

# **EUROPEAN COMMITTEE ON CRIME PROBLEMS (CDPC)**



## **ACTION PLAN ON TRANSNATIONAL ORGANISED CRIME (2016-2020)**

### **REVIEW OF THE RECOMMENDATION REC (2005)9 ON THE PROTECTION OF WITNESSES AND COLLABORATORS (Component 3, Action = B1)**



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## Introduction

1. Improving the protection of witness and collaborators of justice, as well as their close relatives, is one of the needs identified in the White Paper on Transnational Organised Crime (hereafter, TOC) endorsed by the Plenary of the European Committee on Crime Problems (hereafter, CDPC) in 2014<sup>1</sup>.
2. On March 2nd 2016 the Council of Europe adopted the Action Plan on combating Transnational Organised Crime for the years 2016-2020<sup>2</sup>. The Action Plan on TOC, under the Component 3 describes the actions to be developed regarding “Witness protection and incentives for co-operation”. In particular under para.2.3. b) it is provided for the **“Review Recommendation Rec (2005)9 on the protection of witnesses and collaborators (Component 3, Action = B1):** This review should allow an assessment to be made concerning the extent to which the policy/programme relating to the protection of relatives and other people close to the witness is adequately drafted and implemented in practice. Particular attention should be made to the trafficking in human beings and the smuggling of migrants and witnesses in cases of threats from criminal organisations.”
3. In order to analyse the needs and scope of such review the Action Plan foresees the setting up of a working group made of representatives of several member States. The present document aims at presenting the main reasons that have been identified to justify the review and update of the Recommendation Rec(2005)9.

## The Recommendation Rec(2005)9

4. Under paragraph 3.3 of the White Paper on TOC it is recognized that the protection of witnesses and collaborators of justice was specifically addressed by the Council of Europe in Recommendation No. R (1997) 13 of the Committee of Ministers to member States concerning intimidation of witnesses and the rights of the defence,

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<sup>1</sup> 66th Plenary Session of the European Committee on Crime Problems (CDPC) held in Strasbourg on 10-13 June 2014 (CDPC (2014) 13 rev)

<sup>2</sup> This document was approved by the European Committee on Crime Problems (CDPC) at the plenary meeting on 1-4 December 2015 and finally adopted by the Committee of Ministers of the Council of Europe at its meeting on 2 March 2016. See, CDPC(2015) FIN.

adopted on 10 September 1997<sup>3</sup>. The recommendation establishes a set of principles as guidance for national law on witness protection whether in the code of criminal procedure or with out-of-court protection measures. This recommendation offers member states a list of measures which could effectively help protect the interests both of witnesses and of the criminal justice system, while guaranteeing the defence appropriate opportunities for the exercise of rights during criminal proceedings.

5. Eight years later, and after a comprehensive study on the implementation of witness protection measures and programmes in the Council of Europe member states, the Committee of Ministers adopted Recommendation Rec(2005)9 on the protection of witnesses and collaborators of justice at the 924th meeting of the Ministers' Deputies held on 20 April 2005.
6. The 32 paragraphs of the Rec(2005)9 constitute up to now the broadest instrument of the Council of Europe regarding the protection of witnesses and collaborators of justice. This Recommendation was adopted within the context of the fight against terrorism, recognizing that the Rec(1997)13 "*did not contain a comprehensive (procedural and non-procedural) set of measures to protect witnesses in terrorist cases*"<sup>4</sup>, as it focused primarily on vulnerable witnesses –in particular family violence cases–, and did not contemplate the role and needs of the collaborators of justice ("pentiti").
7. Despite the fact that the Rec(2005)9 was adopted in the context of the fight against terrorism, it does equally respond to the needs of protecting witnesses and collaborators relating to other forms of organised crime. In this vein, as stated in the White Paper on TOC there is already a CoE Recommendation that has identified the need to protect witnesses and collaborators in order to fight effectively any form of TOC and that there is further need to identify what are the problems in its implementation.
8. The Rec(2005)9 is quite comprehensive, including definitions, general principles, protection measures to be adopted (procedural and non procedural), the need for protection programmes when specific protection measures are not enough to

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<sup>3</sup> White Paper on Transnational Organised Crime, Council of Europe, page 28.

<sup>4</sup> Explanatory Report of the Recommendation Rec(2005)9, paragraph 3.

protect the life and integrity of the witness, and finally recommendations on international cooperation. It has to be considered a very good document, underpinned by a broad questionnaire answered by the majority of the member states and two non-CoE member States: Japan and the United States of America. As explained in the CoE publication “Terrorism: protection of witnesses and collaborators of justice”<sup>5</sup> prepared by Mr Nicola Piacente, this broad questionnaire and the thorough analytical report based on it, served to assess the needs on protecting witnesses and collaborators adequately in order to elaborate the Rec(2005)9. Undoubtedly it is a good instrument and its clarity is ensured by the explanations contained in the accompanying Explanatory Report.

### **Review of the Recommendation Rec(2005)9**

9. Even though the Rec(2005)9 is extensive and shows the deep knowledge of the drafters on the problems to be addressed regarding the protection of witnesses and collaborators to fight serious forms of TOC, it should be considered the convenience of updating such Recommendation. Some of the reasons identified for reviewing the Rec(2005)9 are explained next:
  
10. 1) More than 10 years have passed since Recommendation Rec(2005)9 was adopted. During this time the experience gained in applying witness/collaborator’s protection measures should be taken into account and be reflected in a new updated document. Experience shows that most countries have provided for a legal framework on witness protection measures, but such measures have proved in many cases not to be enough. A decisive approach towards incentivizing the cooperation should be taken in a future Recommendation.
  
11. 2) The context of the fight against TOC has evolved, showing not only new trends in the forms of criminality –with an increased impact of globalised terrorism actions–, but also a new dimension of the scope of cyber-war, an

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<sup>5</sup> PIACENTE, Nicola, Terrorism: protection of witnesses and collaborators of justice, Council of Europe, 2006.

extended uses of social media in all spheres, and an unprecedented advance in the use of information and communication technologies (ICTs), both in the criminal prevention and prosecution. This new “digital context” may require taking into account not only new ways of threatening witnesses and collaborators, but also new measures for protecting them. The use of video-conferencing and the audio-visual recording of statements made by witnesses/collaborators of justice during the preliminary phase of the procedure, are already foreseen and recommended under paragraph 17 of Rec(2005)9. However, much more emphasis should be given on the use of ICTs to improve the protection of witnesses/collaborators, not only through procedural measures, but also by way of non-procedural measures.

12. 3) The Rec(2005)9 only deals with the protection of persons that are witnesses or collaborators, who are actually threatened or under a risk of life or personal integrity if they testify or agree to cooperate. The Recommendation, under paragraph 20 allows granting anonymity to a witness in criminal proceedings “**only**” when the competent authority finds that “the life or freedom of the person involved or of the persons close to him or her, is **seriously threatened**”. It should be considered if other situations, as for example, when undercover or infiltrated agents in the criminal organisation have to present testimony, should not be contemplated also. Practitioners have highlighted the impossibility to bring to testify the undercover agent, not for having been threatened, but for reasons of having to put an end to the infiltration. While testimonies of undercover agents should not be kept secret, the present witness protection measures are not enough to grant that undercover agents are brought to testify in criminal proceedings.
13. 4) Paragraph 4 of the Rec(2005)9 states that “*witnesses and collaborators of justice should be **encouraged to report** any relevant information regarding criminal offences to the competent authorities and **thereafter agree to give testimony in court***”. This paragraph mentions the two necessary stages where incentives are necessary: first, reporting for detecting; and second, testifying for

prosecuting and convicting. While the cooperation is necessary at both stages, the mere fact that once a witness or collaborator that reports about facts known to him/her or information he/she is in possession is obliged to testify, without being sure of the protection he/she may be granted, this obligation already discourages the person to report about a crime, especially when an organised or terrorist group is involved. It should be considered if regarding to the fight of TOC the duty to report should not automatically lead to the duty to testify. In practice it seems that many witnesses are prevented from reporting, due to their fear of having later to testify and not being sure about the measures they will be granted. More emphasis should be put for “encouraging to report”.

14. 5) Connected to the previous point, by stating the Recommendation that only when serious threats to the life and freedom of the witness, exceptionally non-procedural protection measures might be adopted, the encouragement to testify appears to be quite weak. It does not contemplate the harm to the own property or the risk of losing their peaceful living as a sufficient ground to provide for protection measures to a witness at risk. On the other side, it might be considered if in cases of mafia type organised crime and terrorism, the measures should not be subject to a subsidiarity assessment or the proof that there is an actual risk. In order to encourage the collaboration, the message to be conveyed should be rather the contrary: in such cases of very serious crimes, the witness will be awarded almost automatically the status of protected witness. In sum, the recommendation considers that the possibility of being protected is enough to encourage cooperation of witnesses, when in reality this is not enough. Paragraph 14 sets out the principle that in cases of more intimidation there should be more protection. An adequate assessment of what intimidation means is necessary: facing mafia type organised groups, there is no need for express acts of intimidation, as everyone knows what the grave consequences for life, freedom and property will mean reporting or testifying.
15. 6) Chapter III of the recommendation (2005)<sup>9</sup> (paragraphs 10 to 29) addresses together the measures for any kind of witness and the collaborators. Victim and

collaborator are also witnesses, but their needs, scope (and rights) to be protected differ substantially. This long chapter could be better structured, addressing the specificities of each of these type of witnesses.

16. 7) During the last 10 years, the implementation of the witness/collaborators protection measures shows great divergence. The European Parliament's report on organised crime of September 2013, showed these divergences in the regulation and the implementation of witness protection programmes among EU member states, and recommended introducing "standard pan-European rules on the protection of witnesses, informers and those who cooperate with the courts"<sup>6</sup>. The level of implementation as well as the differences in the legal framework represent also an obstacle in the international cooperation between the member states. It should be reconsidered if a new recommendation could promote some legal approximation if not harmonization.
  
17. 8) There are no precise recommendations on ways in which collaborators should/could be encouraged to cooperate with the justice. As stated in the report "Terrorism: Protection of witnesses and collaborators of justice" (quoted above), in most countries the cooperation of defendants/collaborators is compensated with significant reduction of the custodial sentence, in many as a mitigating circumstance. However, the Recommendation does not address these incentives, it considers that providing protection should already act as an incentive to collaborate. In practice, collaborators enter into a sort of plea bargaining regarding the benefits they may obtain if they agree to testify or provide significant information needed to dismantle a criminal group or identify other members of it. There is need of rethinking in how far a CoE

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<sup>6</sup> See paragraph 125, xviii of the European Parliament Special Committee's Report on organised crime, corruption and money laundering: recommendations on action and initiatives to be taken, presented by Mr Salvatore Iacolino, of September 2013. Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0307+0+DOC+XML+V0//EN>

recommendation should encourage regulating such incentives, going from penalty reductions to immunities.

18. 9) Finally, it appears that there is need to improve the international cooperation in the implementation of witness protection measures and programmes. As stated in the Report “Terrorism: Protection of witnesses and collaborators of justice”<sup>7</sup>, the international conventions only request the states to “endeavour to agree on measures for the protection of the person concerned, in accordance with their national law” (Art. 23 Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters of 8 November 2001<sup>8</sup>). The Second Additional Protocol MLA Convention of 2001 does not cover the cooperation in adopting or implementing measures for close relatives nor for collaborators of justice that are threatened or at risk. The convention does not foresee the adoption of non-procedural protective measures other than relocation, or the sharing of costs of other measures that are not the hearing by videoconference or telephone. It seems necessary to encourage more action in the international cooperation in the protection of witnesses and collaborators: relocation or temporary displacement in another country might be the only way to ensure safety for a witness or collaborator, in particular in small countries. Even if several member states have entered witness protection agreements and other law enforcement agencies cooperate in an informal way, the funding of such programmes and ensuring the confidentiality of the identity of the person protected requires a more decisive approach, that could be enforced in an updated recommendation.
19. 10) Paragraph 28 of the recommendation (2005)<sup>9</sup> is not implemented in several states, where the investigating judge or the prosecutor directly deal and decide with the decision on the protection measures, as well as other incentives. More

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<sup>7</sup> Ibid 5. See page 28.

<sup>8</sup> Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS 182). In the same vein, Art. 24 of the United Nations Convention against Transnational Organized Crime (UNTOC Convention), where it is mentioned that the member states shall consider setting up international agreements or arrangements on the relocation of persons.



uniformity should be achieved, in order to generate not only mutual trust among the CoE member states, but also to facilitate the mutual recognition and enforcement of the protection measures by the state whose cooperation is requested for the relocation of the protected person.

20. 11) It should be considered if the update of the Rec(2005)9 should not become a comprehensive instrument covering mainly, but not only, witness protection measures in the context of TOC and terrorism, but take the opportunity of merging the single instruments on witness protection and provide so for a single recommendation covering all kind of witnesses/collaborators. Further, as the fight against TOC requires targeting the profits of crime and the prosecution of money laundering, cooperation of whistle-blowers within the corporate structures dealing with the proceeds of crime, should also be considered.
21. 12) The idea of establishing a common fund to afford the expenses or the relocation programmes of protected witnesses should be further explored.

## **Conclusions**

22. Only some of the grounds that justify discussing the review of the Recommendation Rec(2005)9 have been outlined here. More information<sup>9</sup> and discussion in a working group with practitioners directly involved in witnesses' protection programmes is definitely needed.

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<sup>9</sup> It is important to highlight that to obtain all necessary information from all member States a questionnaire may be sent to all member States. This exercise may help for other actions also included in the Action Plan on Transnational Organised Crime.