SECURING PROTECTION AND COOPERATION OF WITNESSES AND WHISTLE-BLOWERS
An Overview of the Law as it stands in Germany

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I. INTRODUCTION

A. The Significance of Witness Protection in General

German criminal procedure law obliges the criminal prosecution authorities to prosecute all suspects provided there are "sufficient factual indications" of a criminal offence which may be prosecuted (section 152 subs. 2 of the Code of Criminal Procedure [*StPO*][1]). This so-called principle of mandatory prosecution entails an obligation to prosecute each suspect and, if the prerequisites for this apply, an obligation to prefer charges. The principle of mandatory prosecution however encounters restrictions when it comes to serious and the most serious criminal offences, in particular from the field of organised crime, where the conspirative structures are difficult to penetrate with the existing investigation methods.

It is frequently not possible to penetrate the largely sealed off networks of groups of offenders who associate in gangs using investigation measures from the outside and to obtain the information particularly required to solve serious criminal offences. The criminal prosecution authorities hence particularly depend on information from individuals from the criminal world who can provide the necessary information on structures and on those running the operation from behind the scenes. One way of making the latter willing to testify is by "rewarding", in one form or another, information which incriminates others and leads to their conviction.

Another means of obtaining witnesses who are willing to testify, in particular in fields of crime in which factual information cannot be obtained or is difficult to obtain because of the particular level of professionalism of the offenders, is to structure witness protection so well that such witnesses lose their fear of the offenders and remain willing to testify during the entire proceedings.

B. Definition of "Organised Crime"

Because of the diverse manifestations of organised crime, it is rather difficult to find a conclusive definition. The German Federal Parliament established the following definition[2] in 1992 when adopting the "Act on Suppression of Illegal Drug Trafficking and other Manifestations of Organised Crime" (*Gesetz zur Bekämpfung des illegalen Rauschgifthandels und anderer Erscheinungsformen der Organisierten Kriminalität – OrgKG*)[3]:

"Organised crime is understood to mean planned commission by several parties of criminal offences (which are of considerable significance individually or as a whole), determined by the pursuit of profit and/or power, working together for a prolonged or indefinite period of time, dividing tasks, using commercial or business-like structures or use of violence or other means suitable for intimidation, or attempting to exert an influence on politics, the media, public administration, judicial authorities or the economy."

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1 German Code of Criminal Procedure (*Strafprozessordnung*), Federal Law Gazette 1987 part I, p.1319.

2 Federal Parliament printed paper 12/989; this is at the same time the practical definition which is binding on the public prosecution offices, cf. Guidelines for Criminal and Administrative Fines Proceedings (*RiStBV*) Annex E No. 2.

3 Federal Law Gazette, 1992 Part I, p.1302.

The term "organised crime" however goes further in the view of the European Union and the United Nations; accordingly, at least six of the following eleven characteristics must apply[4]:

- involvement of more than two people,
- for a prolonged or indefinite period of time,
- suspected of involvement in serious crimes,
- determined by the pursuit of profit and/or power,
- separate roles for each member,
- use of some form of discipline or control within the group,
- active internationally,
- use of violence or other means suitable for intimidation,
- use of commercial or business-like structures,
- engagement in money laundering, and
- influence on politics, the media, public administration, judicial authorities or the economy.

The scale of organised crime is made clear if one takes a look at its global annual turnover: Approximate estimates put this figure at Euro 500 to 1,000 billion. For comparison: South Korea's GDP was approx. Euro 640 billion in 2009; India's was Euro 950 billion and Germany's was approx. Euro 2,500 billion. This is therefore a phenomenon of considerable dimensions, not only in terms of criminal law, but also in economic terms.

II. THE CURRENT SITUATION, ISSUES AND CHALLENGES IN GERMANY REGARDING WITNESS/WHISTLE-BLOWER PROTECTION AND EFFORTS TO IMPROVE THE SITUATION

Witnesses in Germany are on principle obliged to appear before the public prosecution office and in court in response to a summons, to testify truthfully and to swear an oath on their testimony if requested to do so (unless the right to refuse testimony or to refuse to provide information applies in accordance with sections 52 et seqq. StPO). These are civil duties which are not established by the Code of Criminal Procedure, but are imposed as a condition, and are now explicitly provided in section 48 subs. 1 StPO. The State has the possibility to enforce this obligation through coercive procedural measures (section 51 StPO). On the basis of this obligation which has been imposed by the law, a particular obligation is incumbent on the State to protect the witness' legal interests, above all of life, limb and certain assets, if these are placed at risk as a result of the testimony.

It is important to make clear that there is a difference between witness protection (in its classical sense) and witness support and assistance measures, although there might be measures which serve both purposes. In Germany there exist a wide range of services to (victims-) witnesses regarding their assistance, e.g. information rights, psychological assistance or assistance in obtaining compensation (section 406h StPO). In the following the focus will be on witness protection measures only.

A. The Legal Basis of Witness Protection

The legislature has continually refined witness protection in the past two decades. The "Act on Suppression of Illegal Drug Trafficking and other Manifestations of Organised Crime"[5] already entailed major improvements in this field. For instance, the possibility was created for the first time to limit statements on place of residence and identity and personal particulars when examining witnesses, depending on the degree of endangerment, or to do without them altogether (section 68 StPO).

4 Art. 2 of the United Nations Convention Against Transnational Organized Crime; Annual European Union Organised Crime Situation Report (6204/1/97 ENFOPOL 35 REV 2) GD H II.
5 cf. footnote 4.

With the Act on the Federal Criminal Police Office (*Bundeskriminalamtgesetz*)[6], the legislature introduced in 1997 a special empowerment provision of the Federal Criminal Police Office for witness protection at national level.

The Witness Protection Act (*Zeugenschutzgesetz*)[7], which came into force on 1 December 1998, provided with sections 58a, 168e, 247a and 255a StPO a statutory basis for the deployment of video technology in examinations, as well as its subsequent use in the main hearing.

With the Act to Harmonise Witness Protection (*Zeugenschutzharmonisierungsgesetz – ZSHG*)[8], which came into force on 31 December 2001, the legislature finally created a clear statutory basis for measures of witness protection.

The culmination of legislative developments in witness protection for the time being is formed by the Second Victims' Rights Reform Act (*2. Opferrechtsreformgesetz – 2. ORRG*)[9], which came into force on 1 October 2009, which in particular enhanced the rights of (victim) witnesses.

1. The Witness-Protection Provisions of the Code of Criminal Procedure

Significance attaches in witness protection in criminal procedure first and foremost to the possibility not to have to state certain personal and address data, and moreover to the deployment of video technology.

(i) The Protection of Address Data

Growing significance attaches to the protection of witnesses' privacy in criminal proceedings, given that many witness are afraid of giving their personal particulars when being examined. A witness is fundamentally obliged to state his/her first and family name, birth name, age, position or trade and place of residence when being examined (section 68 subs. 1 StPO). The purpose of the provision is to avoid mistaken identity; it is however also to create a reliable basis for evaluating credibility and to make it possible for those concerned to obtain information. The obligation is then incumbent on the State to protect witnesses from their data becoming known beyond the degree that is necessary in criminal proceedings. It must however always strike a balance between the necessary protection of witnesses' rights of personality and the purposes of the criminal proceedings, in particular taking account of the right of the accused to a fair trial[10], of the degree of endangerment of the witnesses and where appropriate of the nature of the data which are to be protected.

This is ensured in Germany in many instances by a graduated system of possibilities for confidentiality being provided for, depending on the degree of endangerment, which applies both to witness examination and the bill of indictment, and to the documentation in the files. The Second Victims' Rights Reform Act has retained this graduated system, has further improved the coordination of the individual protection mechanisms, and has also appropriately expanded them with regard to witnesses' rights.

(a) Statement of the Witness' Residential Address on Examination

Even before the Second Victims' Rights Reform Act came into force, there were exceptions to the principle that certain information is to be provided (section 68 StPO). For instance, witnesses could be permitted on examination in accordance with section 68 subs. 2 sentence 1 StPO to state their business address or place of work or another address at which documents can be served, instead of their place of residence, if there is reason to fear that the witness or another person might be endangered by the witness stating his/her place of residence. Such an endangerment may be feared for instance if an attack on the witness or a third party has previously taken place or has been threatened, or if the endangerment emerges

6 Act on the Federal Criminal Police Office and on Cooperation between the Federation and the *Länder* in Criminal Police Matters (*Gesetz über das Bundeskriminalamt und die Zusammenarbeit des Bundes und der Länder in kriminalpolizeilichen Angelegenheiten*), Federal Law Gazette 1997 part I, p.1650.

7 Act on the Protection of Witnesses on Examination in Criminal Proceedings and to Improve Victim Protection (*Gesetz zum Schutze von Zeugen bei Vernehmungen im Strafverfahren und zur Verbesserung des Opferschutzes*), Federal Law Gazette 1998 part I, p.820

8 Act to Harmonise the Protection of Endangered Witnesses (*Gesetz zur Harmonisierung des Schutzes gefährdeter Zeugen*), Federal Law Gazette 2001 part I, p.3510.

9 Federal Law Gazette 2009 part I, p.2280.

10 Codified in Article 6 the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 in the version of 17 May 2002 (Federal Law Gazette II 1054).

because of criminalistic indications, criminological experience or experience of life[11].

This reduced statement of personal particulars in accordance with section 68 subs. 2 StPO was also reflected in the investigation files, given that the provision applies not only to examination by a judge, but via section 161a subs. 1 sentence 2 StPO also to examination by a public prosecutor.

In accordance with section 68 subs. 3 sentence 1 StPO, it was also possible for witnesses to be permitted not to state personal particulars on examination if there was reason to fear that revealing the identity or the place of residence or whereabouts of the witness would endanger the life, limb or liberty of the witness or of another person. Documents establishing the witness' identity are kept at the public prosecution office and are only included in the files when the danger has ceased (section 68 subs. 3 sentence 3 and subs. 4 StPO).

Since implementation of the Second Victims' Rights Reform Act there is now a comprehensive list in section 163 StPO to clarify that the provision contained in section 68 StPO is already to be adhered to by the police in the investigation proceedings.

Also with the aim in mind of witness protection, the right of the witness not to have to state their place of residence in certain cases was additionally expanded to the required degree (section 68 subs. 2 and 3 StPO). This possibility now also exist if there is justified reason to fear that an unfair influence will be exerted on the witness. Moreover, if there is a corresponding endangerment, the witness' information regarding his/her identity or place of residence may not be revealed in the file to the person potentially posing a risk, including after conclusion of their examination (section 68 subs. 5 StPO). The measures described which were carried out in the protection of address data however relate not only to investigation proceedings, but also to court proceedings.

(b) Statement of the Witness' Residential Address in the Bill of Indictment

In the event of an endangerment (in accordance with section 68 subs. 1 sentence 1 and subs. 2 sentence 1 StPO), it was sufficient to state in the bill of indictment the witness' address at which documents can be served (section 200 subs. 1 sentence 3 StPO). Corresponding to the measures that have been described, in order to better consider all witnesses' rights of personality (not only those of endangered witnesses), it has now been clarified by the Second Victims' Rights Reform Act that the bill of indictment does not have to contain a witness' complete address (section 200 subs. 1 sentence 3 StPO) and in special cases even only his/her name (section 200 subs. 1 sentence 4 StPO).

Because it was previous practice in Germany to state (non-endangered) witnesses' full address in the bill of indictment when they were named, this often led to the undesirable situation that the accused was hence automatically aware of the addresses of all witnesses in each set of proceedings since the bill of indictment is to be communicated to the indicted accused in accordance with section 201 StPO. It is however not necessary in the vast majority of cases for the indicted accused to know the witnesses' residential address. Where this might nonetheless be necessary in individual cases in the interest of checking credibility, he/she can be informed of the address where appropriate through inspecting the files.

Finally, when naming witnesses, their identity, place of residence or whereabouts in accordance with section 68 subs. 3 StPO is not to be disclosed, only this fact is to be indicated in the bill of indictment (section 200 subs. 1 sentence 5 StPO).

(ii) Protection by means of the Provisions on Video Examination

Not only the abovementioned data protection provisions, but also provisions on the deployment of video technology, may contribute towards effective witness protection in criminal proceedings. Firstly, the possibility exists to examine witnesses separately, with simultaneous audio-visual transmission for other parties to the proceedings (sections 168e and 247a StPO), whilst it is permissible to record witness

11. Meyer-Goßner, *StPO*, 53rd edition, 2010, section 68, margin number 12.

examinations on an audio-visual medium – video recording – for the purpose of their subsequent use in the main hearing (sections 58a and 255a StPO). The provisions are not limited to specific fields of crime or certain groups of witnesses.

(a) Simultaneous Audio-Visual Transmission

Section 168e StPO provides for the investigation proceedings that if there is an imminent risk of serious detriment to the well-being of the witness, he/she may be examined by the judge such that the judge carries out the examination separately from the other persons entitled to be present (in particular the accused and his/her defence counsel). The examination is transmitted to them simultaneously by means of an audio-visual transmission. Additionally, this video examination by the judge may be recorded and used later in the main hearing, so that the witness is spared a confrontation with the indicted accused (section 168e sentence 4 StPO).

There is however always a requirement of a concrete risk to the well-being of the witness, the cause of which must particularly lie in an examination in the presence of the persons entitled to be present.

For the main hearing, section 247a StPO provides for video examination of the witness such that the presiding judge and the other parties to the proceedings do not leave the courtroom, and the witness is in another place outside the courtroom, the examination being transmitted to the courtroom using a direct audio-visual link. The examination may take place in a separate room in the court building or in another place at home or abroad where the preconditions for audio-visual transmission are guaranteed. This is possible, firstly – as in section 168e StPO – if there is an imminent risk of serious detriment to the well-being of the witness. It may however also be carried out if the personal appearance of the witness in the main hearing is opposed by a particular obstacle.

The testimony may also be recorded in the case of a video examination in the main hearing. In fact, it should be recorded if there is a danger that the witness cannot be examined during a future main hearing (for instance in an appeal proceeding) and if the recording is required in order to establish the truth. Whether this is the case is to be decided by the court at its duty-bound discretion, albeit it follows from the manifestation as a directory provision that, should the statutory prerequisites apply, it is to be ordered as a rule.

(b) Video Recording

The recording of a witness examination on audio-visual media in the investigation proceedings is regulated by law in the shape of section 58a StPO. This recording may be played in the main hearing subject to certain preconditions (cf. section 255a StPO in conjunction with sections 251 et seqq. StPO) – in particular with the consent of the indicted accused and of his/her defence counsel, or if the witness cannot be examined in the foreseeable future. A recording should be made if the examined witness is less than 18 years of age[12] or if there is a fear that the witness cannot be examined during the main hearing and if the recording is required in order to establish the truth, section 58a subs. 1 No. 2 StPO; section 247a StPO.

(c) Possible Detriment to the Rights of the Accused

The implementation of video examination in the main hearing in accordance with section 247 StPO is at the duty-bound discretion of the court. When exercising its discretion, the court must consider that the examination of the witness in person in the courtroom (section 250 sentence 1 StPO) was regarded by the legislature as being the standard case, and hence video examination, as an exception to this principle, is contingent on preconditions subject to a narrow interpretation. Only if these prerequisites are met is there latitude for a discretionary decision. A proper balance is to be struck here between the justified interest of the

12 This age limit was increased from 16 to 18 by the Second Victims' Rights Reform Act, so that there is now greater latitude to spare the witness an encounter with the accused by means of playing the recording. This new age limit also corresponds to the age limit of many international agreements on the protection of children and juveniles.

witness (witness protection) on the one hand and the rights of the indicted accused, which also have constitutional status, to a fair trial on the other hand. In particular, the inalienable rights of the indicted accused, in addition to the presumption of innocence, also include his/her right to a legal hearing and his/her right to ask questions. Furthermore, he/she also has a right to accelerated proceedings and at the same time comprehensive clarification of the criminal offence. The indicted accused must have an effective possibility to question a witness and to question his/her credibility and reliability. All this is at least made more difficult by video examination, if not actually prevented.

The principle of examination in person (section 250 StPO) is largely granted by simultaneous transmission (section 247 sentence 3 StPO), since only the physical presence of the witness in the courtroom is done without[13]. Having said that, the duty to investigate ex officio emerging from section 244 subs. 2 StPO[14] is affected if direct communication between the parties to the proceedings, in particular between the court and the witness, is not possible, but is filtered through a technical medium. This may cause a major detriment to the formation of judicial conviction. Also, spontaneous questions on the part of both the court and of the indicted accused are made more difficult. Finally, the motivation to testify truthfully may be reduced if there is no direct confrontation with the court and the parties to the proceedings.

(iii) The Undertaking of Confidentiality

In order to make it possible to verify the statement of a witness by consulting other evidence, the court must on principle know the identity of the witness. Statements regarding the identity may therefore not be refused as a rule. A witness may however exceptionally be assured by the criminal prosecution authorities (public prosecution office or police) that his/her identity will be kept secret if there is a particular endangerment to the witness. This can be considered namely with serious crime, in particular organised crime. The statement of the witness is then presented in the main hearing by the police officer who examined the witness. This approach is however very seldom taken in practice, especially since it is not binding for the court proceedings and does not eliminate the court's duty to ascertain the truth. Detailed guidelines for this procedure are provided in Annex D to the Guidelines for Criminal and Administrative Fines Proceedings[15].

2. Witness Protection in accordance with the Act to Harmonise Witness Protection[16]

It is particularly important in proceedings related to criminal offences of organised crime to win over witnesses who are willing to testify and to maintain their willingness to testify over the entire proceedings. Criminal prosecution authorities and courts frequently and particularly rely here on witnesses who come from among the offenders and can provide valuable information particularly because of their high degree of familiarisation with the planning of the offence and its commission. The willingness of a witness to testify is contingent on guaranteeing comprehensive protection. This is not only a matter of protecting the witness him/herself, but also his/her relatives and other persons close to him/her.

With the adoption of the Act to Harmonise Witness Protection in 2001, the legislature created a statutory basis for specific witness protection measures, and hence for greater legal security in this field. The legislature opted not to limit the area of application to the fields of crime "organised crime" and "terrorism"[17]. Having said that, section 2 subs. 2 sentence 2 of the Act to Harmonise Witness Protection contains a special proportionality clause according to which witness protection measures in accordance with the Act to Harmonise Witness Protection are ultimately only considered in cases of serious crime.

(i) Scope and Competence in Application of the Act to Harmonise Witness Protection

Section 1 subs. 1 of the Act to Harmonise Witness Protection lists the prerequisites under which

13 cf. on this Fischer in JZ (*JuristenZeitung*) 1998, p.820.
14 Meyer-Goßner, *StPO*, 53rd edition, 2010, section 244, margin number 12.
15 Guidelines for Criminal and Administrative Fines Proceedings, Annex D I. (Use of informants and deployment of cooperating witnesses in criminal prosecution).
16 cf. footnote 9.
17 The Draft of the Federal Council still provided for such a restriction. (Federal Council printed paper [*BR-Dr.*] 458/98).

witness protection may be provided in criminal proceedings. The witness to be protected must be in danger specifically because of his/her willingness to testify. An endangerment which is only abstract is not sufficient. The analysis of endangerment, which is carried out by the competent witness protection units, must reveal factual indications that damage is likely to occur to the legal interests of the witness.

Admission to witness protection is contingent on it being impossible to research the facts, or to identify the accused, or on this being made much more difficult, without the statement of the person who is to be protected. Less incisive measures therefore take priority.

The witness must have consented to the protection measures; he/she may therefore not be included in a witness protection programme against his/her will.

A person must be suited for the implementation of witness protection measures. The person to be protected may for instance be unsuited if he/she makes false statements, fails to meet agreements or is unable to do so, is not willing to maintain confidentiality or commits criminal offences.

In accordance with section 1 subs. 2 of the Act to Harmonise Witness Protection, the Act also applies to relatives of the witness or accused or to other persons close to him/her, given that dangers may also threaten this group of individuals. Even if a witness or accused person were to be willing to testify, suppressing their own endangerment, this is frequently questioned when the endangerment threatens persons close to him/her.

In accordance with section 1 subs. 4 sentence 1 of the Act to Harmonise Witness Protection, witness protection measures may be terminated if one of the preconditions mentioned above did not apply (from the outset) or has subsequently ceased to apply. The termination of criminal proceedings by itself does not however entail rescission of the witness protection measures if the endangerment continues to exist (section 1 subs. 4 sentence 1 of the Act to Harmonise Witness Protection)[18].

(ii) The Witness Protection Unit, Section 2 of the Act to Harmonise Witness Protection

Special witness protection units have been set up both at the Federal Criminal Police Office and in all Federal *Länder*. These special units are as a rule separated from the investigative units, which is considered necessary for reasons of police tactics.

Inclusion in a witness protection programme is as a rule suggested by the individual criminal prosecution authority/public prosecution office dealing with the investigation proceedings; only then does the special witness protection unit start work, which then takes a formal decision on inclusion in the witness protection programme.

In accordance with section 2 subs. 2 of the Act to Harmonise Witness Protection, there is no fundamental legal right to the commencement of protection measures by the witness protection unit. Rather, the decision on the commencement, nature, scope and termination of such measures is in any case contingent on an examination of proportionality in which in particular the gravity of the offence, the degree of the endangerment, the rights of the accused against whom the testimony is to be given, and the impact of witness protection, are to be taken into account.

Accordingly, all witness protection measures taken, such as the issuance of cover documents, financial benefits or the termination of witness protection must be comprehensible at any time, thus obliging the witness protection units to provide seamless documentation. This information, which is subject to confidentiality, is kept in files in the witness protection units and does not constitute a part of the investigation file. The files are however to be made available to the public prosecution office for criminal proceedings on request. Officials of the public prosecution office and witness protection units are also obliged to provide information on witness protection in criminal proceedings in accordance with general principles. In

18 If measures in accordance with the Act to Harmonise Witness Protection can no longer be considered because the preconditions do not apply (or no longer apply), but the endangerment continues to apply to major legal interests of the individual in question, the competent police authorities must ensure their protection by taking measures under police law. In this case, the legal basis changes under which protection is granted, and possibly also the methods and the police officers in persona, but protection continues to be guaranteed.

accordance with section 54 StPO, they however require consent to testimony, which is to be granted, but may however also be restricted where appropriate, taking account of the purposes of witness protection.

The judicial control of the proceedings exercised by the public prosecution office remains unaffected (section 2 subs. 4 of the Act to Harmonise Witness Protection). Until the final conclusion of a set of criminal proceedings, all important decisions are to be taken subject to agreement between the public prosecution office and the witness protection unit. Also, once the proceedings have been concluded, the public prosecution office is to be provided with information because it may have information, for instance from follow-up proceedings, which is significant to the decision on the termination of witness protection.

(iii) Confidentiality, Obligation in accordance with Section 3 and Section 10 of the Act to Harmonise Witness Protection

The solution of the tension between properly safeguarding the necessary confidentiality of witness protection measures, on the one hand, and the right to a fair trial on the other, is served by sections 3 and 10 of the Act to Harmonise Witness Protection. Here, the safeguarding of effective witness protection is contingent inter alia on the confidentiality of the witness protection measures. Office-holders are already obliged to observe confidentiality in accordance with provisions of service law; unauthorised disclosure of information is subject to criminal punishment in accordance with section 353b subs. 1 No. 1 of the Criminal Code (*Strafgesetzbuch – StGB*)[19] – up to five years' imprisonment or a fine. In the main, the provision of section 3 of the Act to Harmonise Witness Protection hence serves to safeguard confidentiality by other persons (firstly, the persons to be protected themselves, and secondly those private individuals who can be claimed against for measures in accordance with the Act to Harmonise Witness Protection), who in accordance with the Obligations Act (*Verpflichtungsgesetz*)[20] can be "formally obliged to carry out their obligations in a conscientious manner". In this respect, these individuals are equated to office-holders, so that they are threatened in the event of violating this obligation with criminal prosecution in accordance with section 353b subs. 1 No. 2 StGB. The person to be protected will need to be placed under an obligation as a rule since the willingness to be placed under an obligation (with the consequences of criminal prosecution in the event of a violation), is a major criterion for the suitability of a person who is to be protected.

Section 10 of the Act to Harmonise Witness Protection, by contrast, regulates obligations to provide information in formal judicial proceedings, that is before courts and committees of enquiry. It must be ensured in these proceedings too that the personal particulars under which a person who is to be protected lives, as well as his/her current whereabouts, are not disclosed and hence their endangerment increased. Section 10 subs. 3 of the Act to Harmonise Witness Protection clarifies for criminal proceedings that the provisions contained in sections 68 and 110b subs. 3 StPO remain, that is that the accused and the defence do not have to accept any further restrictions. For all other court proceedings, a person enjoying protection, in derogation from the provisions of the respective rules of procedure, is entitled to make a statement on the person only regarding a former identity, and may refuse to give information which allows conclusions to be drawn as to the current personal particulars and place of residence and whereabouts.

(iv) Utilisation of Personal Data, Section 4 of the Act to Harmonise Witness Protection

Section 4 subs. 1 of the Act to Harmonise Witness Protection determines as one of the central provisions of the Act that the witness protection units may refuse to provide any information to public and non-public agencies apart from the public prosecution offices regarding personal data of the person who is to be protected, where this is necessary for his/her protection.

Section 4 subs. 2 of the Act to Harmonise Witness Protection contains a blanket clause granting public

19 Criminal Code in the version of the promulgation of 13 November 1998 (Federal Law Gazette. I p.3322), most recently amended by Article 3 of the Act of 2 October 2009 (Federal Law Gazette. I p.3214).

20 section 2 subs. 2 No. 2 of the Act on the formal Obligation of Persons who are not Tenured Civil Servants (*Gesetz über die förmliche Verpflichtung nicht beamteter Personen*) of 2 March 1974 (Federal Law Gazette Part I, 469, 547).

agencies the power, on request by the witness protection units, to block data or not to forward them. The requested authorities must comply with the request of the witness protection units unless there are prevailing third-party interests which are eligible for protection or such interests of the general public. The general clause applies to public files and registers, such as the registration, identity card, passport, driving licence and vehicle registers.

The further blanket clause contained in section 4 subs. 3 of the Act to Harmonise Witness Protection obliges agencies outside the public domain to comply with the request of the witness protection units to block the transmission of data. This provision is necessary because considerable amounts of data processing are also carried out in the private domain, for instance in banks, insurance companies and utilities. Furthermore, public and non-public agencies must ensure for the area of their internal data processing that witness protection is not impaired (section 4 subs. 4 of the Act to Harmonise Witness Protection). The reference to sections 161 and 161a StPO contained in section 4 subs. 5 of the Act to Harmonise Witness Protection makes it clear that these restrictions do not apply in relations to the public prosecution office exercising judicial control of the proceedings. The recognition and prevention of spying attempts by third parties is served by the provision that public and non-public agencies must notify each request to release blocked data to the witness protection unit (section 4 subs. 6 of the Act to Harmonise Witness Protection).

(v) Temporary Cover, Section 5 of the Act to Harmonise Witness Protection

Section 5 of the Act to Harmonise Witness Protection regulates the structure of temporary covers. Persons who are to be protected must be equipped with documents by means of which a fictitious life can be traced, which is for instance necessary to take up work or to register children for school or to change schools. As a blanket clause, section 5 subs. 1 of the Act to Harmonise Witness Protection clarifies that public agencies are empowered to produce and alter cover documents at the request of the witness protection units and to process the altered data. This refers for instance to identity cards, driving licences, wage tax cards or certificates.

The blanket clause contained in section 5 subs. 2 of the Act to Harmonise Witness Protection obliges non-public agencies to comply with the request of the witness protection units to issue cover documents. This is significant because identity cards, as well as documentation of entitlements and performance, are also drawn up in the non-public sphere to document life events.

In accordance with section 5 subs. 3 of the Act to Harmonise Witness Protection, persons to be protected may take part in legal transactions under their cover, for instance by renting apartments or holding bank accounts.

(vi) Benefits from the Witness Protection Unit, Section 8 of the Act to Harmonise Witness Protection

With the provision on benefits from the witness protection units paid to the persons to be protected, section 8 of the Act to Harmonise Witness Protection touches on one of the most controversial topics in the field of witness protection, given that it relates to the tension between effective provision of protection for endangered individuals on the one hand and the right of each accused person to put up defence and to a fair trial on the other.

Section 8 subs. 1 of the Act to Harmonise Witness Protection makes it possible to provide temporary economic support by the witness protection units unless in individual cases the persons to be protected can use their own resources. On principle, these persons must continue to support themselves. They must have recourse to their own savings where necessary.

The fundamental prohibition of economic advantage is one of the fundamental requirements of the Act to Harmonise Witness Protection. Potential witnesses are not to be able to hope to enjoy material advantages through inclusion in witness protection, such as a larger home or higher monthly payments. This provision details the legal concept from section 136a StPO, in accordance with which inter alia the promise of

advantages not provided for by the law is prohibited, including for witness protection.

A strict standard is to be applied to the nature and scope of possible benefits which is orientated in line with the weighing up criteria of section 2 of the Act to Harmonise Witness Protection. Hence, the accusation is prevented which would otherwise be possible that the testimony of the person who is to be protected was, so to speak, bought with material advantages.

Section 8 sentence 2 of the Act to Harmonise Witness Protection makes it clear that benefits from the witness protection units which a person to be protected has deceptively and unfairly obtained, such as by knowingly making untrue statements about the preconditions for witness protection, can be demanded back. These prerequisites will not normally apply if the content of a statement is simply corrected.

3. Impairment of the Defence through Measures in accordance with the Act to Harmonise Witness Protection?

The provisions of the Act to Harmonise Witness Protection offer good possibilities to achieve effective protection of an endangered witness. Disadvantages may however be caused to the accused and the indicted accused with regard to an effective defence as a result of measures provided for in the Act to Harmonise Witness Protection. Since inclusion in a witness protection programme as a rule is proposed by the respective criminal prosecution authority dealing with the investigation proceedings (section 2 subs. 2 sentence 1 of the Act to Harmonise Witness Protection, see above), case constellations are conceivable in which the protection of the witness is not primarily focussed on, but procedural tactical considerations of the criminal prosecution authorities also at least play a role[21]. Instead of strengthening the ascertainment of the truth, witnesses who are willing to testify may also be influenced in particular by the prospect of being included in a witness protection programme and nicen up their testimony so as to make themselves more important for the criminal prosecution authorities than they actually are. This may encourage false testimony. It is also possible for the witness to be protected to portray the endangerment potential more dramatically than it is in reality, given that inclusion in a witness protection programme is associated with measures which might be understood to constitute not inconsiderable advantages[22].

There is no empirical proof of these fears, and these would probably also be difficult to establish, but because of the comprehensible motivation of the witness they cannot however be fully ruled out. It is however first and foremost a matter for those who deal with inclusion in the witness protection programme to recognise such tendencies and nip them in the bud. The judge in the main hearing must however also be aware that he/she might need to pay particular attention to the motivation of the witness, and concomitantly to the value of his/her testimony.

B. Witness Protection as an Obligation incumbent on Employers: Federal Constitutional Court's "Whistleblower" Ruling

The "whistleblower"-problematic does not refer to witness protection in its classical sense as "whistleblowers" do not necessarily become witnesses in a criminal proceeding. In general they alert to the competent authorities important information on wrongful acts in private companies or even in the public sector. This is more an aspect of civil-/labour-law. In the "Whistleblower" ruling of the German Federal Constitutional Court it has been pointed out that in addition to the state's obligation to protect witnesses, (civil and public-law) employers also have an obligation in individual cases to protect a witness who has provided information on irregularities within the company to the criminal prosecution authorities, in criminal proceedings against civil law sanctions or other disadvantages with which they may be threatened during or after the conclusion of criminal proceedings. This is not witness protection in the classical sense; nonetheless, this area is highly significant since it repeatedly occurs in current political discussions in Germany.

21 More on this: Ulrich Eisenberg, *Zeugenschutzprogramme und Wahrheitsermittlung im Strafprozess*, in Festschrift für Gerhard Fezer, p. 197 et seqq.

22 Such as creation of a cover (section 5 subs. 1-3 of the Act to Harmonise Witness Protection) and material benefits (section 8 sentence 1 of the Act to Harmonise Witness Protection).

The Federal Constitutional Court found in its "Whistleblower" ruling of 2 July 2001[23] that testimony of an employee in the investigation proceedings against his/her employer did not necessarily entitle it to terminate employment. Particularly the obligation to testify was said to be a general civic duty. It was said not to be compatible with this duty in a state based on the rule of law for those who complied with it to suffer disadvantages under civil law. The Court found that this was the only way to satisfy the constitutional duty of the State to guarantee a functioning administration of justice in the public interest.

The case-law of the labour courts which has been handed down since the "whistleblower" ruling has not been able to prevent non-uniform and partly contradictory handling of this prohibition of discrimination pronounced by the Federal Constitutional Court. The legislature has hence been planning for quite some time to include a "whistleblower section" in the Civil Code (*Bürgerliches Gesetzbuch*) to eliminate the legal and factual uncertainties in this field[24]. However, so far without any results.

III. EFFECTIVE MEASURES TO ENCOURAGE COOPERATION OF WITNESSES OF ORGANISED CRIME IN GERMANY WITH A FOCUS ON THE "CROWN WITNESS" SYSTEM

Before the crown witness system in Germany is explained in more detail, it is important to know that these regulations do only apply to persons who themselves have committed a criminal offence and who are subject to mitigation principles due to the fact that they are willing to cooperate with the judicial authorities.

A. The Crown Witness Arrangements in Germany prior to the Entry into Force of the Act Amending the Criminal Code[25]

The figure of the crown witness was fundamentally alien to German criminal procedure law for a long time. A crown witness arrangement was included in criminal law, including those criminal provisions which are not contained in the Criminal Code, for the first time in 1981 with section 31 of the Narcotics Act (*Betäubungsmittelgesetz*)[26]. This provides that the court may mitigate the sentence, or can refrain from imposing punishment, if the offender

- has made a major contribution by voluntarily revealing his/her knowledge to discovering the offence over and above his/her contribution to it, or
- voluntarily reveals his/her knowledge to a unit in such good time that considerable criminal offences in accordance with the Narcotics Act with regard to which he/she has become aware of the planning can still be prevented.

Further "crown witness arrangements" for specific criminal offences are provided for by the applicable law in the field of organised crime (sections 129 subs. 6 and 261 subs. 9 StGB), as well as in the field of terrorism (section 129a subs. 7 StGB).

Controversial discussions have been going on in Germany for decades and are continuing on the introduction of a crown witness arrangement covering all crimes[27]. This is partly because crown witness arrangements are in a certain state of tension with the principle of mandatory prosecution and the guilt principle: A criminal offender may buy him/herself free of criminal prosecution by means of denunciation. The punishment distances itself from its function of being a fair compensation for guilt[28]. Art. 3 of the Basic

23 Order of the Federal Constitutional Court of 2 July 2001, ref. 1 BvR 2049/00.
24 German Federal Parliament, Committee on Food, Agriculture and Consumer Protection: Proposal for the statutory establishment of informant protection for employees in the Civil Code of 30 April 2008. (Committee printed paper 16(10)849 – This proposal did not find political favour.)
25 Act Amending the Criminal Code – Assessment of Punishment with Assistance in Solving and Preventing Crimes (*Gesetz zur Änderung des StGB – Strafzumessung bei Aufklärungs- und Präventionshilfe*), Federal Law Gazette. Part I 2009, 2288.
26 Act on Trafficking in Narcotics (*Gesetz über den Verkehr mit Betäubungsmitteln*), of 28 July 1981 (Federal Law Gazette. I, 681).

Law (*Grundgesetz*) (the principle of equality) is also affected given that those who are entangled in a criminal environment can obtain advantages more easily than a person committing a single crime, who cannot denounce anyone. What is more, the criminal prosecution authorities place themselves under suspicion of negotiating with crime.

German legal policy has also repeatedly tackled the question in recent years of the degree to which the structure of crown witness arrangements should be improved or expanded in the law, particularly in view of the fact that the threat not only of organised crime, but in recent years especially also of terrorist attacks, appeared to grow[29].

The discussions in this respect touched on the same questions again and again: Should crown witness arrangements be regulated for specific crimes in the individual elements of the offences themselves (as in the abovementioned sections 129 and 129a StGB), or should a multi-crime provision be introduced? Should the advantages granted only be considered if the testimony of the crown witness relates to offences in which he/she was personally involved, or should they also apply if he/she can provide information regarding offences which are unrelated to the offence of which he/she is being accused? And, finally, also the question of whether one should adopt a US system of "corroboration", according to which no conviction may be handed down solely on the basis of the testimony of a crown witness.

B. The So-called "Big Crown Witness Arrangement" adopted as Law

With the "Act Amending the Criminal Code - Assessment of Punishment with Assistance in Solving and Preventing Crimes", which came into force on 1 September 2009[30], a multi-crime "big" crown witness arrangement was opted for, whilst retaining the provisions contained in sections 31 of the Narcotics Act and sections 129 and 129a StGB. A provision was included in the Criminal Code[31] with which all offenders of particularly serious criminal offences are to be covered if they make a major contribution by voluntarily disclosing their knowledge towards solving or preventing criminal offences, including those in which they were not personally involved ("multi-crime" application). It was particularly pointed out as a reason for the necessity of such a broad crown witness arrangement that "there are considerable evidentiary problems when it comes to crimes from the area of organised crime and terrorism" and that it was hence necessary to provide adequate and suitable tools to offer an incentive to offenders who might be willing to cooperate in solving crimes and to assist in their prevention[32].

As to the crimes for which assistance in solving and preventing crimes is to be provided, the new provision is linked to the lists of criminal offences contained in section 100a StPO. These are in particular criminal offences which as a rule are committed in connection with organised crime.

The legal consequences of assistance in solving crimes within the meaning of section 46b StGB are placed at the discretion of the courts: In accordance with section 49 subs. 1 StGB they can mitigate sentence – including life imprisonment – or refrain from imposing sentence if the offence is only threatened with time-limited imprisonment and the offender has not incurred a prison sentence of more than three years. The discretion of the court in this term is guided by section 46b subsection 2 of the Criminal Code which states that the court shall have particular regard to the nature and scope of the disclosed facts and their relevance to the discovery or prevention of the offence, the time of disclosure, the degree of support given to the prosecuting authorities by the offender and the gravity of the offence to which his disclosure relates, as well as the relationship of the circumstances mentioned before to the gravity of the offence committed by and the

27 The so-called Crown Witness Act, promulgated on 16 June 1989 (Federal Law Gazette. I 1989, 1059), on which – having been expanded to include the prosecution of (other) organised crime – a sunset clause was ultimately imposed up to 31 December 1999, and which was then no longer extended, was of little significance in practice.
28 Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts*) 45, 259.
29 On the development of the legislative procedure cf. König in *Neue Juristische Wochenschrift (NJW)* 2009, 2481.
30 cf. footnote 26.
31 Section 46b of the Criminal Code "Assistance in solving or preventing serious criminal offences".
32 Federal Parliament printed paper 16/6268, p. 1 et seq.

degree of guilt of the offender.

In order to avoid any misuse of the concessions made possible under section 46b of the Criminal Code, a time limit is stipulated for the submission of information as a witness for the prosecution.

Mitigation of punishment or dispensing with punishment are excluded if the perpetrator discloses the information at his disposal after the decision has been issued to open the main proceedings against him (section 207 of the Code of Criminal Procedure). This cut off point for considering submissions by the perpetrator is designed to enable the courts to examine the statements of witnesses for the prosecution as to their veracity before judgment is handed down. Should the perpetrator provide information relevant to the investigation during interlocutory proceedings (section 199 et seqq. of the Code of Criminal Procedure), the court may have these examined before the decision is taken to open the main proceedings, and send the files to the public prosecution office for further investigation if necessary.

However, even if the perpetrator contributes to discovery or prevention only during the course of the main proceedings (thus excluding the possibility of applying section 46b of the Criminal Code), there is the possibility of honouring this during sentencing in accordance with section 46 subsection 2 of the Criminal Code.

It is not yet possible to say with certainty whether the new Act fulfils its purpose; there are no authoritative figures on this. The Coalition Agreement of the current government however provides in turn to structure the crown witness arrangement in such a way that the possibility to mitigate punishment may only be opened up if the offender's disclosure is linked to with his/her own criminal offence[33].

IV. WITNESS PROTECTION AT EU LEVEL

Witness protection is not only of national interest; this topic is also becoming more and more the subject of debate in the cross-border domain. Considerations to regulate witness protection EU-wide have been in existence for several years. It was suggested back in 1997 in Recommendation 16 of the "Action Programme on the Prevention and Fight against Organised Crime"[34] to examine the needs of protection of witnesses and persons who collaborate in the action of justice. The Council Declaration of 25 March 2004[35] on combating terrorism and the Hague Action Plan[36] also refer to a proposal on the protection of witnesses and collaborators.

The European Commission in particular has also been calling for a long time for the introduction of obligatory minimum standards for witness protection at European level; to this end, it presented already in 1996 a "Resolution on individuals who cooperate with the judicial process in the fight against organised crime"[37]. Furthermore, a Commission Working Document on 13 November 2007 on the feasibility of EU legislation in the area of protection of witnesses and collaborators with justice was presented[38]. This document provides an overview of the state of legislation and the general procedure to be followed at national, European and international levels; it furthermore contains an analysis of the problems, goals and possible political options.

But not only the European Commission, also the Council of Europe has made big efforts when it comes to witness protection. Especially the "Recommendation concerning intimidation of witnesses and the right of the defence"[39] and the "Recommendation on the protection on witnesses and collaborators of

33 "Growth, Education, Unity": The coalition agreement between the CDU, CSU and FDP for the 17th legislative period, Nos. 4945 et seqq. (http://www.cdu.de/doc/pdfc/091215-koalitionsvertrag-2009-2013-englisch.pdf).
34 Official Journal of the European Union C 251 of 15 August 1997.
35 In English at: http://www.ena.lu/declaration_combating_terrorism_extract_concerning_establishment_position_coordinator_brussels_march_2004-020007089.html
36 Official Journal of the European Union C 65/120 of 17 March 2006 - COM(2005) 184 final.
37 Official Journal C 010, 11/01/1997, p. 0001-0002.
38 Commission of the European Communities, Brussels, 13 November 2007 - COM(2007) 693 final.

justice"[40] provide for specific guidance in the field of witness protection.

Therefore, it has been shown in recent years that, on the one hand, there has been progress in the field of EU-wide cooperation; for instance both the Council Framework Decision on combating terrorism[41] and the Council Framework Decision on the standing of victims in criminal proceedings[42] offer possibilities to alleviate punishment in exchange for information and protection rights of (victim) witnesses. Most EU Member States also have a witness protection regulation either in a separate statute or in their Code of Criminal Procedure[43]. These as a rule contain definitions of terms (protected witness, anonymous witness, person collaborating with the judiciary), procedural (special precautions in the proceedings, alternative procedures for testimony), as well as non-procedural measures (physical protection, change of place of residence, cover identity).

However, there are also differences: Some countries consider witness protection to be primarily a matter for the police, whilst others allot a primary role to the judiciary and the ministries. The countries also differ widely in the manner of the measures with which witnesses' collaboration is to be made easier. In some cases different legal traditions and contexts also have a role to play. These differences show that, all in all, a framework for binding minimum standards is not in place.

One can however gather from practitioners that the necessary protection can be provided in most cases by means of bilateral agreements which – where necessary – are concluded on an ad hoc basis, as well as through an increased informal exchange of experience and information, as well as cooperation. Those practitioners often give the opinion that there is no need for an EU-wide regulation on minimum standards in this field and that such a regulation would not have any added value.

V. STATISTICAL INFORMATION

A. On Witness Protection Cases

It is difficult to obtain reliable figures on witness protection measures and programmes in that the responsible authorities are unwilling to reveal certain information because of the priority of the protection and confidentiality of witness protection measures. This is to prevent amongst other things interested groups obtaining a picture of the specific means and methods with which witness protection is provided by collating information in a mosaic-like manner.

The Federal Criminal Police Office has released the following figures from 2006 for publication:

• Numbers of cases:	witness protection cases 2006	330
	carried over from 2005	266
	new cases	64
	completed cases	55
• Fields of crime:	organised crime	262
	national security crimes	10
	other serious crime	58
• Protected witnesses:	witnesses (total)	330
	male	229
	female	101
	nationality German	154
	nationality not German	176
	others involved	328

39 Council Recommendation No. R (97) 13 as of 10 September 1997.
40 Council Recommendation No. R (2005) 9 as of 20 April 2005.
41 Official Journal of the European Union L 164 of 22 June 2002, 3 Article 6.
42 Official Journal of the European Union L 82 of 22 March 2001, 1 Article 8.
43 A separate Witness Protection Act exists in 18 EU Member States; 9 EU Member States do not have such a law (these include Denmark, Finland, France, Greece, Luxembourg, the Netherlands, Austria, Spain and Cyprus).

For the above reasons, virtually no information is also available when it comes to the question of the cost and staffing needs in the context of witness protection. According to unverifiable estimates, an average of six to eight witness protection officers per witness protection unit in Germany appears to be sufficient. Special response units, mobile response units, or also investigation groups, are also deployed in some cases, each of which is independent of the witness protection unit in terms of staffing.

Taking a look at the budget plans of the individual Federal *Länder* is also no more informative since the funds officially entered for the purposes of witness protection frequently do not reflect the actual circumstances (for instance because financial resources used for witness protection are "hidden" in other items of the budget plan in order not to permit conclusions to be drawn here either).

B. On the Impact of the Crown Witness Arrangements in Germany

One can observe that the crown witness arrangement on terrorism, which was not extended beyond 1999, was applied with particular success in the cases of former RAF (*Rote Armee Fraktion*) terrorists and in the exposure and prosecution of the PKK [Kurdistan Workers' Party]. There are also several sets of proceedings in which the arrangement which was brought into the field of organised crime made it possible to solve cases.

In terrorist crime committed by foreigners, and when it comes to trials of members of the PKK in particular, crown witness statements have made it possible to indict senior PKK cadres and made a major contribution towards their conviction, in some instances sentencing them to long prison terms. The lion's share of these indictments could presumably never have been laid without the contribution towards detection made by "crown witnesses". The successes in investigation at that time made it possible not only to expose the structures of the PKK; they are also likely to have made a major contribution towards the PKK's decision to cease violent terrorist activities in Germany. In terms of German terrorism, the crown witness arrangement was applied to former RAF members who had gone into hiding in the GDR and who were taken into custody after unification. Their testimony made a major contribution towards solving crimes from the seventies. It remains to be seen whether the "big crown witness arrangement", which has now been adopted as law[44], will lead to comparable successes in investigation.

In the criminal law on narcotics, the "crown witness arrangement", which has been in existence since 1982 (section 31 of the Narcotics Act), has been well received by practitioners. It was already applied in more than 2,300 cases in the few years subsequent to its entry into force, namely from 1985 to 1987[45]. According to practitioners, the regulation led to considerable successes in investigation, particularly in the fight against organised narcotics-related crime.

VI. CONCLUSION

The constitutional system of the German Basic Law obliges the state agencies to also consider the interests of witnesses in criminal proceedings. The legislature is in this regard faced by a challenge to achieve optimum protection of witnesses without in doing so impairing the justified interests of the accused in a defence. Measures to protect witnesses must be compatible in general terms with the purposes of criminal proceedings, given that the state bodies are primarily obliged to solve crimes and to find the guilt or innocence of an accused person in a fair trial based on the rule of law. Under this premise, an attempt should be made to ensure that the measures have as concrete an impact as possible: Witnesses of criminal offences primarily need the best possible protection in practice.

In the field of witness protection within criminal procedure, the legislature once more took a major

44 cf. footnote 26.
45 Körner, *Kommentar zum Betäubungsmittelgesetz, Arzneimittelgesetz*; 6th ed. 2007: section 31 marginal no. 8.

step towards improving this protection in 2009 with the Second Victims' Rights Reform Act.

It is possible to state for the period prior to this that the legislative activities to improve witness protection in Germany took a major step forward with the adoption of the Act to Harmonise Witness Protection. The discussion on stepping up the fight against organised crime, which started in the mid-eighties, brought about improvements in witness protection in a total of three steps: First of all, with the Act on Suppression of Illegal Drug Trafficking and other Manifestations of Organised Crime from 1992, witness protection in criminal procedure was considerably improved by enabling endangered witnesses when examined to refrain from stating their personal details or place of residence, or to limit the information provided. The Witness Protection Act from 1998 led especially to a statutory provision of the deployment of video technology in the Code of Criminal Procedure. Finally, the Act to Harmonise Witness Protection placed witness protection by the police, which has a long tradition, on a statutory footing, and hence closed a loophole in the law to combat particularly serious manifestations of crime. It can be regarded as a slight blemish that it has not been possible to integrate the provisions of the Act to Harmonise the Protection of Endangered Witnesses in the Code of Criminal Procedure. However, this reflects the fact that witness protection lies in the grey area between risk aversion and criminal prosecution, and that at least when it comes to police witness protection the two aspects cannot be separated from one another.

Through its "whistleblower" ruling in 2001, the Federal Constitutional Court made it clear that statements of an employee in the investigation proceedings against his/her employer do not necessarily entitle it to terminate employment if the witness was merely carrying out his/her general civic duty.

When it comes to the harmonisation of witness protection at EU level, it can be found that on the one hand there are many efforts to establish joint minimum standards, but that because of the highly-differing witness protection systems which the EU Member States have implemented nationally, there is no common consensus on how this has to take place.