

# THE EVIDENTIAL VALUE OF AUDIO RECORDINGS OR VIDEO RECORDINGS

Ioan GÂRBULET\*  
Sandra GRĂDINARU\*\*

**ABSTRACT:** *Effecting interceptions and audio or video recordings can take place only under the conditions and as per limits established by law, otherwise these will be removed from the trial, the solution of returning the case to the prosecutor being unacceptable. The possibility of performing audio or video recordings and interceptions is accepted in the period of prior acts, as the legal provisions which regulate this institution don't determine the process of effecting these recordings or interceptions according to the start or cease of criminal prosecution. At the same time, the dialogues and conversations which were intercepted or recorded can be also used in another criminal case, if from their content there result pieces of information which are important and useful with regards to preparing or performing another crime besides the ones in art. 91<sup>1</sup> par. 1 and 2 from the Criminal Procedure Code, the legislator giving the possibility that a recording submitted by the parties be an evidence in the trial, if it concerns the accused own conversations held with third parties, if they are not prohibited as per law, and they are authentic.*

**KEYWORDS:** *audio or video interceptions and recordings, evidential value, evidences, prior acts, parties.*

**JEL CODE:** *K 14*

## 1. GENERAL CONSIDERATIONS

The possibility of intercepting the telecommunication systems and informatics systems is provided in the legislation of all democratic states<sup>1</sup>, but one has to consider respecting provisions in art. 8 of the European Convention of Human Rights, which states the right to respect private and family life, aiming at defending the individual against any

---

\* Ph.D. Candidate, Judge, Vice-President of Tîrgu-Mures Court of Appeal, ROMANIA.

\*\* Ph.D. Candidate, Teaching Assistant, "Alexandru Ioan Cuza" University of Iași, ROMANIA.

<sup>1</sup> For details regarding the interception of phone calls and their use in other cases, see I. Garbulet, *Trafficking of Persons*, Universul Juridic Publ. House, Bucharest, 2010, pg. 359-386.

arbitrary interference of the public powers in exerting this right<sup>2</sup>. Thus, according to art. 8, par. 2 of the Convention, the interference of any public authority in exerting this is prohibited, unless this interference is provisioned as per law, and it constitutes a measure taken for national security, economic wellbeing, defense and prevention against crimes, health protection or morals protection, or defense of rights and liberties of other parties.

So, given the provisions in the Criminal Procedure Code, for performing legally the interception and audio or video recordings, it is necessary to meet the following conditions:

a) *Formulating a request in this respect.* As per art. 91 par. 1<sup>1</sup>, criminal procedure, intercepting and recording conversations of communication processes performed by phone or any other electronic means of communication is realized with motivated authorization on behalf of the judge, at the prosecutor's demand, who performs or oversees criminal investigation as per current law, if there are any hints or data regarding the preparation or performing of any crime for which penal investigation is performed by default, and if the interception or recording are necessary for establishing the situation or if the localizing or investigation of the parties cannot be performed by any other means, as the criminal investigation might be belated. Thus, as per herein cited law, the result is that the authorization request must be done by the prosecutor which performs or oversees the criminal investigation. The provisions of art. 23, Law 678/2001 regarding the prevention and sanctioning of trafficking, of art. 27 of Law 78/2001 regarding preventing, discovering and sanctioning corruption deeds and of art. 23, par. 1 of Law 143/2000 regarding preventing and fighting illicit drug trafficking and consumption, which provide that the authorization is given by the prosecutor or that the request be made by prosecutors, cannot be held to the provisions of art. 10 of Law. 281/2003<sup>3</sup>. The request must include the following elements: the name of the issuing institution; the number of the file; the date of request; showing of factual and legal reasons for which it is necessary to intercept the telecommunication and computing systems; data and hints in case of preparing or committing a crime out of the ones provided by Law.

b) *The prepared crime or the already-committed crime should be regulated by law.* This condition results from provisions of art. 91, par 2<sup>1</sup> criminal procedure. According to this legal text, the interception or recording of conversations or communication sessions by phone or by any other means of communication can be authorized in case of crimes against national security provided by Criminal Code, and by other special laws, as well as in case of drug trafficking, guns trafficking, persons trafficking, terrorist acts, money laundering, counterfeiting, in case of crimes provided by Law 78/2000 for preventing, discovering sanctioning of corruption deeds, amended and supplemented afterwards, in case of serious crimes or of crimes committed by means of

---

<sup>2</sup> See C. Birsan, The European Convention of Human Rights. Article Comments, vol. 1 – Rights and Liberties, All Beck Publ. House, Bucharest, 2005, pg. 591-695. C Bogdan, Audio and Video Intercepting, in R. D. P, no 1/2006, 106-113, D. Dambu, Interception and Recording of Conversations, Law Magazine, 3/2007, pg. 116-119

<sup>3</sup> Article 10 of Law no. 281/2003 has the following content: „Whenever other laws have provisions with regards to the prosecutor's decision of taking, maintaining, revoking, or ceasing the temporary arrest, with regards to temporary setting free or of obligating the accused to not leave the county, with regards to security measures provided in art. 113 and 114 in Criminal Procedure Code, with regards to intercepting and recording conversations, of retaining and submitting the mails and objects submitted by the accused or by the accuser or addressed to him, the provisions in art 1, present Law are applicable”

electronic devices. As consequence, only in case of crimes strictly determined by law or in case of serious crimes (e.g. killing), one can admit intercepting and recording communication sessions performed by phone or by any other electronic device, and in no way in any other case. Anyway, the legislator established an exemption in art. 91<sup>1</sup> par. (8) Criminal Code, showing that the prosecutor can demand the judge to give the authorization of intercepting and recording conversations performed by phone or by any other electronic means only at the request of the injured party, no matter the nature of the crime investigated.

*c) Intercepting and recording must be performed for establishing the factual situation or because the identification or localization of the parties cannot be done by any other means or the investigation process might be belated.* So, only in these three situations one can authorize the interception of telecommunication systems of the offenders. If in fact the offenders can be identified and localized, the investigation is not very belated, and the factual situation is outlined, so this kind of request from the injured party is not admitted.

Thus, both the prosecutor's request and the judge's conclusion can also be motivated in this respect. If the prosecutor's request was accepted by the judge, the fact that the recording and intercepting of the communication sessions is not necessary cannot be invoked anymore.

The only person who can cease with the demand of the prosecutor is the legally invested judge, who can resolve such a request.

*d) Authorizing the interception of the telecommunication and computational systems.* As per art. 91, par. 3<sup>1</sup> Criminal Code, the authorization is given by the president of Court who has the authorization to judge this case or to the corresponding court in whose jurisdiction the Public Prosecutor's Office for the prosecutor which performs the criminal investigation is based, only when the court's president is not present the authorization being given by the judge named by him. So, only the president of court or in his absence the judge named by him can authorize the interception of conversations and computer-aided conversation sessions. Naming this judge is performed by means of order of service, written as per the Rules of Procedure of the Court. In case when the authorization is not given by the president of court or by the judge named by him, this authorization is null, because when there is no order of service, the judge has no authorization to perform the interception of phone calls, as only the law provides the persons which can authorize. The president of the court or the designated judge acts by means of a court report, approved by the *counsel chamber*, without summoning the parties, and including: actual hints and facts which justify the measure taken; the reasons why the factual situation was established or the identification or localization of the participants cannot be performed by any other means or the investigation might be belated; the person, means of communication or the place subjected to surveillance; the period of time for which the intercepting and recording are authorized. When solving the requirements regarding the authorization to intercept, the prosecutor is not required to be present, but when he requests to plead, the court cannot restrict this right.

*e) The duration period for the authorization.* As per art. 91. par. 3<sup>1</sup>, Criminal Procedure Code, the authorization is given for the whole period necessary for intercepting and recording, *but not for more than 30 days*. The authorization can be renewed, either before or after the expiration date for the previous one, under the same conditions, for

duly justified reasons, but each but each extension may not exceed 30 days. The total duration of intercepts and records authorized for the same person and the same act may not exceed 120 days. This period of 120 days refers to all authorized interceptions and records, regardless of their nature, and in no way to every type of requirement. The recording of dialogues between lawyer and the assisted party cannot be used as legal proof unless we can note in its content important and useful data and information regarding the fact that the lawyer has prepared or committed persons trafficking. When there are no reasons which justified the issue of authorization, the prosecutor is forced to dispose at the immediate ceasing of intercepts and records before the authorization's expiry date, informing the court that issued this act. The criminal code includes a series of regulations in view of the aim of the criminal trial, amongst which there are provisions regarding the liberty of evidences and the liberty to estimate them, as per art. 63 and 64, criminal procedure code. In this respect, the evidences don't have predetermined value, the appreciation of each evidence being performed by the prosecution institution or by court as a consequence of evaluating all evidences, and on the other hand the evidences obtained illegally cannot be used in the criminal investigation<sup>4</sup>. Art. 91 states that the intercepting and recording of communications and conversations can serve as evidences when from their content there result facts or circumstances which contribute to finding the truth. These are not evidences by themselves, unless they are recorded in a procedure act, or in the assessment protocol, and if there are facts or circumstances which contribute to finding the truth<sup>5</sup>. In our opinion, it is very necessary that the court require the viewing of audio-video recordings or listen to the audio recordings, thus perceiving the evidences thoroughly, and having a greater capability to find the truth than in case when these evidences are perceived from the documents which recorded them<sup>6</sup>. We appreciate as per art. 91<sup>1-96</sup> Criminal Procedure, that in some situations, although very rare, the conversations or dialogues intercepted or recorded can provide valuable information serving as direct evidence. This assumption is valid only under the conditions when from their contents there result the elements which make the subject of the case and also establish the guilt of the accused. Most of the times the dialogues recorded and listened as per the official report in art. 91<sup>3</sup> Criminal Procedure, cannot constitute but indirect evidences, which must be attached to other indirect or direct criminal evidences.

## **2. THE VALUATION OF AUDIO OR VIDEO RECORDINGS OBTAINED IN PROBATION**

The valuation of audio or video recordings obtained in probation implies, as per art. 91, Criminal Procedure Code<sup>3</sup> the issue of a report for fully playing the dialogues or communication sessions recorded and intercepted. These writings, when obeying the

---

<sup>4</sup> G. Mateu, *Treatise of Criminal Procedure, General Considerations*, Vol 1, C. H. Beck Publishing House, pag. 170-171

<sup>5</sup> V. Pavaleanu, *Criminal Lawsuit, General Considerations*, vol 1, 3rd ed., Lumina Publ. House, Bucharest 2007, pag 288, G. Theodoru, citation, 402

<sup>6</sup> I. Garbulet, S. Gradinaru, *Considerations Regarding the Principle of Non-intercession in Criminal Lawsuit*, Law Magazine, 5/2009.

rules, are documents for criminal investigation, being parts of the prosecution handled in the case<sup>7</sup>.

The report obtained under the conditions provided by the Criminal Investigation Code is a means of written proof of the facts and circumstances regarding the interception process. It is stated that on this basis, the entitled person can challenge the interception by a complaint made as per art. 275 and as per Cr.Proc.Code, during the prosecution or through judicial means or specific means of appeal during trial<sup>8</sup>. In what concerns the invalidation process in case of intercepts and records obtained with the violation of legal provisions, it was estimated that these<sup>9</sup> evidences will submit to the common regime of nullity as per art 197 C, Cr.Proc.Code, the solution of returning them to the prosecutor being non-applicable to this situation, as the legal text states that the evidences obtained in this manner cannot be restored, no matter the nature of the nullity. However, it is stated that as per ar. 64 Cr.Proc.Code and as per reasons for which it was accepted as warranty for the right to defense, it must be admitted that the accused can make use in his defense of the evidence obtained illegally.

To the report there is attached a copy of the CD or DVD that has the recording, in a sealed envelope with the seal of the criminal investigation institution<sup>10</sup>. Besides, recording the dialogues in different ways and keeping them under the conditions of the Criminal Procedure Code was regulated in view of the possibility to be listened or to watched afterwards, and also aiming at verifying the relation between the content of the recordings and of the criminal records. The operation of intercepting is not bound to be fixed on a certain type of DVD or CD, therefore what is preserved is the recording only<sup>11</sup>.

Contrary to the majority's opinion, according to which the report which contains the intercepts and records of dialogues and communication sessions are evidences, an opposing point of view arose. Thus it is stated that the writing of the report is mainly a guarantee and certification that the recordings were done correctly, and it is also a way of giving easier access to them, although they aren't considered evidence properly.<sup>12</sup>

In what concerns the written rendering of the content of dialogues, this must be done under certain conditions. The rendering must be done literally, preserving the specific way of speaking in case of the involved persons, keeping regionalisms, jargon, pronunciation traits.

There shouldn't be neglected the way of using punctuation and phraseology in rendering the expression nuances or the tone of voice<sup>13</sup>, which, under certain conditions can lead to a different way of talking as related to the meaning of the communicated message. There is also a need to take into account the explanation of certain words –

---

<sup>7</sup> I Neagu, *Treatise of Criminal Procedure, General Part*, 2nd edition completed and reviewed, Universul Juridic Publ. House, Bucharest 2010, pg 500

<sup>8</sup> N. Volonciu, A. Barbu, *The Criminal Procedure Code Commented*, art 62-135. Evidences and Means of Providing Evidence. Hamangiu Publishing House, Bucharest, 2007, p. 159.

<sup>9</sup> Mateut, *A Novelty for the Romanian Criminal Investigation : Unvalidating Evidences Obtained Illegally*, Law Magazine no. 7/2004, pg. 140-142.

<sup>10</sup> N. Jidovu, *Criminal Law*, 2nd edition, C. H. Beck Publishing H., Bucharest 2007, pg. 205.

<sup>11</sup> N. Grofu, *Audio or Video Recordings and Sound and Video Recordings – Differences in Case of Flagrant Crimes*, Law Magazine, 9/2009, pg. 218

<sup>12</sup> A. Sava, *Estimating Evidences in Criminal Lawsuit*, Junimea P.H. , Iasi 2002, p. 145

<sup>13</sup> D. Stanciu, *Theory and Practice Regarding the Audio and Video Interceptions and Recordings in the Romanian Criminal Lawsuit* p. 13-14 [www.univnt.ro](http://www.univnt.ro)

regionalisms, acronyms, technical or argotic terms, which can lead to the subjective interpretation of the dialogue, and that's what it happens in practice<sup>14</sup>. From this perspective, we state that in order to establish the truth for a correct appreciation of evidences, it is very important that the audio recordings contain the whole conversation, not only fragments, as it happens in practice. Besides, art 91 par. 1<sup>3</sup> Criminal Proc. Code establishes the necessity to transcribe the entire recorded conversations and not only paragraphs.

The record is certified for authenticity by the prosecutor which performs or overlooks the criminal investigation. When there is no authentication of the reports performed by the prosecutor, in a correct manner<sup>15</sup> the courts have already eliminated these methods of providing evidence, when the aim of the authentication is the one of providing reality and exactness for the information contained in the report.

### 3. THE EVIDENTIAL VALUE FROM THE PERSPECTIVE OF THE RECORDINGS' AUTHENTICITY

It is necessary that in any situation and no matter the moment of authorizing the interceptions and recordings, the juridical institutions pay special attention to the risk of falsification which can be performed usually by taking just some parts of the dialogue which took place in the past and are declared as recent, or by deleting parts of dialogues or truncating images<sup>16</sup>. This is the reason for which the legislator provided an express provision regarding the verification of recordings<sup>17</sup>.

So, an audio recording is considered authentic if it was performed simultaneously with the acoustic elements contained by it and it doesn't represent a copy if it doesn't have interventions (deleting, inserting, truncating words, sentences or counterfeiting elements) and if it was realized with the technical equipment presented by the one that made the recording<sup>18</sup>. As a consequence, under the condition when there is doubt with respect to the correctness of the recorded dialogues, wholly or partially, or if this means of probation cannot connect to the other evidences, the Law offers the possibility of technical expertise of the originality and continuity of recordings, at the prosecutor's demand, at the parties' demand or by default.

So, the audio recordings serve as means of evidence in the criminal investigation per se, if they are not challenged, or by confirming them through technical expertise, if there are any doubts with respect to their connection to reality. If after performing the expertise, one can note some lack of authenticity in case of recordings, they couldn't be considered evidences in criminal investigation<sup>19</sup>, thus being eliminated from the criminal investigation trial, as per art. 64, par. 2 Crim.Proc.Code.

---

<sup>14</sup> D. Dumitru, *Tactics for Intercepting and recording Conversations*, Chisinau 2010, p 92-93 [www.cnaa.md](http://www.cnaa.md). High Court of Cassation and Justice, Criminal Division, decision no. 275/27.01.2010, [www.diicot.ro](http://www.diicot.ro), The Court of Appeal, resolution no. 386/R/16.09.2010, [www.juridice.ro](http://www.juridice.ro); Court of Bucharest, Section II criminal, no criminal sentence. 4114/14.04.2009, unpublished

<sup>16</sup> G. Theodoru, *Criminal Procedural Law Treatise*, Hamangiu House, Bucharest, 2007, p. 402.

<sup>17</sup> N. Jidovu, *op. cit.*, p. 207.

<sup>18</sup> A. Peter, C. Grigoras, *audio and audio-video recordings. Evidence in criminal proceedings. Legal expertise*, Ed C.H. Beck, Bucharest, 2010, p. 201-202.

<sup>19</sup> *Ibidem*, p. 201.

#### 4. VALUATING THE INTERCEPTS AND RECORDS EFFECTED AT THE STAGE OF PRIOR DOCUMENTS

There are opinions according to which the audio and video recordings cannot be effected legally before starting the criminal investigation, which has as consequence their nullity as evidences.

Nevertheless, for the judicial bodies that have the obligation to evaluate the evidences, these recordings are bound to cause trust, if they are obtained when the recorded persons don't know about this procedure<sup>20</sup>. On the other hand, when making a comparison, the Anglo-Saxon legal system shows that the audio-video recordings are not admitted in Court, because they could unveil the fact that the dialogues were intercepted, along with the way in which the intercepting was performed, which would lead to their lack of efficiency in the future<sup>21</sup>.

In legal practice and in the doctrine, it is admitted that the audio or video recordings be made at the stage of prior acts, but this implies the necessity to operate a distinction between the report which renders the whole conversation, as per art. 91<sup>3</sup>, par. 1 Crim.Proc. Code on one hand, and the report which notes the issue of the prior acts on the other hand.

Thus, the valuation of prior acts involves the issue of a report which would state the performance of the above-mentioned<sup>22</sup>. In this matter, art. 224 par 3, Crim. Proc. Code provides that the report through which the prior acts are considered as issued can be a means of evidence.

These observations, when finalized by the criminal investigation institution alone or in alliance with institutions responsible for applying the rules in the field of national security, performed when effecting the prior acts, are reported in a minute of record/finding of performing the prior acts, which is signed when starting the criminal investigation or on the contrary, when not commencing the criminal investigation<sup>23</sup>.

The prior acts are effected in view of starting the criminal investigation and they are noted in a record of findings.

The absence of the record which notes the performance of prior acts has as effect the removal of evidences gathered at this stage of criminal proceedings as per Article 64. 2 Crim. Proc. Code.

The aspects presented herein lead to the conclusion that performing audio or video interceptions and recordings at the stage of prior acts will have evidential value only by means of the record of findings, to which art. 224 par. 3, Crim. Proc. Code refers. Thus, the dialogues or communication sessions rendered by the prosecutor or the criminal investigator as per art. 91<sup>3</sup> Crim. Proc. Code will be included in the record of finding the performance of prior acts or in an addendum. In this case, these will have the same evidential value as any other prior acts noted in the record provided by art. 224, par. 3, Crim. Proc. Code, which can be considered evidence.

---

<sup>20</sup> G. Theodoru, *op. cit.*, p.403.

<sup>21</sup> A. Sanders, R. Young, *Criminal Justice*, Third Edition, Oxford University Press, 2007, p. 292.

<sup>22</sup> High Court of Cassation and Justice, Criminal Section, Decision no. 4481 of 12 July 2006, [www.juris.ro](http://www.juris.ro).

<sup>23</sup> I. Bararu, *Crimes of Terrorism. Law and Criminal Procedure*, Universul Juridic Publishing, Bucharest, 2010, p. 59.

## 5. THE EVIDENTIAL VALUE OF VIDEO OR AUDIO INTERCEPTIONS AND RECORDINGS USED IN OTHER CONTEXTS

As per art. 91<sup>2</sup> par. 5 Crim. Proc Code, the conversations and dialogues intercepted and recorded can be used in other criminal investigation too, if from their contents there result useful information and data with respect to preparing and performing another crime than that provided by art. 91, par 1 and 2<sup>1</sup>.

The doctrine<sup>24</sup> notes that the text doesn't make a difference between the dialogues or conversations recorded and intercepted, which leads to the conclusion that they can be used as evidences in other cases too, no matter if they regard the trial for which they were issued, or if they are collateral to it, as it is the case of the dialogues which don't concern the deed that consists the subject of the investigation, let alone contribute to identifying or localizing the participants.

Thus, in order for a conversation to be used in another criminal case, it is necessary to meet the following conditions:

- *the interception or recording of the dialogues performed by phone or any other electronic means must be performed by strictly respecting the provisions of art 91<sup>1</sup> - 91<sup>3</sup> Crim. Proc. Code, referred to above.*

- *the existence of any other criminal case, different from that which provided the authorization of interceptions and recordings*

- *the existence of important data with regards to preparing or committing a crime against national security as stated in the Criminal Code and other laws, committing drug trafficking, gun trafficking, persons trafficking, terrorist acts, money laundering, in case of crimes as per law 87/2000, for the prevention, discovery and sanctioning of corruption deeds, with the subsequent modifications and amendments, committing serious crimes or crimes by means of electronic communication.*

All these conditions must be fulfilled as a whole, otherwise these evidences cannot be used in another criminal case. Still as per art. 91 par 5, Crim. Proc Code, we state that the third parties' situation must be considered, in case when they communicate to the person whose conversations are recorded and when there is a possibility to commit various abusive acts. We support the idea that the right to have private life is violated in case of these persons, as well as the guarantees offered by the European Convention and Constitution in what concerns a fair trial, under the conditions when in these situations there is no other authorization than for intercepting dialogues of the person subjected to trial.

Under these conditions, we consider that it is necessary to regulate the interception of dialogues in case of an unidentified person, in order to identify the interlocutors and also to establish a maximum period of time for an authorization given exclusively for this purpose, which period must be as short as possible, as the right to private life according to art. 8 in the Convention and art. 26 in the Constitution is a personal right and any interference in this respect must have in view the entitled person, which implies that we know as soon as possible, who is that entitled person.

---

<sup>24</sup> N. Volonciu, A. Barbu, *op.cit.*, p. 155-156.

We therefore notice the necessity to modify the provisions of art. 91<sup>2</sup> par. 5, Crim. Proc. Code, which allow keeping and archiving sine die the conversations and dialogues intercepted and recorded in a case, as well as using them in another criminal case. We note that this text is opposed to art. 91<sup>2</sup>, par 4, (which states that all conversations which don't regard the deed subjected to investigation and don't contribute to identifying or locating the participants are bound to be archived separately, being destroyed when resolving the case) and to art. 91<sup>3</sup>, par.4 and 5 Criminal Proc Code (which forces the prosecutor at the end of the criminal investigations to let the person know that their conversations were recorded, which means that as per art 91<sup>2</sup>, par. 5 this event won't be happening any longer, if the records will be used in another file, different from the one which decided not to commence criminal prosecution). Furthermore, we consider that the text is arbitrary and it gives the possibility to use anytime intercepted devices in a criminal case, in other files which may not meet the requirements for obtaining the authorization.

Under these conditions, using the intercepted dialogues as evidences in other files is highly questionable with regard "to ensuring proportionality of the interference in privacy with the met aim", this aim being legit, real, known, verified and analyzed by the judge at the moment of authorization and not being a future one, hypothetical one, which could come up afterwards, in other cases. Another question arises with regards to the legal grounds of the quality and compatibility with the principle of law, of keeping and archiving dialogues for a long period of time, so as to use them in other future cases.

In this respect, the position of the European Court for Human Rights reflects the fact that art.8 in the Convention is violated when there were intercepted a few of the dialogues of the accuser, one of these dialogues leading to the start of criminal investigation against him, although the phone line belonged to a third party<sup>25</sup>. At the same time, the European Court of Human Rights noted the violation of art. 8 in the case of Lambert against France, with regards to the French Court of Cassation, which refused the right of a person to criticize the phone-calls to which it was subjected, on the basis of the fact that the calls were dialed from a third party's line. Thus, the Court stated that the French courts have "annulled the protective mechanism" of the Convention, depriving from the legal protection a very large number of people<sup>26</sup>, respectively those who communicate through a third party's phone line.

In the same manner acted a part of the French doctrine, which states that when the criminal investigation is pursued, recorded phone calls can serve as evidences for facts which justified the interception method, but these recordings cannot be used for proving a crime which wasn't included in the judge's authorization<sup>27</sup>.

## **6. THE EVIDENTIAL VALUE OF RECORDINGS PRESENTED BY THE PARTIES**

It is mandatory to analyze the situation of audio and video recordings submitted by the parties, which can be considered evidences, as per art. 91, par. 2<sup>6</sup> Criminal Proc.

---

<sup>25</sup> C.E.D.O., Decision of 24th April 1990 in the *Kruslin against France case* www.coe.int.

<sup>26</sup> C.E.D.O., Decision of 24<sup>th</sup> August, 1998, in the case *Lambert v. France*, www.coe.int.

<sup>27</sup> B. Bouloc, G. Stefani, G. Levasseur, *Criminal proceedings*, 20th ed., Dalloy, Paris, 2006, p. 633, cited. Volonciu N., A. Barbu, cited p. 156.

Code. It is important to notice that these recordings are performed very often before starting the criminal investigation process and even before issuing any investigative act, and these recordings can serve as evidence when they have in view one's own dialogues and conversations held with third parties<sup>28</sup>. The doctrine criticized art.91, par. 2<sup>6</sup>, Crim.Proc. Code, as per which parties or any other persons involved can perform recording of dialogues and conversations with third parties, without legit authorization by Court, no matter the nature of crime or the existence or inexistence of a criminal lawsuit, being stated the fact that<sup>29</sup> it is allowed to arbitrarily interfere in the right to private life, the registered persons being without minimum protection required by the rule of law in a democratic society. In this respect, as related to the recording of a conversation with the accused with devices (e.g. a voiceover) used by the accuser or by any other person, it is stated in specialized literature<sup>30</sup> that this procedure doesn't meet the provisions of art 91<sup>6</sup> Crim. Proc Code and can't be considered evidence, as it is obtained with the violation of art. 26. par 1 in the Constitution and art. 68 par. 2 Criminal Proc. Code, because it can be obtained by means of challenge.

It is stated that the recording submitted to the investigators, being obtained with the violation of the respected and defended values by Constitution, and with the purpose of obtaining evidences against the accused, aiming at determining him to commit a crime, cannot be considered evidence, because it doesn't meet the requirements of art. 91<sup>6</sup>. Therefore, at present time, the Romanian legislation provides the possibility that a recording be an evidence in lawsuit, but it is necessary to meet the following conditions:

- *The video-audio recordings must be their own conversations or with third parties only.* When these conversations were held by other persons, including relatives (husband, children) they are not evidences.

- *These recordings mustn't be prohibited by law.* As follows, the Romanian Constitution's provisions must be taken into account, and also the provisions of the Criminal Procedure Code and other internal laws which regulate the rights and liberties of human being, and last but not least, the European Convention of Human Rights, as well as the Strasbourg European Court Case Law in this field.

- *These recordings must be authentic.* In the specialized literature<sup>31</sup> it was noted that in this situation the provisions of art. 91<sup>3</sup> par. 1 & 2 aren't applicable, thus the prosecutor isn't entitled to present these recordings in a criminal record or to authenticate the recordings.

The only person who can confirm or invalidate the authenticity of the recordings is the expert. Moreover, in this case, the prosecutor is forced to require that an expert establish if the recording submitted is authentic or not.

When the recording is not subjected to expertise, it cannot be used as evidence in the criminal trial, therefore it must be removed.

---

<sup>28</sup> G. Theodoru, *cited* p. 403.

<sup>29</sup> Udrioiu M., O. Predescu, Protection of Human Rights and Romanian criminal lawsuit-Treatise, House Ch Beck P.H., Bucharest, 2008, p. 831.

<sup>30</sup> G. Cocuță, M. Cocuță, audio recording made by the Accuser in anonymous conditions is not evidence. The competence of the prosecutor to certify such recording. Article 916 para. 2 of the code of criminal procedure, Law magazine no. 7 / 2004, Bucharest, p. 155-160.

<sup>31</sup> *Ibidem*.

## 7. CONCLUSION

Intercepting and recording conversations of communication processes performed by phone or any other electronic means of communication can be made only in case of crimes strictly determined by law or in case of serious crimes (e.g. killing), and not for any crimes.

In our opinion, it is very necessary that the court require the viewing of audio-video recordings or listen to the audio recordings, thus perceiving the evidences thoroughly, and having a greater capability to find the truth than in case when these evidences are perceived from the documents which recorded them.

By “*lege ferenda*”, we consider that it is necessary to regulate the interception of dialogues in case of an unidentified person, in order to identify the interlocutors and also to establish a maximum period of time for an authorization given exclusively for this purpose, which period must be as short as possible, as the right to private life according to art. 8 in the Convention and art. 26 in the Constitution is a personal right and any interference in this respect must have in view the entitled person, which implies that we know as soon as possible, who that is entitled person.

---

---

---