



THE 7<sup>TH</sup> EDITION OF THE INTERNATIONAL CONFERENCE  
EUROPEAN INTEGRATION  
REALITIES AND PERSPECTIVES

**Playing Full Written Records, an Indispensable Condition  
for Carrying Out Certification**

**Sandra Grădinaru<sup>1</sup>**

**Abstract:** This paper aims at examining the procedure by which relevant information obtained by prosecution bodies through interception acquire a probative value through minutes of play. The exploitation of audio or video recordings in a probation plan implies, according to art. 91<sup>3</sup> Criminal Procedure Code, preparation by the prosecutor or employee of the judicial police appointed by the prosecutor, of the minutes of playing a full conversation or communication intercepted and recorded. These documents, provided that they comply with the law, is evidence, being part of the criminal prosecution handled in the case. From this perspective, we consider that, in order to establish the truth and a correct assessment of the evidence, it is very important for sound recordings to contain conversations in full, not piecemeal, as frequently happens in practice. In fact, art. 91<sup>3</sup> par. 1 from the Criminal Procedure Code unequivocally establishes the necessity of a full transcript of the recorded conversations not only some of these passages. On the other hand, under the full transcript, there is a risk of being violated article 8 of the Convention.

**Keywords:** authenticity; selection; transcription; classified information

## **1. Preliminary Issues**

Article 91<sup>3</sup> of the Criminal Procedure Code, as amended by Law no. 356/2006<sup>2</sup>, with marginal name “certification of records” is the based material. Although the legislature did not define the term “certification”, this involves the following steps (Julean, 2010, p. 255): selecting by the prosecutor of the intercepted conversations or communications concerning the offense which is the subject of investigation or help in locating and identifying participants; the selected conversations or communications are rendered entirely in a report (minutes) by the prosecutor or employee of the judicial police appointed by it; the report is certified for authenticity by the prosecutor who performs or supervises the prosecution; to the report (minutes) it is attached, in a sealed envelope, a copy of the recording media conversation.

In the judicial practice, it was stated that “*in addition to initiation and control of the people called to make eavesdropping according to the law (art. 91<sup>1</sup> and 91<sup>2</sup> Criminal Procedure Code), the prosecutor is obliged to give an endorsement of legality, the legal operation being accomplished by certifying the records, according to Art. 91<sup>3</sup> Criminal Procedure Code. Thus, certification is not a mere formality, but an essential condition for guaranteeing the authenticity and consistency of the minutes (reports) of transcription in relation to records, knowing that such means of probation are allowed only when evidence meet the rigors of Art. 8 par. 2 C.E.D.O*” (Court of Appeal Iasi, Criminal Decision no. 141/03 march 2009).

Under the circumstances in which the interception and the audio or video recordings work to the limit of the Constitution, the conditions under which these cases can be made are expressly provided by law,

---

<sup>1</sup>Assistant Professor, “Al. I. Cuza” University, Faculty of Economics and Business Administration. Address: Iași, Romania, tel. no.: 40.232.201070, fax no.: 40.232.217000, Corresponding author: sandra.gradinaru@yahoo.com.

<sup>2</sup> Law no. 356/2006 on amending and supplementing the Criminal Procedure Code and amending of other laws published in Official Gazette of Romania, Part I no. 677/7 august 2006.

being an investigative tool with greater difficulty in administration, it is required a greater attention from the prosecution bodies, both at the moment when the process evidence is used, and in transforming the obtained information into evidence.

## 2. The Certification

The certification, in terms of playing in full in the minutes (reports) of the conversations or communications intercepted and recorded regarding the deed that is the subject of investigation or help to identify or locate participants, establishes a guarantee that the prosecutor will not take over from a discussion cut passages, taken out of context, so as to determine the criminality of the act. Also, the requirement established by the legislature avoids the possibility to alterate the content of the intercepted and recorded conversations, the purpose being that of providing a different connotation than the actual message.

Fixing activities in the pleading registration aims, mainly, technical aspects of this operation, the reason considered by the legislature is to create an accurate picture of the chronology and the content of the operations resulted in obtaining those records.

In this respect, it sees the need for preparation of reports (minutes), including a comprehensive and detailed description of these undertaken activities and their outcome. The reason for recording the conversations or communications on various types of media is listening to or further viewing of the stored information, in order to playback the conversations under the writing form, to verify the identity between the content of the conversations and their written form, and to certify their authenticity (Stanciu, pp. 13-14), when given in the evidence.

According to the existing precedents, “nothing in the Code of Criminal Procedure allows the prosecution ‘hearing’ a phone conversation with the consent of one of the interlocutors, in the absence of authorization issued or confirmed by the judge, neither recording its content in a so-called act of finding other than full minutes of play, certified true” (Court of Appeal Bucharest, Criminal Decision no. 141/A/ 09 June 2009). Also, by playing intercepted conversations and communications in its entirety, in the written form, by minutes (reports) prepared and signed by the prosecutor and the employee in the competent judicial police, the requirements of art. 91<sup>3</sup> Criminal Procedure Code, concerning the legality of their certification, are met<sup>1</sup>.

Evidence resulting from the process evidence of intercepting and recording of the conversations or communications is the report (minutes), in which the performed technical surveillance activities are mentioned.

## 3. Way to Transcribe Records in the Minutes

The minutes (reports), in which there are rendered the telephone conversations between the attorney and the part he represents or assists in the process, can not be used as evidence, unless in their contents there are data or information which seem conclusive and useful in the preparation or commission by a lawyer of an offense, for which technical supervision may be provided (Udroiu, 2010, p. 137).

In terms of written content of the playback calls, it must be done under certain conditions. Thus, the play is the literary form of the speech content, while maintaining, in acceptable limits, the specific speech of the people involved; there can be kept regionalisms, slang or jargon terms, peculiarities of pronunciation. Also, there should be mentioned many of the adjacent elements of individuality: the number and date of authorization, the issuing court name, case number and the name of the criminal prosecution, the names of the persons involved in the call and the circumstances in which registration

---

<sup>1</sup> Court of Appeal Ploiesti, criminal and cases involving minors and family section, *Criminal decision no. 114/15 September 2008*; Court of Appeal Brasov, Criminal and cases involving minors and family section, *Criminal decision no. 775/R/17 november 2009*, [www.avocatura.com](http://www.avocatura.com).

took place, details of the identity or quality of such persons, and time when that conversation started, its duration. It should not be overlooked how to use punctuation and phraseology in playing nuances of expression or even the tone of voice (Stanciu), which, in certain situations, could lead to a different connotation to the meaning of the conversation reported to the message of speakers. Also, it must be taken into account to explain some words - regionalisms, acronyms, technical terms or slang, which can lead to a subjective interpretation of the dialogue, as happens repeatedly in practice. At the same time, we need scoring breaks occurred in speech, and when they exceed a reasonable duration, indicating their duration. The compliance of the recording transcription also implies the case, when, due to ambient conditions or technical conditions (overlapping voices, strong background noise, distortion etc.), the words are not distinct, in which case it is absolutely necessary to specify that they are “unintelligible” (Dumitru, 2010, pp. 92-93).

#### 4. Aspects of Legal Practice

However, in practice the playback conversations contained in the records/minutes is often distorted, truncated, taken out of context, containing ambiguous talk in vague terms, leaving room for ambiguity.

Moreover, there were situations in which people have been prosecuted or even convicted based on subjective interpretations of calls, which can not be considered acceptable, given that the prosecution and the courts do not have skills in psychology, semantics or non-verbal or verbal communication or. We often notice in practice, indictments based solely on recordings, as well as interpretations, often without objectivity performed by some of the prosecutors, conditions which often would require some psychologists to confirm or refute the prosecutor's interpretation of the discussions transcribed in the reports (minutes), of playback.

In this respect, with the entry into force of Law no. 202/2010<sup>1</sup>, we see that the text of art. 91<sup>6</sup> Criminal Procedure Code was amended, leaving the parties, the prosecutor or court, ex officio, the opportunity to expertise not only technically sound or video recordings, but also psychologically, in order to analyze gestures, mimicry, voice tone, pace, discussion, the position of the involved players.

We propose below to present a prime example<sup>2</sup> in which the interpretation of the facts made by the prosecutor in the indictment, reported to records, shows a lack of objectivity in interpretation, his subjective comments drawing the so-called criminal offense.

So, after playing a record passage, the prosecutor argues: “*we insist to see the naturalness with which P. explains to spouses F., as well as P.'s facial expression, his face betraying the mimics of a human delighted by that discussion and satisfied with its results*” (N.A.D. indictment 2006).

The ambient recordings made in that case were analyzed by specialists in psychology, communication theory, and from the opinion expressed by prof. Dr. John Dafinoiu, from “Alexandru Ioan Cuza” University, specialist in clinical psychology, it is retained the following: “The images are difficult to interpret as they have no clarity and stability. In general, the emotions expressed by mimics are difficult to interpret and, sometimes we witness at phenomena of projection (the one who makes the interpreter projects his own beliefs and emotions). Referring to Mr. P.'s facial expression that would express “delight” and “satisfaction with the results of discussion” (registration of 21/08/2006), he who makes such an interpretation assumes a very high risk of error, not only because of the difficulty to interpret any expression, but also because these expressions are part of the behavior prescribed to any official clerk: courtesy to citizens, the professional “smile” and so on.

Here are other subjective comments highlighted along in the indictment: “... he greeted with a friendly attitude ...”, “...he had a natural reaction which revealed a criminal connivance between the two, it will be pointed out that this is the meaning of all discussions ...” (N.A.D. indictment 2006).

<sup>1</sup> Law no. 202/2010 on measures to accelerate trial solving, published in Official Gazette of Romania, Part I, no. 714/26 october 2010.

<sup>2</sup> Curtea of Appeal Iasi, Court Order of 28 november 2011, file no. 236/45/2007.

Regarding these comments, Professor. Dr. Adrian Miroiu retains the following: “The expressions used by Mr. P. showed a kindness that I could not interpret as a condition of the administrative act. ... In conclusion, Mr. P. discussions are ethical in terms of public servants by what he said clearly.”

According to prof. dr. Aurora Liiceanu member of the Romanian Academy, a specialist in psychology: “the friendly attitude, kindness must be decoded as verbal and nonverbal indicators (...). Given that these indicators do not have degrees of intensity, but only express a communication of solicitude and respect for one that ‘depends’ on who is interpreted in this case, although a person depends on the civil servant, it is the civil servant who must be available to the people”.

Taking into account those mentioned above, we consider that, given the minutes (report) is written evidence of the facts and circumstances found by interception, it is necessary that the prosecutor, or criminal investigation body that is specially designed, to highlight what he understands from the transcribed dialogue and the relevance in relation to factual context. Our support is the fact that in practice, most of the times, in the case file we find calls that are not relevant in terms of crime, the prosecutor highlighting passages that are not supported by his statements that led the prosecution.

This is also underlined by the legislature in art. 143 par. 1 of the new regulation, which claims that the minutes (report) shall include the result of the performed operations concerning the action that is the subject of investigation.

## **5. The Minutes of Playing Records, Evidence in Criminal Proceedings**

However, the minutes (report) rendering calls and notices must have the content and form provided by art. 91 of the Criminal Procedure Code. In case of breach of these provisions, when writing the minutes/report, the provisions of art. 197 Criminal Procedure Code become incident, on procedural nullity.

The report (minutes) is written evidence of the facts and circumstances found during interception. It is estimated that, based on that report (minutes) the entitled person may challenge the interception by a complaint made under art. 275 and the following of the Criminal Procedure Code, in the criminal prosecution stage, or by specific means of judicial investigation, or remedies in court, in the trial stage (Volonciu & Barbu, 2007, p. 159). To this report (minutes) it is attached the support copy that contains the recording of the call, in a sealed envelope with the seal of the criminal investigation body (Jidovu, 2007, p. 205).

Moreover, the recording of communications on various media, as well as keeping them in conditions imposed by the Code of Criminal Procedure was regulated to ensure the possibility to be heard or viewed later, but, also, in order to be able to provide, if necessary, checking the correspondence between the content of the recordings and of the minutes (reports).

There were views (Bercheșan, 2001, p. 186) that the audio or video evidence is a double meaning. On the one hand, it is considered evidential value as written, in the form of minutes (reports) and full playback of recorded conversations in writing, for the criminal investigator to obtain the necessary elements for finding out the truth in that, on the other hand as a means of proof material, through the cassettes or rolls containing the recordings, in the sense of an object that contains or may provide data necessary to solve the case.

Interception operation is not likely to be fixed on a certain support, therefore what is preserved is the recording (Grofu, 2009, p. 218). Reported to the majority opinion, according to which the minutes (reports), containing the recorded and intercepted communications and call records, are evidence, it was set an antinomic point of view, too.

Thus, it is argued that the preparation of the minutes (reports) and recording in writing, is essentially just a warranty and a certification that the records were made correctly and a means to facilitate their consultation, but it is not a means of evidence. In formulating this view also contributes the fact that

the legislature accepts audio or video submitted by the parties, for which no authorization provided either the judiciary or the conclusion of a report (minutes) (Sava, 2002, p. 145).

The literature (Tulbure, 2006) has also emerged the opinion, according to which, the probative value of the transcriptions, of the the reports (minutes), is very low, so it must be removed if no other legal evidence. Essentially, only the report (minutes) is usable judicially.

On the other hand, as we are concerned, I agree that in reality, audio and video recordings “are methods of proof, because they consist of a series of technical operations, of recording and transcript, made by technicians with appropriate certifications, which is completed in minutes (reports), becoming evidence, in which the conversations and communications are recorded, or the images that are evidence” (Theodoru, 2007).

The literature (Crișu, 2011, p. 246.) appreciated that the minutes (reports), given the position and qualifications of preparers, provide a greater degree of confidence, but without having, legally, a different regime from other documents and implicitly from other evidence. By comparison with the French criminal procedure law on the issue of minutes (reports) as evidence, we find that the French doctrine considers that they are evidence until proven otherwise, beneficiaries had not benefited of a great probative value and the relevant issues within their contents have only the value of simple information which convinced the judge to base (Guinchard & Buisson, 2009, p. 455).

## **6. Recording State Secrets**

Regarding the cases where the state secrets need to be recorded in its minutes (reports), they are governed by paragraph 2 of art. 91<sup>3</sup> Criminal Procedure Code, which includes specific provisions in this case of how to certify for authenticity. Thus, it is necessary to prepare a separate report (minutes), which, by reference to art. 91<sup>3</sup> par. 3 Criminal Procedure Code, must be kept under the legal provisions on documents containing classified information. The earlier legislation contained, unlike the existing one, provisions on both the “state secret” and the “professional secrecy”, but only calls that contained state secrets were to be recorded in a separate report (minutes), those containing information about trade secrets being played in the usual manner. By comparison, it was noted that the current regulation is a restriction of the scope of the institution “professional secrecy” in criminal proceedings (Neagu, 2010, p. 499).

In accordance with art. 91<sup>3</sup> par. 2 Criminal Procedure Code, all persons having access to those minutes (reports) are required to be authorized according to specific procedures regarding the access to classified information. Also, under these provisions, it is required for the institutions to establish and ensure appropriate storage conditions of this information. To respect the right to a fair trial, as they are evidence in criminal proceedings, it is necessary to give the defense the opportunity to consult and to challenge, and this aspect involves either being declassified, in whole or part, the information contained in the minutes/reports or providing access to this report (minutes) both of the defendant and of his defender. Now, motivated by the fact that there are no specific provisions to declassify information in the interest of justice, these operations are carried out according to general rules, being particularly difficult the access to such information, not only of the defense but also of the judicial bodies (Volonciu & Barbu, 2007, pp. 159-160).

According to an opinion<sup>1</sup>, a criminal file can not possibly contain classified information. If, hypothetically, a piece of information classified as state secret or as job secret comes to the attention of a prosecutor in one case, he must not bring it into discussion to the parties, he is also forbidden to rely on it in the proceedings, in this case the priority being the interest to protect the national security the and defense of the country.

---

<sup>1</sup> Accesible at [www.mateut-budusan.ro](http://www.mateut-budusan.ro).

## 7. Conclusions

Thus, we reveal the need for regulations to clarify these issues, given that any classification raises practical problems as to whether they are compatible and can be applied – also in the domain of the transcripts of the intercepted communications - the provisions of special legislation concerning the classified information.

So, we think it is necessary to know the people responsible for classifying documents and the procedure followed in such situations; which is the date by which a document is considered to be classified; if, under the declassification of the document, it is still followed the formal procedure of the special legislation and what is the manner in which it is done concretely. In our view, any document submitted to the courts should be declassified by the issuer (especially for professional confidentiality), the courts are only required to take measures to prevent leaks in the cases provided by law.

Also, unlike the current text of the law, which includes specific provisions for cases in which the state secrets to be recorded, the new Code does not expressly refer to a procedure followed in such circumstances. Thus, the present wording is made to the provisions of art. 97 par. 3 Criminal Procedure Code, requiring preparation of a separate report (minutes), to be kept with the legal provisions<sup>1</sup> on documents containing classified information.

In such circumstances, the new code provisions are lacking in the context in which the provisions of art. 8 of Law no. 14/1992 provide that there can be gathered, recorded and stored in secret files information related to the national security and no internal regulation mentions limits to be observed in that power.

Moreover, Romania has been condemned by the European Court<sup>2</sup> because the internal law does not define the kind of information that can be recorded, the categories of persons likely to be subject to surveillance measures, such as collecting and storing data, and any circumstances in which these measures can be taken or the procedure to be followed. Also, the law sets no limits on the age of the information held and how long that may be kept.

From this perspective, we consider that if the case file contains documents containing classified information, it is necessary to implement declassification proceedings of these ones, to ensure parties can exercise the rights to their defense.

Taking into account the aforementioned aspects, we notice that the legislature had in mind, when drafting the text of the law, to impose an additional condition for the recovery of the relevant issues obtained by tapping, the purpose being to provide additional safeguards against arbitrariness by confirming the authenticity of the facts found by the prosecutor in his minutes (reports).

More than that, in the absence of performing a selection of records of evidence, of the transcription of this information in protocols (minutes), and of validity of these documents without attestation by the prosecution, the recordings legally obtained have no value in terms of probation.

We appreciate, in terms of probative value of evidence provided in art. 91<sup>1</sup>-91<sup>6</sup> Criminal Procedure Code, that in some cases, in fact extremely rare in practice, the intercepted and recorded conversations or communications can provide great probative value, which is direct evidence. This situation occurs only in conditions in which, from their contents results both the constituent meeting of the offense which is the subject case, and the defendant's guilt. Most times, however, the calls recorded and rendered entirely in the minutes (reports) provided by art. 91<sup>3</sup> Criminal Procedure Code, may establish only circumstantial evidence, that will be combined with other direct or indirect evidence of the criminal case (Garbuleț & Grădinaru, 2012).

<sup>1</sup> Law no. 182/2002 concerning the protection of classified information, published in Official Gazette of Romania, Part I nr. 248/12 april 2002 and its secondary legislation, particularly *Government Decision no. 585/2002*.

<sup>2</sup> European Court of Human Rights, *Rotaru vs. Romania case*, Decision of 29 march 2000, published in Official Gazette of Romania, Part I, no. 19/11 january 2001, in that it was decided that there has been a violation of Art. 8 of the Convention.

## 8. References

- Bercheșan, V. (2001). *Criminal Investigation (Criminology, theory and practice). Complete guide on criminal investigation*. Bucharest: Icar Publishing House.
- Crișu, A. (2011). *Criminal procedural law. Revised and updated edition in accordance with Law no. 202/2010*. Bucharest: Hamangiu.
- Dumitru, D. (2010). *Interception and recording of communications tactics*. Chișinău, pp. 92-93, retrieved from [www.cnaa.md](http://www.cnaa.md).
- Gârbuleț, I. & Grădinaru, S. (2012). The Evidential Value of Audio Recordings or Video Recordings. *Curentul Juridic Journal*, no. 1/2012.
- Grofu, N. (2009). Audio or video recordings and sound or image recordings – distinctions in case of flagrant crime ascertaining. *Law Journal* no. 9/2009.
- Guinchard, S., Buisson, J. (2009). *Criminal procedure*. Paris: LexisNexis Litec.
- Jidovu, N. (2007). *Criminal procedural law. Second edition*. Bucharest: C.H. Beck.
- Julean, D. (2010). *Criminal procedural law. General Part*. Timisoara: West University Publishing House.
- Mateuț, Gh. *Illegally obtained means of proof*, in *Comercial Criminal Law Journal*, retrieved from [www.mateut-budusan.ro](http://www.mateut-budusan.ro).
- Neagu, I. (2010). *Criminal procedural law treaty. General part*. Bucharest: Universul Juridic.
- Sava, A. (2002). *Assessment of evidence in criminal trials*. Iași: Junimea.
- Stanciu, D. *Theoretical and practical considerations on audio and video interceptions and recordings in the Romanian criminal trial*, pp. 13-14, retrieved from [www.univnt.ro](http://www.univnt.ro).
- Theodoru, Gr. (2007). *Criminal procedural law treaty*. Bucharest: Hamangiu.
- Tulbure, A. St. (2006). Audio and video interceptions and recordings in German and Romanian law. *Journal of Criminal Law*, no. 1/2006.
- Udroiu, M. (2010). *Criminal procedure. General Part. Special part*. Bucharest: C.H. Beck.
- Volonciu, N. & Barbu, A. (2007). *The Code of Criminal Procedure commented. Art. 62 – 135. Evidences and means of proof*. Bucharest: Hamangiu.
- \*\*\*Law no. 182/2002 concerning the protection of classified information published in Official Gazette of Romania, Part I nr. 248/12 april 2002 and its secondary legislation, particularly *Government Decision no. 585/2002*.
- \*\*\*Law no. 202/2010 on measures to accelerate trial solving, published in Official Gazette of Romania, Part I, no. 714/26 octomber 2010.
- \*\*\*Law no. 356/2006 on amending and supplementing the Criminal Procedure Code and amending of other laws, published in Official Gazette of Romania, Part I no. 677/7 August 2006.
- \*\*\*Court of Appeal Brașov (2009), criminal and cases involving minors and family section, *Criminal decision no. 775/R/17 November 2009*, retrieved from [www.avocatura.com](http://www.avocatura.com).
- \*\*\*Court of Appeal Bucharest (2009), criminal section, *Criminal Decision no. 141/A/ 09 june 2009*, retrieved from [www.jurisprudenta.org](http://www.jurisprudenta.org).
- \*\*\*Court of Appeal Iasi (2009), criminal section, *Criminal Decision no. 141/03 march 2009*, retrieved from [www.jurisprudenta.org](http://www.jurisprudenta.org).
- \*\*\*Curtea of Appeal Iași, (2009) *Court Order of 28 November 2011*, file no. 236/45/2007.
- \*\*\*Court of Appeal Ploiești (2008), criminal and cases involving minors and family section, *Criminal decision no. 114/15 september 2008*, retrieved from [www.avocatura.com](http://www.avocatura.com).
- \*\*\*European Court of Human Rights, (2001) *Rotaru vs. Romania cause*, Decision of 29 march 2000, published in Official Gazette of Romania, Part I, no. 19/11 january 2001.