

Strasbourg, 27 April 2021

CDPC-PWCJ(2021)01

EUROPEAN COMMITTEE ON CRIME PROBLEMS (CDPC)

WORKING GROUP ON THE PROTECTION OF WITNESSES AND COLLABORATORS OF JUSTICE (CDPC-PWCJ)

DRAFT UPDATED RECOMMENDATION REC(2005)9 ON THE PROTECTION OF WITNESSES AND COLLABORATORS OF JUSTICE

Document prepared by the CDPC Secretariat
Directorate General I – Human Rights and Rule of Law

COUNCIL OF EUROPE

COMMITTEE OF MINISTERS

Recommendation Rec(2005)9-rev **of the Committee of Ministers to member states** **on the protection of witnesses and collaborators of justice**

*(Adopted by the Committee of Ministers on 20-April-2005XXXX
at the 924XXXth meeting of the Ministers' Deputies)*

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Recalling that the aim of the Council of Europe is to achieve greater unity among its members;

Aware of the need for member states to develop a common and coordinated crime policy in relation to the protection of witnesses and collaborators of justice-protection;

Noting that there is growing recognition of the special role of witnesses and collaborators of justice in criminal proceedings and that their evidence is often crucial to securing the conviction of offenders, especially in respect of , but not limited to, serious crimes;

Considering that in some areas of criminality, such as organised crime, gang-related crime, transnational crime and terrorism, there is an increasing risk that witnesses will be subjected to intimidation;

Considering that the final report of the Multidisciplinary Group on International Action against Terrorism (GMT) and the subsequent decisions of the Committee of Ministers recognise the protection of witnesses and collaborators of justice as a priority area of the Council of Europe's legal action against terrorism;

Recalling that in Resolution No. 1 on Combating International Terrorism approved at the 24th Conference of European Ministers of Justice (Moscow, 4-5 October 2001), the Committee of Ministers was invited to adopt urgently all normative measures considered necessary for assisting states to prevent, detect, prosecute and punish acts of terrorism, such as the improvement of the protection of witnesses and other persons participating in proceedings involving persons accused of terrorist crimes;

Recalling that in Resolution No. 1 on Combating Terrorism approved at the 25th Conference of European Ministers of Justice (Sofia, 9-10 October 2003), the Committee of Ministers was invited to, *inter alia*, pursue without delay the work with a view to adopting relevant international instruments on the protection of witnesses and collaborators of justice;

Convinced that, while 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, concerns and needs, including the right not to be subject to any undue interference or be placed at personal risk;

Considering that member states have a duty to protect witnesses and collaborators of justice against such interference by providing them with specific protection measures aimed at effectively ensuring their safety;

Considering the special needs of vulnerable witnesses such as victims, including victims of sexual and gender-based violence, minors and witnesses with health issues;

Considering that it is unacceptable for the criminal justice system to fail to bring defendants to trial and obtain a judgment because witnesses or collaborators of justice have been effectively discouraged from reporting information relevant to criminal proceedings and testifying freely and truthfully;

Noting that such discouragement could be brought about by a lack of trust and failure of the criminal justice system to guarantee adequate protective measures and safeguards to the witness or collaborator of justice prior to the reporting of information relevant to criminal proceedings;

Aware that the protection of witnesses and collaborators of justice requires confidentiality and trust throughout the entirety of the process and that efforts should be made to ensure that effective measures are taken to thwart attempts to trace witnesses and collaborators of justice, in particular by criminal organisations, including terrorist organisations;

Aware of the challenges for the protection of witnesses and collaborators of justice that arise from the widespread use of social media and the continuous development of information and communication technologies, in particular the risk of exposure and identification of witnesses/collaborators of justice posed by biometric technology;

Aware of the persisting differences in the legal frameworks of the member states and therefore emphasising the increasing need for legal harmonisation and stronger international cooperation and exchange of best practices in matters related to the protection of witnesses and collaborators of justice;

Bearing in mind the provisions of the European Convention on Human Rights (ETS No. 5) and the case-law of its organs, which recognise the rights of the defence to examine the witness and to challenge his/her testimony;

Considering that the standards contained in Recommendation No. R (2005)9 of the Committee of Ministers of the Council of Europe on the protection of witnesses and collaborators of justice need to be revised and updated in order to reflect the developments which have occurred in the field of witness/collaborator of justice protection in Europe;

Taking into account Recommendation CM/Rec(2006)8 on assistance to crime victims, Recommendation CM/Rec(2012)4 on the protection of human rights with regard to social networking services, Recommendation CM/Rec(2012)3 on the protection of human rights with regard to search engines, Recommendation No. R (99) 5 for the protection of privacy on the Internet, Recommendation No. R (97) 13 concerning intimidation of witnesses and the rights of the defence, in particular with respect to the measures to be taken in relation to vulnerable witnesses, especially in cases of crime within the family; Recommendation No. R (85) 4 on violence in the family, Recommendation No. R (85) 11 on the position of the victim in the framework of criminal law and procedure, Recommendation No. R (87) 21 on assistance to victims and the prevention of victimisation, Recommendation No. R (91) 11 concerning sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults and Recommendation No. R (96) 8 on crime policy in Europe in a time of change;

Taking further into account the Council of Europe Action Plan on Combating Transnational Organised Crime,

Recommends that governments of member states:

- i. be guided, when formulating their internal legislation and reviewing their criminal policy and practice, by the principles and measures appended to this Recommendation;
- ii. ensure that all the necessary publicity for these principles and measures is distributed to all interested bodies, such as judicial organs, investigating and prosecuting authorities, bar associations, and relevant social institutions.

Appendix to Recommendation [Rec\(2005\)9](#)

1. Definitions

For the purposes of this Recommendation, the term:

- "witness" means any person who possesses information relevant to criminal proceedings about which he/she has given and/or is able to give testimony (irrespective of his/her status and of the direct or indirect, oral or written form of the testimony, in accordance with national law), who is not included in the definition of "collaborator of justice";

- "collaborator of justice" means any person who faces criminal charges, or has been convicted of taking part in a criminal association or other criminal organisation of any kind, or in offences of organised crime, but who agrees to cooperate with criminal justice authorities, particularly by giving testimony about a criminal association or organisation, or about any offence connected with organised crime or other serious crimes;

- "victim" means any natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, caused by acts or omissions that are in violation of the criminal law of a member state. The term victim also includes, where appropriate, the immediate family or dependants of the direct victim to the extent that they have suffered harm by association;

- "intimidation" means any direct or indirect threat carried out or likely to be carried out to a witness or collaborator of justice, which may lead to interference with his/her willingness to give testimony free from undue interference, or which is a consequence of his/her testimony;

- "threat assessment" means the process by which the threat is understood; it identifies and examines potential source(s) of threat, the capability, propensity and history of violence and the potential or the intended use of any form of violence, intimidation or interference towards potential witnesses/collaborators of justice irrelevant of whether actual harm is caused;

- "risk assessment" means the process by which risk is understood; it examines the likelihood and consequence of the threat materialising and the nature, seriousness and pattern of offences the person to be protected possesses information on and identifies his/her level of involvement in the investigation and/or case, the relevance of the contribution, the seriousness of the intimidation and the circumstances that contribute to these factors. It informs appropriate decision making and action with the aim of reducing risk;

- "anonymity" means that the identifying particulars of the witness are not generally divulged to the opposing party or to the public in general;

- "people close to witnesses and collaborators of justice" includes the relatives and other persons in a close relationship to the witnesses and the collaborators of justice, such as the partner, (grand)children, parents and siblings;

- "protection measures" are all individual procedural or non-procedural measures aimed at protecting the witness or collaborator of justice from any intimidation and/or any dangerous consequences of the decision itself to cooperate with justice;

- "protection programme" means a standard or tailor-made set of individual protection measures which are, for example, described in a memorandum of understanding, signed by the responsible authorities and the protected witness or collaborator of justice;

- "witness protection unit" refers to the competent national unit responsible for implementing and supervising the protection of witnesses, collaborators of justice and other persons afforded protected persons status under national law authorised to implement protection programmes. It is responsible for the risk assessment and threat assessment of participants in the program and ensures the confidentiality of the program. It facilitates the integration of the witness by offering legal, psychological, social and technological assistance, and, if appropriate, care and financial assistance.

II. General Principles

1. Appropriate legislative and practical measures should be taken to ensure that witnesses and collaborators of justice may report and testify freely and without being subjected to any act of intimidation.

2. While respecting the rights of the defence, the protection of witnesses, collaborators of justice and people close to them should be organised, where necessary, before, during and after the trial.

3. Acts of intimidation of witnesses, collaborators of justice and people close to them should, where necessary, be made punishable either as separate criminal offences or as part of the offence of using illegal threats.

4. Subject to legal privileges providing the right of some persons to refuse to give testimony, 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.

5. While taking into account the principle of free assessment of evidence by courts and the respect of the rights of the defence, procedural law should enable the impact of intimidation on testimonies to be taken into consideration and statements made during the preliminary phase of the procedure to be allowed (and/or used) in court.

6. While respecting the rights of the defence, alternative methods of giving evidence which protect witnesses and collaborators of justice from intimidation resulting from face-to-face confrontation with the accused should be considered.

7. The personnel involved in the Criminal justice process, threat and risk assessment and the granting of witness protection personnel should have adequate training and guidelines to deal with cases where witnesses might require protection measures or programmes, or other relevant support measures or reassurances to testify.

8. All the stages of the procedure related to the adoption, implementation, modification and revocation of protection measures or programmes should be kept confidential; the unauthorised disclosure of this protected information should be made punishable as a criminal offence where appropriate, especially to ensure the security of a protected person and prevent impunity.

9. The adoption of protection measures or programmes should also take into account the need to strike an adequate balance with the principle of safeguarding the rights and expectations of victims.

III. Protection measures and programmes

10. When designing a framework of measures to combat serious offences, including those related to organised crime, gang-related crime and terrorism, and violations of international humanitarian law, appropriate measures should be adopted to protect witnesses and collaborators of justice against intimidation, interference or violence.

11. No terrorism-related crimes should be excluded from the offences for which specific witness protection measures/programmes are envisaged.

A. Entitlement to protection measures or programmes

12. The following criteria should, *inter alia*, be taken into consideration when deciding upon the entitlement of a witness/collaborator of justice to protection measures or programmes:

- involvement of the person to be protected (as a victim, witness, co-perpetrator, accomplice or aider and abetter) in the investigation and/or in the case;
- relevance of the contribution;
- seriousness of the offence the witness or collaborator of justice reports information on;
- seriousness of the intimidation;
- willingness and suitability to being subject to protection measures or programmes;
- risk to the programme and community.

13. When deciding upon the adoption of protection measures it should also be considered, in addition to the criteria mentioned in paragraph 12, whether there is no other evidence than the testimony of the witness/collaborator of justice available that could be deemed sufficient to establish a case related to serious offences.

B. Scope and application of protection measures and programmes

14. Proportionality between the nature of the protection measures and the seriousness of the intimidation of the witness/collaborator of justice should be ensured.

15. Witnesses/collaborators of justice being subjected to the same kind of intimidation should be entitled to similar protection. However, any protection measures/programmes adopted will need to take into account the particular characteristics of the matter and the individual needs of the person(s) to be protected. Special consideration and protection measures should be given to vulnerable groups of witnesses, such as victims, including victims of sexual and gender-based violence, minors and witnesses with medical or special needs.

16. Procedural rules aimed at the protection of witnesses and collaborators of justice should ensure that the balance necessary in a democratic society is maintained between the prevention of crime, the needs of the ~~victims~~ and-witnesses, collaborators of justice and victims and the safeguarding of the right to a fair trial.

17. While ensuring that the parties have adequate opportunity to challenge the evidence given by a witness/collaborator of justice, the following protection measures aimed at preventing identification of the witness/collaborator of justice prior to, during and after the criminal proceedings, may, *inter alia*, be considered :

- the use of pseudonym and redaction of identifying information throughout the whole criminal proceedings;
- audiovisual recording of statements made by witnesses/collaborators of justice during the preliminary phase of the procedure;
- using statements given during the preliminary phase of the procedure as evidence in court when it is not possible for witnesses to appear before the court or when appearing in court might result in ~~great~~ actual danger to the witnesses/collaborators of justice or to people close to them; pre-trial statements should be regarded as valid evidence if the parties have, or have had, the chance to participate in the examination and interrogate and/or cross-examine the witness and to discuss the contents of the statement during the procedure;
- disclosing information ~~which enables~~ the witness to be identified at the latest possible stage of the proceedings, when this might not endanger the witness or collaborator, and/or releasing only selected details;
- excluding or restricting the media and/or the public from all or part of the trial, for example by conducting parts of hearings in private or closed session when necessary to protect the identity of the witness/collaborator of justice;
- using devices preventing the physical identification of witnesses and collaborators of justice, such as using screens or curtains, disguising the face of the witness or distorting his/her voice;
- using all available means offered by information and communication technologies to facilitate the protection of witnesses/collaborators of justice, including video-conferencing;
- sensitising witnesses/collaborators of justice to the risks associated with the use of information and communication technologies, in particular the internet and social networks, and their duties and rights with regard thereto;
- interagency cooperation between authorities dealing with biometric verification systems in order to avoid risks of protected witnesses/collaborators of justice being identified while travelling to the location of testimony or being relocated as part of a protection programme.

18. Any decision to grant anonymity to a witness in criminal proceedings will be made in accordance with domestic law and European human rights law.

19. Where available, and in accordance with domestic law, anonymity of persons who might give evidence should be an exceptional measure. Where the guarantee of anonymity has been requested by such persons and/or

temporarily granted by the competent authorities, criminal procedural law should provide for a verification procedure to maintain a fair balance between the needs of criminal justice and the rights of the parties. The parties should, through this procedure, have the opportunity to challenge the alleged need for anonymity of the witness, his/her credibility and the origin of his/her knowledge.

20. Any decision to grant anonymity should only be taken when the competent judicial authority finds that ~~the life or freedom of~~ the person involved, or of the persons close to him or her, is seriously threatened, the evidence appears to be significant and the person appears to be credible.

21. When anonymity has been granted, the conviction should not be based solely, or to a decisive extent, on the evidence provided by anonymous witnesses.

22. Where appropriate, witness protection programmes should be set up and made available to witnesses and collaborators of justice who need protection in accordance with national witness protection legislation or internal regulation. These programmes should, where feasible in the context of the competent authority, be supervised and coordinated by specialised witness protection units, and their ~~The~~ main objective ~~of these programmes~~ should be to safeguard the life, ~~and~~ personal security and wellbeing of witnesses/collaborators of justice, and people close to them, aiming in particular at providing the appropriate physical, psychological, educational, social and financial protection and support. Member States should ensure that the personnel of these units get the adequate training.

23. Protection programmes implying dramatic changes in the life/privacy of the protected person (such as relocation, ~~and~~ change of identity or deletion of digital identity) should be applied to witnesses and collaborators of justice who need protection beyond the duration of the criminal trials where they give testimony. Such programmes, which may last for a limited period or for life, depending on the persistence of threat, should be adopted ~~only~~ if no other measures are deemed sufficient to protect the witness/collaborator of justice and persons close to them.

24. The adoption of such programmes requires the informed consent of the person(s) to be protected and an adequate legal framework, including appropriate safeguards for the rights of the witnesses or collaborators of justice according to national law.

25. Where appropriate, protection measures could be adopted on an urgent and provisional basis before a protection programme is formally adopted.

C. Special needs of collaborators of justice

26. Given the essential role that collaborators of justice may play in the fight against serious offences, and the particular risks they face, they should be given adequate consideration and incentives to collaborate, such as penalty reductions or immunities in exchange for providing information to be used in criminal proceedings. Where necessary, protection programmes applicable to collaborators of justice serving a prison sentence may also include specific arrangements such as special penitentiary regimes.

27. Protection of collaborators of justice should also be aimed at preserving their credibility and public security. Adequate measures should be undertaken to protect against the risk of the collaborators of justice committing further crimes while under protection and therefore, even involuntarily, jeopardising the case in court. The intentional perpetration of an offence by a collaborator of justice under protection should, according to the relevant circumstances, imply the revocation of protection measures.

D. Witness protection units

28. Dedicated witness protection units specifically dealing with the protection of witnesses/collaborators of justice should be established where feasible in the context of the competent authority. These units should be staffed with highly specialised personnel with required expertise including, but not limited to, the fields of physical protection, covert logistics, psychosocial assessment and support, information and communication technologies, threat and risk assessment, care and financial management. Specialised personnel should also be available for vulnerable groups of witnesses, such as victims, including victims of sexual and gender-based violence, minors or

witnesses with medical or special needs. Due consideration should also be given to gender, ethnic/cultural/religious and language expertise within the units to manage changing demographics and increased diversity in the witness protection population. Adequate and continuous training should regularly be provided in order to ensure the highest degree of protection to individuals in programmes, not least in the fields of information and cyber-security. While respecting the fundamental principles of administrative organisation of each state, staff dealing with the implementation of protection measures should be afforded operational autonomy and should not be involved either in the investigation or in the preparation of the case where the witness/collaborator of justice is to give evidence. Therefore, an organisational separation between these functions should be provided for. However, an adequate level of cooperation/contact with or between law-enforcement agencies should be ensured in order to successfully adopt and implement protection measures and programmes.

IV. International cooperation

29. While respecting the different legal systems and the fundamental principles of administrative organisation of each state, a common approach in international issues related to the protection of witnesses and collaborators of justice should be followed. Such a common approach should aim at ensuring proper professional standards, at least in the crucial aspects of confidentiality, integrity and training. Member states should ensure sufficient exchange of information, best practices and cooperation between the authorities responsible for protection programmes.

30. Measures aimed at fostering international cooperation should be adopted and implemented in order to facilitate the examination of protected witnesses and collaborators of justice and to allow protection programmes to be implemented across borders.

31. The scope and the effective and rapid implementation of international cooperation in matters related to the protection of witnesses and collaborators of justice, including with relevant international jurisdictions, should be improved.

32. The following objectives should, for example, be considered:

- to provide assistance in temporarily or permanently relocating abroad protected witnesses, collaborators of justice and persons close to them and ensuring their protection, in particular in those cases where no other solution can be found for their protection;
- to provide psychosocial support to witnesses and collaborators of justice temporarily or permanently relocated abroad, including by setting up programmes to integrate witnesses, collaborators of justice and persons close to them into working and social life of their new country of residence and specifying the legal basis for their permission to stay;
- to facilitate and improve the use of information and communication technologies—modern means of telecommunication such as video links, and the security thereof, while safeguarding the rights of the parties;
- to cooperate, exchange best practices and develop common solutions to face the challenges posed by rapidly developing new technologies susceptible of endangering the safety of witnesses, collaborators of justice and persons close to them by revealing their identity through biometric authentication (for example, facial recognition, fingerprints, etc);
- to continue to cooperate and improve the exchange of best practices through the use of existing networks of national and international witness protection units and experts;
- to establish a common fund among member states for the management and sharing of expenses arising from the relocation of witnesses/collaborators of justice;
- to contribute to the protection of witnesses and collaborators of justice within the context of cooperation with international criminal courts and tribunals, international fact-finding bodies and relocated specialist judicial institutions.