

Act n.º 93/99, of 14 July 1999: Governing the enforcement of measures on the protection of witnesses in criminal proceedings

CHAPTER I

General provisions

Section 1

Object

1. This Act governs the enforcement of measures on the protection of witnesses in criminal proceedings where their lives, physical or mental integrity, freedom or property of a considerably high value are in danger due to their contribution to the collection of evidence of the facts which are subject to investigation.
2. The measures stated in the previous paragraph may cover the witnesses' relatives and other persons in close contact with them.
3. This Act also provides for measures intended to collect, under the most satisfactory conditions, any testimonies or statements of specially vulnerable persons, namely by reason of age, even if the danger mentioned in paragraph 1 hereabove does not apply.
4. The measures laid down in this Act are extraordinary in nature, and they do not apply unless deemed necessary and adequate in casu to the protection of the persons involved and to the fulfillment of the purposes of the proceedings.
5. The cross-examination allowing a fair balance between the needs for combating crime and the right to a defense is hereby guaranteed.

Section 2

Definitions

For the purposes of this Act

- a) Witness means any person who, notwithstanding his status towards the procedural law, is in possession of any information or knowledge necessary to the disclosure, apprehension or evaluation of facts subject to investigation and which are likely to represent a danger to that person or to others by virtue of paragraphs 1 and 2 of the previous article.
- b) Intimidation means any kind of pressure or threat, either direct, indirect or potential, exercised by any person over a witness with a view to influence his testimony or statement;
- c) Teleconference means any testimony or statement taken in the witness's physical absence by using technical means of transmission, at long distance and in actual time, either of sound or animated images;
- d) Identification features means any particulars which, separate or jointly, enable a person's individualisation, thus distinguishing him from any other person;
- e) Residence means the place where the witness lives or where he can be contacted.

Section 3

Appeals

The delay for any appeal from the decisions mentioned in this Act is reduced to half its usual duration. The appeal shall be immediately and separately committed to the competent court.

CHAPTER II

Concealment and teleconference

Section 4

Witnesses' concealment

1. The court may decide, either unofficially, upon the request of the Public Prosecutor, or upon the demand of the defendant or of the civil party claiming damages, that the testimony or the statement must be taken by means of either concealing the witness's image or distorting his voice, or both, instead of taking the form of a public procedural act or of a cross-examination, in order to avoid the witness's recognition.

2 - The decision must be based upon facts or circumstances which reveal intimidation, or a high risk of intimidation of the witness, and it shall also refer to the degree of concealment of image or distortion of voice.

Section 5

Teleconference

1. In case of offer of evidence relating to a crime to be judged by a three-judge court or by a jury court, whenever there are serious grounds to believe that the protection is necessary, the use of teleconference is admissible during the procedural acts mentioned in paragraph 1 of the previous article.

2. Teleconference can include the resort to distortion either of image or voice, or of both, with a view to avoid the witness's recognition.

Section 6

Request

1. The use of the teleconference is decided either upon request of the Public Prosecutor, or upon the defendant's or the witness's demand.

2. The request must specify the specific circumstances which justify the measure and the distortion of image and sound, if applied.

3. The decision is preceded with the hearing of the non-applicant procedural subjects.

Section 7

Location

The long-distance testimony or statement shall be taken in a public building, whenever possible in the Courts, or in the Police or prison premises which offer the appropriate conditions to the installation of the necessary technical devices.

Section 8

Access to the location

The court may restrict the access to the place where the testimony or the statement shall be taken, allowance being granted to the technical staff, the officials or the security personnel deemed strictly indispensable.

Section 9

Commitment

Whenever the witness's recognition by image or voice is to be avoided or his identity is to be kept unrevealed, the technical staff intervening in the teleconference shall render a commitment not to disclose the location or the witness's identification features. Should the technical staff fail to do so, the punishment for aggravated disobedience shall apply.

Section 10

Escorting judge

The judge presiding to the act shall guaranty the presence of a judge at the location where the testimony or the statement shall be taken, on whom shall be incumbent namely:

- a) To identify and take the oath to the witness whose identity is to remain unrevealed or whose recognition is to be avoided;
- b) To receive the commitment mentioned in the previous section;
- c) To ensure that the witness will make a free and spontaneous testimony or statement;
- d) To provide for the clear understanding of the questions by the witness and for the transmission of the answers in actual time;
- e) To act as interlocutor of the judge presiding to the act, by calling his attention to any incident occurring during the testimony or statement;
- f) To guaranty the authenticity and the integrity of the video recording to be enclosed to the proceedings;
- g) To take all the preventive, disciplinary and restraining measures legally admissible, which prove adequate to enforce the access restrictions to the location and, in general, to guaranty the security of all persons present.

Section 11

Questions

The questions to which the witness is required to answer during the collection of evidence are made at distance, and they shall observe the terms of the procedural law.

Section 12

Recognition

If, during the testimony or the statement, any recognition of persons, documents or objects becomes necessary, the witness shall allowed the respective visualization.

Section 13

Non-disclosure of identity

Where the witness's identity is to remain unrevealed, it is particularly incumbent of the judge presiding to the act to avoid asking any question likely to induce the witness to the indirect disclosure of his identity.

Section 14

Access to sound and image

1. In case of the concealment of the witness's image and voice, the access to the undistorted sound and image is to be allowed in exclusive to the judge presiding to the act or the court, should the technical means available enable it.
2. The autonomous and direct communication between both the judge presiding to the act and the escorting magistrate, as well as between the defendant and his counsel, shall be guaranteed in any circumstance.

Section 15

Proximity

The testimonies and statements made through teleconference, according to this Act and to any other relevant legislation, are deemed, for all purposes, as having been made in the presence of the judge or of the court.

CHAPTER III

Restriction regarding the disclosure of the witness's identification features

Section 16

Prerequisites

The non-disclosure of the witness's identity may cover one or all the phases of the proceeding provided the following conditions occur concurrently ?

- a) The testimony or the statement relates to criminal offences stated in sections 169, 299, 300 or 301 of the Criminal Code and in section 28 of the Cabinet Order n° 15/93, dated the 22nd January, or to criminal offences committed by whoever belongs to a criminal association, in the scope of its purpose or activity, and to which corresponds an imprisonment sentence equal or superior to eight years;
- b) The witness, his relatives or other persons in close contact with him face a serious danger of attempt against their lives, physical integrity, freedom or property of a considerably high value;
- c) The witness's credibility is beyond reasonable doubt;
- d) The testimony or the statement constitutes a relevant probative contribution.

Section 17

Jurisdiction

1. The non-disclosure of the witness's identity is decided by the Examining Magistrate upon the request of the Public Prosecutor.
2. The request contains the grounds for the non-disclosure of the identity in casu, as well as the reference to the evidence that must be offered thereto.
3. No Examining Magistrate can appreciate a request for non-disclosure of a witness's identity in a proceeding in which he has performed, ordered or authorised any of the acts listed in article 286, paragraph 1, sub-paragraphs a) and d), or in article 269, paragraph 1, sub-paragraphs a) and c), both of the Criminal Procedure Code, as well as in a proceeding in the scope of which he has presided over preliminary acts of investigation or preliminary hearings.
4. The Examining Magistrate's decision on a request for non-disclosure of identity impeaches him to intervene in the proceeding thereafter.

Article 18

Supplementary proceedings of non-disclosure of identity

1. For purposes of decision on a request for non-disclosure of identity a supplementary proceeding of a confidential and urgent nature shall be separately prepared, to which only the Examining Magistrate and whoever he appoints for that purpose shall have access.
2. The Examining Magistrate shall be entrusted with the safekeeping and confidentiality of the supplementary proceeding.
3. The Examining Magistrate asks the Bar to appoint a lawyer with the proper profile to represent the defence's interests. The appointed lawyer shall only intervene in the supplementary proceeding. Unofficially or upon request the Examining Magistrate makes the investigation he deems indispensable to meet the requirements needed for the granting of such a measure.
4. Before rendering his decision the Examining Magistrate calls the Public Prosecutor and the representative for the defence for an oral debate under cross-examination on the grounds of the request.
5. The decision allowing the requested measure confers the witness a codified reference, by which he shall be referred afterwards in the proceeding. The reference is transmitted to the judicial authority with jurisdiction over the proceedings.

6. The defendant has the right to demand the hearing set out in paragraph 4 hereabove in his benefit, in case he assumes such a status by virtue of article 57 of the Criminal Procedure Code after the measure of non-disclosure of a witness's identity has been granted. Provisions of paragraphs 3 and 4 hereabove apply correspondently.

7. As soon as it is deemed unnecessary, the measure is revoked by the Examining Magistrate upon the request of the Public Prosecutor or upon the witness's demand, the proper procedural acts having been carried out and the Public Prosecutor having been heard, in case he is not the requesting party.

Article 19

Witnesses' s testimony or statement and respective probative value

1. The witness to whom it has been granted the measure of non-disclosure of identity may make his testimony or statement either by concealing his image or distorting his voice, or through teleconference, pursuant to articles 4 and 5 hereabove.

2. No condemning decision can be based, exclusively or significantly, upon the testimony or the statement made by one or more witnesses whose identity has not been disclosed.

CHAPTER IV

Security and special measures and programs

Section 20

Sporadic measures of security

1. Where significant grounds for security so justify and where the criminal offence requires the intervention of a three?judge court or of a jury court, notwithstanding the enforcement of other protective measures laid down in this Act, the witness may benefit from sporadic measures of security, namely?

a) Mention in the proceedings of an address different from the one he uses or which does not coincide with the domicile locations provided by the civil law;

b) Being granted transportation in a State vehicle for purposes of intervention in the procedural act;

c) Being granted a room, eventually put under surveillance and security, located in the Court or the Police premises, to which he must displace himself and inside which he may stay without the presence of other intervenients in the proceedings;

d) Benefiting from police protection extended to his relatives or other persons in close contact with him;

e) Benefiting from an inmate regimen which allow him to remain isolated from the others and to be transported in a separate vehicle.

2. The measures laid down in the previous paragraph are ordered by the Public Prosecutor during the enquiry, either unofficially, upon the demand of the witness or his legal representative or upon proposal of the criminal police authorities. Subsequent to the enquiry the said measures are ordered by the Judge presiding to the current phase of the proceeding, upon the request of the Public Prosecutor.

3. The judicial authority undertakes the necessary procedures to assess in casu from the need and the suitness of the measure.

4. Every third month the judicial authority reappreciates the decision, either maintaining or modifying it, or revoking the applied measures.

5. The police protection stated in paragraph 1, sub-paragraph d) hereabove shall generally be at the charge of a police entity which did not have a relevant intervention during the investigation.

Section 21

Special programme of security

Any witness, the respective wife or husband, ancestors, descendants, brothers and sisters or any other persons in close contact with him, may benefit from a special programme of security during the running of the proceeding or even after its closure, provided the following concurrent conditions occur -

- a) The testimony or statement concern the criminal offences laid down in article 16, paragraph 1, sub-paragraph a);
- b) There is a serious danger to their lives, physical or psychological integrity or freedom;
- c) The testimony or the statement constitutes a contribution which is deemed, or has proved to be, essential to the ascertainment of the truth.

Section 22

Contents of the special programme of security

1. The special programme of security includes the enforcement of one or several administrative measures of protection and support, eventually supplemented by duly combined rules of behaviour to be complied with by the beneficiary.
2. For the purposes of the previous paragraph the following measures are regarded, among others, as measures of protection and support?
 - a) Delivery of documents officially issued, including identification features different from those previously inserted or that should be inserted in the replaced documents;
 - b) Changes in the physiognomy or the body of the beneficiary;
 - c) Granting of a new place to live in the country or abroad, for a period to be determined;
 - d) Free transportation of the beneficiary, his close relatives and the respective property, to the new place of living;
 - e) Implementation of conditions for the obtaining of means of maintenance;
 - f) Granting of a survival allowance for a specific period of time.
3. Where the special programme of security includes rules of behaviour, their intentional non-compliance entails the exclusion from the programme.

Section 23

The Commission for Special Programmes of Security

1. It is hereby established a Commission for Special Programmes of Security under the direct supervision of the Minister of Justice, on whom the definition and the implementation of special programmes of security shall be incumbent.
2. The Commission for Special Programmes of Security is composed of a president and a secretary - both nominated by the Minister of Justice -, a judge and a public prosecutor with experience in the field of the combat against violent and organised crime - respectively appointed by the High Council of the Judiciary and the High Council of the Public Prosecution Service -, and one representative of the Minister for Home Affairs appointed by the latter.
3. The decisions of the Commission shall be taken by a simple majority of votes, and the president shall have the casting vote.
4. The members of the Commission are nominated for a renewable three-year period.

Section 24

Procedure

1. Whenever possible, a unique confidential proceeding covering the witness and the persons mentioned in section 21 shall be organised for each special programme of protection.

2. With a view to the establishment and enforcement of the programme the Commission shall be given the most effective and prompt cooperation by all public entites.
3. The enforcement of the programme is subject to the beneficiary's agreement, who shall sign the declaration agreeing thereto and shall commit to respect the programme.
4. The special programme of protection can be modified whenever necessary. It shall be compulsively reviewed from time to time as specified therein.

Section 25

Impeachments

The personal intervention in a specific criminal proceeding constitutes an impeachment to become a member of the Commission for Special Programmes of Security in the field of the definition and the enforcement of the programme issued by virtue of such a proceeding.

CHAPTER V

Specially vulnerable witnesses

Section 26

Specially vulnerable witnesses

1. Where a specially vulnerable witness is to take part in a specific procedural act, the relevant judicial authority shall make all efforts to ensure that, notwithstanding other measures laid down in this Act, such procedural act be held in the better conditions possible in order to seek the spontaneity and the sincerity of the answers.
2. The witness's special vulnerability may be caused by his being too young or too old, because of his health condition or by the fact that he has to make a testimony or a statement against a person of his own family, or against a restricted social group to which he belongs in a condition of subordination or dependance.

Section 27

Accompanying the specially vulnerable witnesses

1. When realising the witness's special vulnerability the judicial authority shall appoint a social welfare officer or any other person specially prepared to accompany the witness, and, if necessary, it shall designate an expert to give the witness the psychological support he needs.
2. The judicial authority presiding to the procedural act may authorise the social welfare officer or any other accompanying person to stand by the witness during the said procedural act.

Section 28

Intervention in the enquiry

1. During the phase of enquiry the testimony or the statement of a specially vulnerable witness shall be made immediately after the commission of the concerned criminal offence.
2. Whenever possible, a new hearing of the specially vulnerable witness during the phase of enquiry shall be avoided. The registry can also be required pursuant to article 271 of the Criminal Procedure Code.

Section 29

Intervention in the phases subsequent to the enquiry

The judge presiding to any procedural act, either public or under cross-examination, with a view to obtain free, spontaneous and true answers may?

a) Direct the different acts so that the specially vulnerable witness has never to encounter certain intervenients in the same act, namely the defendant;

b) Take the witness's testimony or statement using means of concealment or teleconference, namely at a different location inside the court house, in which case the provisions of article 4 and 5 shall apply after duly adapted;

c) Take the witness's testimony or statement. The associate judges, the jurors, the Public Prosecutor and the counsel for the defence, as well as the representatives for the private prosecution and for the parties claiming damages are only allowed to demand to the presiding judge the making of additional questions.

Section 30

Preliminary visit

Whenever deemed useful, the judge presiding to a procedural act, either public or under cross-examination, may notify the accompanying person to appear before him together with the specially vulnerable witness for the sole purposes of presenting one another and allowing the witness to see the room where the act shall take place.

Section 31

Temporary separation

1. In any phase of the proceedings the specially vulnerable witness may temporarily be separated from his family or from the restricted social group to which he belongs.

2. The temporary separation is decided by the judge upon the request of the Public Prosecutor.

3. Before taking a decision thereupon, the judge carries out the necessary procedural acts by summoning the specially vulnerable witness, the accompanying person and other persons whose statement or testimony the judge deems necessary, namely the social welfare officer.

4. Whenever deemed necessary, the judge requires the support and the supervision of the Social Welfare Institute.

CHAPTER VI

Ruling orders and their enforcement

Article 32

Ruling orders

1. The Government shall take the organisative and technical measures necessary to the correct enforcement of this Act . Furthermore it shall ensure the availability of the infrastructures and other technological means needed thereto.

2. The measures mentioned in the previous paragraph may be required and adopted from the date, and under the conditions, laid down in the legislation which shall rule this Act.

Section 33

Entry into force

This Act shall enter into force on the 60th day following its publication.