of cooperation in the context of witness protection programmes. It even requested member states to consider, where appropriate, to develop witness protection programmes¹⁷. In order to consider these programmes an evaluation of existing national legislation was mentioned as an

14 Korten, M., p. 143

15 Commission of the European Communities. (2006). *Commission Legislative and Work Programme 2007*. 24.10.2006. COM (2006) 629 final. Brussels

16 Korten, M., p. 144.

17 European Council. (2008). *EU Drugs Action Plan for 2009-2012*. OJ C 2008/C 326/09. p. 10.

important first step. Eurojust was appointed as responsible actor and to coordinate this evaluation¹⁸.

In 2010 in the context of The Stockholm Programme, i.e. the need for closer cooperation based on mutual recognition of the EU member states in cross-border crime was articulated. On the topic of witness protection it explicitly stated that: *"Victims of crime or witnesses who are at risk can be offered special protection measures which should be effective within the Union."*¹⁹. The way in which this protection is supposed to be carried out precisely was left unanswered. As well as the appointing of the responsible authority. Nevertheless it was an acknowledgement of the importance of the role witnesses play in fighting organized crime.

Although witness protection is seen as an important subject that needs the attention of the EU, there are still huge administrative and judicial differences between the member states. These differences can be explained by the different decisions that are being made by the individual international units in the EU member states. In addition to that one can say that the policy on witness protection has not yet been coordinated sufficiently by the member states and their competent European units²⁰.

And last but not least there is no shared all encompassing vision on the already achieved progress since a thorough analysis of relevant data is missing due to the confidentiality of this data²¹. Despite the mentioned intentions and regulations there are no binding texts on witness protection in EU legislation²². This lack of binding legislation provides a context in which the EU competent authorities dealing with witness protection have to find other platforms on which to cooperate. On EU level Europol is the institution that is tasked with the facilitating of police cooperation in the EU.

IMPACT OF EUROPOL

Article 88 of the Treaty on the Functioning of the European Union (TFEU) under paragraph 1 states that Europol's mission shall be to support and strengthen action by the Member States' police authorities and other law enforcement services and their mutual cooperation in preventing and combating serious crime affecting two or more Member States,

18 Van Driessche, E. (2009) *Relocatie van getuigen (master thesis)*. Ghent: Ghent University. p. 73.

19 The Stockholm Programme (2010). *An open and secure Europe serving and protecting citizens*. OJ C 115, 04/05/2010. p. 12.

20 Van Driessche, E., p. 80.

21 Van Driessche, E., p. 80.

22 Enikö, F., p.314.

terrorism and forms of crime which affect a common interest covered by a Union policy. However, Europol is still a cooperation or coordination agency with minor operational powers and it does not have coercive powers to make decisions for the national police forces of the EU member states²³. *Europol can best be described as a centralized coordination network that coordinates the activities of national police organizations in the EU.*

As mentioned in paragraph 2 there are differences between the member states when it comes to the organization of their witness protection programmes. However starting in 2000 Europol has coordinated a European Liaison Network comprising the heads of specialists of the separate witness protection units throughout the EU. Next to these specialists the network also consists of 8 non-member states of the European Union, 12 international organisations active in this field, and overseas observers from Australia, Canada, New Zealand, South Africa and the U.S.A. Although this network provides information and develops instruments and guidelines with regard to the witness protection programmes it doesn't conduct operational activities²⁴. Nevertheless this network was mentioned as the most efficient network regarding operational international cooperation in the field of witness protection programmes in the EU according to a member of the Dutch witness protection unit²⁵.

It did also accomplice to draw up two guidelines for international cooperation on witness protection. The first guideline "Basic principles of European Union police cooperation in the field of witness protection"²⁶ dealt with the international placing of witnesses due to the problems for smaller and more densely populated countries as well as the thread posed by the large extend of some OCG's. This expressed the need for closer and more regulated cooperation between the EU member states. The second guideline "Common Criteria for taking a witness into a Protection Programme"²⁷ contained the criteria for admission in witness protection programmes. These criteria were meant as a guideline meant to be used by all EU member states in order to harmonize and regulate the work process and above all to ascertain a certain uniformity in witness protection programmes.

CONCLUSIONS AND RECOMMENDATIONS

23 Busuioc, M., & Groenleer, M. (2011). *Beyond Design - The Evolution of Europol and Eurojust*. Amsterdam Law School Research Paper No. 2011-09.

24 Commission of the European Communities. (2007). *Commission working document on the feasibility of EU legislation in the area of protection of witnesses and collaborators with justice*. Brussels, p. 4

25 Personal communication, June 2018.

26 Europol. (2003). *Witness Protection; Common Criteria for taking a witness into a Protection Programme*.

27 Europol, 2003

The aim of this article was to take a closer look at the legal regulation of witness protection in the European Union. There are many differences between the EU member states concerning witness protection. In some EU member states it is embedded within the police forces while in others it is i.e. part of the ministry of interior. Some member states have a specialized unit dedicated to witness protection. Other member states might consider witness protection as a part of basic police work. The form in which witnesses are protected and the measures implemented depend on the level of threat that is posed on the witness. The most comprehensive form of witness protection is the entry into a witness protection programme in which the witness who requires protection comes under the control of members of the witness protection unit. International police cooperation is more often than not needed in these cases. Especially for the smaller and more densely populated member states of the EU, it is paramount to cooperate with the responsible units and authorities of the other member states to ensure functioning and efficient witness protection programmes .

In the EU there is no primary legislation on witness protection. Witness protection in the EU is regulated using secondary legislation. In the fight against organized crime and terrorism the Council has drawn up several Council Resolutions on witness protection. These resolutions and documents of The Council encourage the EU member states to create measures which ensure the protection of witnesses and at the same time respecting the rights of the defence. Besides the resolution there are also framework decisions, work programmes, action plans and commission proposals in which the importance of witness protection is mentioned and in which cooperation between the EU member states is promoted. Although witness protection is acknowledged as an important subject that needs the attention of the EU there is no binding legislation. This absence can be explained by the difficulties in coordination between the EU member states and by the lack of a shared and all encompassing vision on the already achieved progress since a thorough analysis of relevant data is missing due to the confidentiality of this data.

Starting in 2000 Europol has coordinated a European Liaison Network comprising the heads of specialists of the separate witness protection units throughout the EU and even beyond. Although this network provides information and develops instruments and guidelines with regard to the witness protection programmes it doesn't conduct operational activities itself. Regarding regulating and making international witness protection more effective it did manage to draw up two guidelines for international cooperation on witness protection dealing with the

international placing of witnesses and another for the criteria for admission in witness protection programmes.

In order to improve the efficiency of the protection of witnesses in the EU there is a need to harmonize the national legislations of the individual member states. The EU is nevertheless reluctant to force the member states to implement equal legislation because of the existing differences. As a result witnesses will be less inclined to deliver incriminating statements against OGC's. Efforts like the European Liaison Network coordinated by Europol are the first steps in the right direction. It will strengthen the cooperation between the member states and at the same time forms a platform to share experiences and to express the needs and difficulties from the operational side of witness protection. Although the nature of the relevant data generated by the European Liaison Network is mostly highly confidential, it could be of importance to determine the status quo that is needed as a basis for future European legislation. More effort can be put in by i.e. Europol by sharing this data without compromising the confidentiality. Further studies should be conducted at the same time to pave the way towards a binding EU legislation on witness protection.

Although this article focussed on the legal and regulatory aspects of witness protection in the EU, there is one more recommendation I would like to offer of a broader scope. Witness protection on the EU level is still mainly focused on the fight against organised crime and terrorism. One can wonder whether this limitation is necessary. In a time when cross-border crime and international crime groups are prevailing, the importance of protecting witnesses is also increasing. More and more it is recognized that the nature of contemporary crime, without distinctions in the type of crime, urge to rely on witnesses since traditional investigative methods have proven to be less successful. Police investigations are relatively transparent nowadays resulting in evasive counter strategies by the perpetrators. Cooperation and communication with other people however will always be the weak spot in the efforts of hiding any crime, even outside the focus of the EU with regard to organized crime and terrorism. In relevance to this one might think about crimes relating cultural heritage and illicit trafficking of stolen artwork for example. Often these crimes are not directly related to OCG's nor to terrorism despite some. Therefore it might be effective if witness protection on international and EU level can be applicable to a wider scope of crimes in the future. Moreover it could be treated as a principle instead of merely an investigative measure in fighting organized crime and terrorism in the EU.

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Table of abbreviations

CEPOL	-	European Union Agency for Law Enforcement Training
EC	-	European Commission
EJMP	-	European Joint Master Programme
EU	-	European Union
OCG	-	Organised Crime Group
TEU	-	Treaty on European Union
TFEU	-	Treaty on the Functioning of the European Union

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