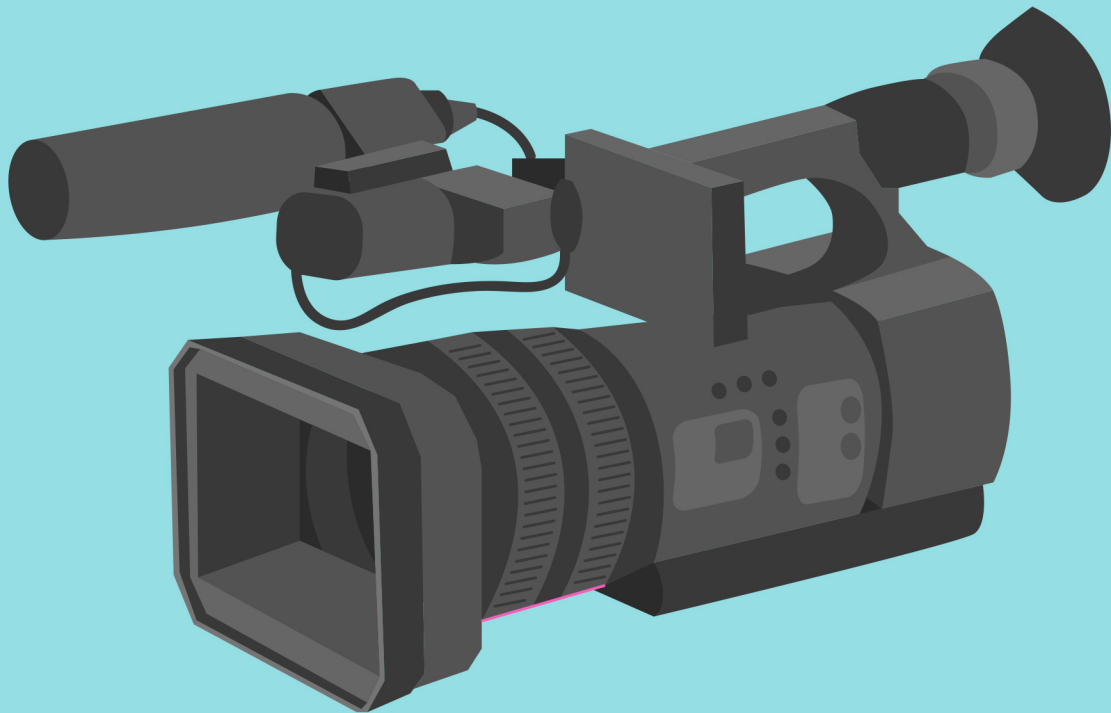


# PROCEDURAL RIGHTS OBSERVED BY THE CAMERA – AUDIOVISUAL RECORDING OF INTERROGATIONS IN THE EU

(PROCAM)

## COUNTRY REPORT - ITALY





# Procedural rights observed by the camera

## Audiovisual recording of interrogations in the EU

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## Summary

1. Introduction.....	3
2. Legal framework.....	5
3. Statistical information .....	16
4. The practice .....	18
5. Attitudes of relevant stakeholders.....	21
6. Possibilities of introducing (increased) audiovisual recording of interrogations and the analysis of factors facilitating and hindering it .....	24
7. Recommendations .....	25



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## 1. Introduction

### 1.1. About the project; aim and methodology of the research

This country report is based on a research carried out in Italy in the framework of an empirical research project conducted in five European Union (EU) countries. This international project "*Procedural rights observed by the camera – Audiovisual recording of interrogations in the EU (ProCam)*", supported by the European Commission, aims at mapping the link between audiovisual recording of interrogations and the enforcement of the rights of defendants, with special regard to the rights of vulnerable defendants and the rights enshrined in Directive 2013/48/EU on access to a lawyer, along with an EU-wide identification of good practice of recording interrogations of vulnerable persons and understanding concerns about audiovisual recording of interrogations.

The research in the respective countries was conducted by local project partners, with the coordination of the Hungarian Helsinki Committee. The project partners are the following:

- Hungarian Helsinki Committee (Hungary),
- Associazione Antigone (Italy),
- Fair Trials (France),
- Human Rights House Zagreb (Croatia),
- Liga lidských práv (Czech Republic).

The project included an analysis of the legal framework and the statistical data, and an empirical research. Results are summarized in the present country report.

#### ***Analysis of the legal framework and the available statistical data***

As a first step, researchers analysed the applicable national legal rules with respect to the audiovisual recording of interrogations and of testimonies given at court hearings, along with the available statistical data pertaining to the practice of audiovisual recording. Results were summarized in desk reviews, with the overall purpose to provide, on the basis of the information available, a critical account of the criminal procedure with respect to the focus of the research, and to provide a contextual framework for interpreting the data gathered through the empirical research.

#### ***Empirical research***

In addition to analysing the legal provisions of Member States, we wished to assess compliance with the respective EU Directive on the basis of strong empirical evidence. As part of the empirical research, we conducted semi-structured interviews with the participants of the criminal procedure: with representatives of the investigation authorities, with prosecutors, judges, defence counsels and defendants. The willingness of authorities and other stakeholders to cooperate with the researchers varied country by country, similarly to the availability of statistics. Some national research teams faced lack of cooperation at a political and administrative (that is, on a governmental / ministerial) level, and on behalf of the police. In Italy, interviews were conducted with the following criminal justice stakeholders: four defence lawyers, one representative of a lawyers' association, three different members of the Judiciary (one Public Prosecutor, one Judge for the Preliminary Investigations and one Judge of the hearing) and three formerly accused persons or former suspects.

The EU Directives require Member States to transmit the text of measures adopted to implement the Directives to the European Commission, and require the Commission to submit reports to the European Parliament and to the Council assessing the extent to which Member States have taken the necessary measures in order to comply with the Directives. This project, in common with similar research previously conducted, demonstrates that even if legislative and other measures are adopted to give effect to the Directives, it does not follow that the Directives are fully complied with in practice. Even if the provisions of the Directives are faithfully reflected in national legislation and regulations, effective implementation is reliant on a range of other factors, including financial and other resources, detailed

regulation of processes and procedures, and the professional cultures of criminal justice officials and lawyers. Therefore, the best way of obtaining reliable and comparable data on the practical implementation of the Directives, and on the ways in which they are experienced by criminal justice actors, is by fieldwork-based research. A failure by certain government representatives, officials and institutions to facilitate, and to co-operate with, such research will mean that the European Commission, and ultimately the EU itself, will not have an adequate basis for assessing either compliance with, or the effectiveness of, its policies and legislation in this field. Moreover, it will mean that Member States will forgo the opportunity to effectively regulate and improve their criminal justice systems and processes, having particular regard to procedural rights and, ultimately fair trial. This is true for both the EU Directive which is in the focus of this research, and for the other Directives adopted under the EU procedural rights roadmap.

## 1.2. Brief description of the national criminal justice system and criminal procedure

The function of a Judge, as well as of that of a Public Prosecutor, is exercised by members of the Judiciary. There is no separation of careers between judicial and prosecutorial offices. The members of the Judiciary – both Judges and Public Prosecutors – are completely independent and autonomous *vis-à-vis* the Executive power as prescribed by Article 104 of the Constitution (hereafter: Const.) Its autonomy refers first and foremost to its organisation: it is autonomous *vis-à-vis* the executive, in that the independence of the Judiciary would be undermined if the measures pertaining to the career advancement of the members of the Judiciary, and in more general terms, their status, were assigned to the executive power. The Judiciary is also autonomous *vis-à-vis* the Legislative power, in that judges are subject only to the law (Article 101 Const.). When judges win the open competitive exam, they are assigned to a Court; when magistrates win the open competitive exam, they are assigned to a Public prosecutor office (hereafter: Procura). To ensure organizational autonomy, the Constitution gives the competence on matters like transferrals and disciplinary measures regarding members of the Judiciary to a self-governing body (Article 105 Const.), the *Consiglio Superiore della Magistratura* (Superior Council of Magistracy, hereafter: CSM), which guarantees the independence of the members of the Judiciary. A special role is played by the National Association of Magistrates (hereafter: ANM), a powerful association which represents more than 90% of the about 9,000 Italian judges and prosecutors.

Since 1988, due to following amendments on the Code of Criminal Procedure (hereafter: c.c.p.) and as far as the practice is concerned, the Italian criminal system is mixed, thus presenting both elements of the inquisitorial tradition and elements of the adversarial one. The prosecutor interrogates the suspect in order to find elements showing whether the investigation must be pursued. Nonetheless, once before the judge, the matter is entirely re-examined.

## 2. Legal framework

### 2.1. Legislation or binding internal rules pertain to recording interrogations either audiovisually or by audio

		<i>Regime applicable in Italy</i>
A	General obligation to audiovisually (or audio) record interrogations of suspects and accused persons	
B	<b>Limited obligation to audiovisually (or audio) record interrogations of specified suspects and accused persons</b>	<b>x</b>
C	Limited obligation to audiovisually (or audio) record interrogations of certain victims, children, and/or witnesses (but not suspects and accused persons)	
D	Discretionary audiovisual (or audio) recording of interrogations of suspects and accused persons	
E	No audiovisual or audio recording possible	
F	<i>Other:</i>	

The provisions on the documentation of the criminal trial are included in the Code of Criminal Procedure (hereafter: c.c.p.) and in the enforcement norms of the criminal procedure. Unless it is otherwise specified, the articles that will be mentioned in this answer were adopted by the Parliament with law D.P.R. 22nd of September 1988, n. 447 (hereafter: c.c.p.), and Legislative Decree 28th of July 1989 n. 271 (hereafter: disp. att. cpp.).

#### 2.1.1. General provisions

According to the c.c.p., the **ordinary** way of documenting the criminal procedural acts is the **minutes** (*“verbale”*), which can be made in two different forms, **complete or summarized**.

According to the Constitutional Court<sup>1</sup>, the judge is allowed to choose, on the basis of the concrete case, the most suitable way of documentation, as it is possible to justify the use of the more flexible summarized minutes with the simple content or the little relevance of the activity to document<sup>2</sup>.

Article 134 (3) of the c.c.p. sets out that when the documentation is carried out using the **summarized minutes**, an **audio recording** should also be made.

However, this rule is not absolute and has to be read together with Article 140 (1), according to which it is possible that no audio recording is done along with the summarized minutes, if the acts have little relevance, a simple content, or if there is no audio recording instrument or technical personnel available. Although, there is no sanction provided if, without the requirements listed in Article 140 (1), the audio recording is not carried out: according to the Court of Cassation<sup>3</sup>, this does not affect the validity of the act and the documentation can still be used for the decision.

<sup>1</sup> Judgement no. 284/1992.

<sup>2</sup> Bricchetti, R., Canzio, G. (a cura di); (2017), *Codice di procedura penale*, Giuffrè Editore, p. 944.

<sup>3</sup> Judgement no 13610/2010.

Article 140 (2) however prescribes that, when only the summarized minutes are made, the judge shall monitor by checking himself that the core of the statements is faithful to the original and contains the description of the circumstances in which these statements were made, if they may be useful to assess their credibility.

When audio or audiovisual recordings are made, the minutes shall specify the time the recording starts and the time it stops (Article 139 (2)). For the part of the recording in which it is, for any reason, not clearly intelligible, the summarized minutes become the official documentation of the act. On the other hand, if the audiovisual or audio recordings are clear and understandable, they outvalue the summarized minutes (Article 139 (3)).

The recording operations are always carried out by technical personnel, also not employed by the State administration, under the direction of the judge's assistant (Article 139(1)).

When the documentation modalities described up to now are considered insufficient, an **audiovisual recording** can be added, **if the judicial authority deems it to be absolutely indispensable** (Article 134 (4)), which means that the audiovisual recording performs an exceptional role compared to the other ways of documentation. Some cases that fall under the case of absolute indispensability are: the documentation of IT investigative acts and in the case of an evidentiary hearing (see below for more details).

The audiovisual recording is allowed in every case, even if it does not fall under the cases of absolute necessity, for the documentation of the **depositions of the victim that is a particularly vulnerable person**. This latter provision has been added with Legislative Decree n. 212 of 15 December 2015 in order to give execution to the 2012/29/EU Directive on the rights, support and protection of victims of crime (hereafter: Directive on rights, support and protection)<sup>4</sup>.

Lastly, one general disposition very important for our research is represented by Article 141 *bis* c.c.p. which prescribes the methods for documentation of the **questioning of a person who is lawfully deprived of liberty**. In particular, **any questioning conducted outside the hearing of a person who is detained for any reason, has to be fully documented – under penalty of exclusion - by means of audio or audiovisual recording**. The questioning shall also be minuted in summary form. The transcription of the recording shall be ordered only upon request the parties. The State bears the total cost of this activities. The Court of Cassation<sup>5</sup> specified that **the meaning of "deprivation of liberty"** is the material condition of restriction of personal liberty that takes place upon execution of a custodial sentence, application of a pre-trial detention order or any temporary order of deprivation of liberty in any kind of institution. **Home detention does not fall under these cases.**

#### 2.1.2. Ways of documentation and moments of the proceeding

Along with the general provisions described above, the c.c.p. includes other provisions about the documentation of the acts, depending on the different phases of the proceeding and on the authority in front of which the statements are made.

#### **Preliminary investigations**

##### ***Police forces*** (Article 357)

Please, see under section 2.1.10 for police forces, as they generally don't video- or audio-record.

##### ***Public Prosecutor***

The ways of documenting the acts carried out by the public prosecutor are regulated by Article 373.

This rule provides that the following acts shall be minuted:

<sup>4</sup> Bricchetti, R., Canzio, G. (a cura di); (2017), *Codice di procedura penale*, Giuffrè Editore, p. 946.

<sup>5</sup> Judgement no: 31415/16

- a) reports, complaints and petitions for proceedings submitted orally;
- b) questionings and line-ups ("*confronti*"<sup>6</sup>) involving the suspect;
- c) summary information gathered from people who may be able to provide information that is useful for investigative purposes;
- d) questionings of people accused in joined proceedings or accused of an offence related to the offence being persecuted in the case.

In these cases, the minutes shall be drawn up according to the methods provided for in the general dispositions analysed in the previous paragraph (Article 134-142).<sup>7</sup>

In cases of questioning of a person who is detained, conducted by the Prosecutor outside the hearing (*ex artt. 363, 364 e 388*), article 141 *bis* applies.

### ***Preliminary Investigations Judge (hereafter: GIP)***

The activities of the GIP that are relevant in our research are:

- a) the confirmation of the arrest carried out in the act of committing an offence (*flagrante delicto*) or police stop;
- b) the questioning of the person subject to a personal precautionary measure (the so-called "*garanzia*" interrogation provided by Article 294 (1));
- c) the taking of the special evidentiary hearing (the so-called "*incidente probatorio*").

For the **confirmation of the arrest or police stop** (Article 391), please refer to section 2.1.10, as the law prescribes it be only minuted.

The **so-called "garanzia" questioning** shall be carried out in the stages of the proceedings prior to the opening of the trial by the Preliminary Investigations Judge when he decides on the application of a personal precautionary measure, if the judge did not do it during the confirmation hearing. In these cases, the questioning is carried out outside the hearing, with the necessary assistance of the lawyer. If the suspect is detained, Article **141 bis** applies.

The discipline described for the so-called "*garanzia*" questioning also applies in cases of questioning ordered by the judge when a request for the revocation of the pre-trial detention has been issued (Article 299.3-*ter*) and when the prorogation of the investigation time has been requested (Article 301.2-*ter*)

The **special evidentiary hearing** takes place during the preliminary investigations and allows, in several cases strictly identified by article 392 c.c.p., to anticipate the moment of taking evidence, which normally takes place in the trial.

With specific reference to declarative acts, the Public Prosecutor and the suspect may request that the judge proceed by means of special evidentiary hearing to:

- a) the taking of a person's testimony, if there are reasonable grounds to believe that the same person will not be able to be examined during the trial due to illness or any other serious impediment or that the person will be exposed to violence, threat, promise of money or any other benefit so as to avoid that he testifies or gives a false testimony;
- b) the examination of the suspect on facts regarding someone else's liability;
- e) the examination of persons accused in joined proceedings;

<sup>6</sup> A *confronto* is a way of acquiring declarations that involves the presence of several persons. It is performed when there are contradictions between the statements of several accused and/or witnesses.

<sup>7</sup> Bricchetti, R., Canzio, G. (a cura di); (2017), *Codice di procedura penale*, Giuffrè Editore, p. 2629.



- f) the taking of testimony either of minors and particularly vulnerable adult, when the offences on which the investigation is being done are **family and sexual offences**.

**Evidence shall be gathered following the procedure set for the trial, in a hearing that takes place in chambers, with the mandatory participation of the Public Prosecutor and the suspect's lawyer.** Furthermore, during the trial, the evidence gathered in a special evidentiary hearing shall be used exclusively against accused persons whose lawyers have participated in evidence gathering.

According to the law, the evidentiary hearing is documented in the same way provided for the hearing in chambers (please refer to section 2.1.10); however, the **witness statements** given during the evidentiary hearing shall be integrally documented by means of audio or audiovisual recording, when the offences on which the investigation is being done are **domestic violence and sexual offences** and there are **minors** among the witnesses to be heard (Article 398 (5) *bis*). **Upon the request of the parties of the trial**, the judge orders the same way of documentation for the testimonies given during the evidentiary hearing, when there is a **particularly vulnerable adult** among the witnesses to be heard. In these cases, the questioning shall be also minuted in summary form.

### **The hearing**

According to the law, the hearing is documented through the **minutes** (Article 480-481); however, as it emerged from the interviews, in the praxis, the hearings are audiorecorded.

In general, the auxiliary which writes the minutes must integrally report the spontaneous declarations of the accused (Article 494(2)), the questions made to witnesses, independent experts, parties' consultants and interpreters and their answers (Article 510(2)). However, the judge is always provided with the power to order the only summarized minutes to be done (Article 494 (2); 510 (3)). Apparently, the choice of the form of the minutes and the addition of audio or audiovisual recording is mostly at the judge's discretion.

### **Other provisions about the hearings**

#### ***Preliminary hearing*** (Article 420 (4))

The preliminary hearing takes place in chambers, but with the mandatory participation of the accused person's lawyer and of the Public Prosecutor. The paragraph 4 with the introduction of an explicit **option of the parties of requesting an audio or audiovisual recording**.

## 2.1.2. The scope to which recording is mandatory/possible by law

Table 1: The authorities covered

	Police officers	Judicial authorities (Judge during the hearing)	Public prosecutor
Mandatory audio	Never mandatory.	<p>1) The only case of <i>mandatory audio</i> (or audio-visual) <b>recording</b> of a questioning in front of a Judge, <b>under the penalty of exclusion</b>, is when the interrogated person is <b>deprived of liberty</b> and the questioning takes place <b>outside of a hearing</b> (Article 141 <i>bis</i>).</p> <p>This happens in the questioned carried out by the Preliminary Investigation Judge (G.I.P.) outside the hearing:</p> <p>a) the so-called "garanzia" questioning, provided by Article 294 (1);</p> <p>b) the questioning ordered when a request for the revocation of the pre-trial detention has been issued (Article 299 (3<i>ter</i>));</p> <p>c) the questioning ordered when the prorogation of the preliminary investigations time has been requested (Article 301 (2<i>ter</i>)).</p> <p>2) The audio recording of the testimonial statements given during an "evidentiary hearing", when the offences on which the investigation is being done are family and sexual offences and there are minors among the persons interested in the testimony (Article 398 (5<i>bis</i>)). Upon the request of the parties, the judge orders the same way of documentation for the testimonies given during the "evidentiary hearing" when there is a particularly vulnerable adult among the persons interested in the testimony.</p>	<p>1) When the suspect who is being interrogated by the Public Prosecutor is <b>deprived of liberty</b>, the documentation of the act has to be done through <b>audio recording or audio-visual recording</b>, otherwise the act cannot be used for the decision. The questioning is recorded also with summarized minutes (Article 141 <i>bis</i>).</p> <p>2) The documentation of the statement of the "collaborator of justice" (Verbale illustrativo dei contenuti della collaborazione) who wants to receive the special measures of protection has to be entirely documented following the documentation procedure of Article 141 bis (Article 16 (3 <i>quater</i>) of decree-law 8/91 and converted into law with L. 82/91).</p>
Mandatory audiovisual		<p>1) The only case of <i>mandatory</i> (audio or) <b>audio-visual recording</b> of an interrogation in front of a Judge, <b>under the penalty of exclusion</b>, is when the interrogated person is <b>deprived of liberty</b> and the questioning takes place <b>outside of a hearing</b>, as provided by <b>Article 141 bis</b>.</p> <p>However, the compliance to the obligation is already granted with the audio recording.</p>	<p>1) When the suspect who is being interrogated by the Public Prosecutor is <b>deprived of liberty</b>, the documentation of the act has to be done through <b>audio recording or audio-visual recording</b>, otherwise the act cannot be used for the decision. The questioning is also recorded with summarized minutes (Article 141 <i>bis</i>).</p> <p>2) The documentation of the statement of the "collaborator of justice" (Verbale illustrativo dei contenuti della collaborazione) who wants to receive the special measures of protection has to be entirely documented following the documentation procedure of Article 141 bis (Article 16 (3 <i>quater</i>) of decree-law 8/91 and converted into law with L. 82/91).</p>
Possible audio	<p>Among the acts to be documented with the minutes ex Article 357 CCP there are:</p> <p>a) the reports, complaints and petitions submitted orally;</p> <p>b) the summary information and the spontaneous statements made by the suspected person;</p> <p>c) the summary information gathered from persons who may be able to provide information useful for investigative purposes (including persons accused in joined proceedings or accused of an offence related to the offence being persecuted in the case).</p> <p>The provision does not specify whether the police forces must always carry out an audio recording when they choose the summarized minutes, but the audio recording is possible.</p>	<p>The documentation of the hearings in front of the Judge is done pursuant the general discipline of Articles 134-142 CCP:</p> <ul style="list-style-type: none"> <li>• the ordinary way of documentation is the minutes, integral or summarized (Articles 134 (2));</li> <li>• when the summarized minutes are chosen, also an audio recording is made (Articles 134 (4))</li> <li>• however, in case of acts of a simple content or little relevance and in case of unavailability of technical devices, the Judge can order to document the act by the only summarized minutes, without audio recording (Article 140).</li> </ul> <p>The audio recording is therefore always possible, when the minutes are written in the summarized form.</p>	<p>Among the acts that to be documented with a written report ex Article 373, there are:</p> <p>a) the reports, complaints and petitions submitted orally;</p> <p>b) the questionings and line-ups involving the suspect;</p> <p>c) the summary information gathered from persons who may be able to provide information useful for investigative purposes;</p> <p>d) the questionings of persons accused in joined proceedings or accused of an offence related to the offence being persecuted in the case.</p> <p>According to Article 373 (2), the acts carried out by the Public Prosecutor are documented pursuant the general discipline of articles 134-142 (v. Judicial authorities).</p> <p>The audio recording is therefore always possible, when the minutes are written in the summarized form.</p>
Possible audiovisual	<p>The audio-visual recording of the statements made in front of the police forces can be added, pursuant the general discipline set in articles 134-142, in two cases.</p> <p>1) When the other ways of documentation (written reports, audio recording) are considered insufficient, the audio-visual recording can be added if absolutely indispensable.</p> <p>2) For the documentation of the statements made by the victim that is a particularly vulnerable person, the audio-visual recording can be added outside of the cases of absolute indispensability.</p>	<p>The audio-visual recording of the statements made in front of the Judge can be added, pursuant the general discipline set in articles 134-142, in three cases.</p> <p>1) When the other ways of documentation (written reports, audio recording) are considered insufficient, the audio-visual recording can be added if absolutely indispensable.</p> <p>2) For the documentation of the statements made by the victim that is a particularly vulnerable person, the audio-visual recording can be added outside of the cases of absolute indispensability.</p> <p>3) For the documentation of the preliminary hearing, the audio-visual recording can be added at the request of the parties.</p>	<p>The audio-visual recording of the statements made in front of the Public Prosecutor can be added, pursuant the general discipline set in articles 134-142, in two cases:</p> <p>1) when the other ways of documentation (written reports, audio recording) are considered insufficient, the audio-visual recording can be added if absolutely indispensable;</p> <p>2) for the documentation of the statements made by the victim that is a particularly vulnerable person, the audio-visual recording can be added outside of the cases of absolute indispensability.</p>

Table 2: The interrogated persons covered

	Suspects (i.e. before being charged with an offence)	Accused persons (i.e. charged with an offence)	Witnesses	Vulnerable persons, irrespective of their status	Minors	Victims
Mandatory audio	According to Article 141 <i>bis</i> , every questioning of a <b>person that is deprived of liberty</b> , taking place <b>outside of a court hearing</b> , must be integrally documented, <b>under the penalty of exclusion</b> , with an <b>audio or audio-visual recording</b> .			The documentation of <b>the statement</b> of the " <i>collaborator of justice</i> " who wants to receive the special measures of protection <b>must be entirely documented following the procedure provided for by Article 141 <i>bis</i></b> (Article 16.3 <i>quater</i> of d.l. 8/91 and converted into law with L. 82/91).	The <b>audio recording</b> of the <b>testimonial statements</b> given during an " <i>evidentiary hearing</i> " is <b>mandatory</b> , when the offences on which the investigation is being done are <b>family and sexual offences</b> and there are <b>minors</b> among the persons interested in the testimonial statements (Article 398.5- <i>bis</i> CCP).	
Mandatory audiovisual	According to art. 141 <i>bis</i> , every interrogation of a <b>person that is deprived of liberty</b> , taking place <b>outside of a court hearing</b> , must be integrally documented, <b>under the penalty of exclusion</b> , with an <b>audio or audio-visual recording</b> . However, the compliance to the obligation is already granted with the audio recording.			The documentation of <b>the statement</b> of the " <i>collaborator of justice</i> " who wants to receive the special measures of protection <b>must be entirely documented following the documentation procedure of art. 141 <i>bis</i></b> (Article 16 (3 <i>quater</i> ) of d.l. 8/91 and converted into law with L. 82/91). However, the compliance to the obligation is already granted with the audio recording.	The <b>audio recording</b> of the <b>testimonial statements</b> given during an " <i>evidentiary hearing</i> " is <b>mandatory</b> , when the offences on which the investigation is being done are <b>family and sexual offences</b> and there are <b>minors</b> among the persons interested in the testimonial statements (Article 398.5- <i>bis</i> CCP). However, the compliance to the obligation is already granted with the audio recording.	
Possible audio	Always possible, along with the summarized minutes.		The audio (or audio-visual) recording of the testimonial statements given during an "evidentiary hearing", can be ordered upon request of the parties, when among the persons interested in the testimonial statements there is a vulnerable adult (Article 398 (5- <i>ter</i> ) CCP).			Always possible, along with the summarized minutes. The audio (or audio-visual) recording of the testimonial statements given during an "evidentiary hearing", can be ordered upon request of the parties, when among the persons interested in the testimonial statements there is a vulnerable adult (Article 398 (5- <i>ter</i> ) CCP).
Possible audiovisual	According to the general discipline, when the documentation through minutes or audio recording is considered insufficient, an <b>audio-visual recording can be added, if absolutely indispensable</b> (Article 134). Moreover, every questioning of a person that is deprived of liberty, taking place outside of a court hearing, must be integrally documented, under the penalty of exclusion, with an audio (or audio-visual) recording.		<b>1) For the documentation of the statements made by the victim that is a particularly vulnerable person, the audio-visual recording can be added also outside of the cases of absolute indispensability.</b> <b>2) The audio recording of the testimonial statements given during an "evidentiary hearing", can be ordered upon request of the parties, when among the persons interested in the testimonial statements there is an adult vulnerable person (Article 398 (5-<i>ter</i>)).</b> <b>3) The documentation of the statement of the "collaborator of justice" who wants to receive the special measures of protection has to be entirely documented following the documentation procedure of Article 141 <i>bis</i> (Article 16 (3 <i>quater</i>) of decree-law 8/91 and converted into law with L. 82/91).</b> However, the compliance to the obligation is already granted with the audio recording.			For the documentation of the statements made by the <b>victim that is a particularly vulnerable person, the audio-visual recording can be added outside of the cases of absolute indispensability.</b>

### 2.1.3. The location of audio/audiovisual recording of interrogations by police or judicial authorities, use of mobile equipment

Aside from audio and audiovisual recording machinery in police stations and courtrooms, other mobile equipment exists. In particular, Progetto Mercurio<sup>8</sup> and Progetto O.D.I.N.O.<sup>9</sup> introduced the use of an IT system that also involves the use of cameras installed in some police and carabinieri cars. Their use is related to activities such as the identification of stolen cars through plate numbers, checking if the driver is abiding by the rules related to the car insurance.

### 2.1.4. Decision on making a recording

With regard to the possibility to request an audio recording or an audiovisual recording, the only provision that allows the request by an affected person is Article 420 (4) of the c.c.p., concerning the preliminary hearing. It prescribes that the minutes of the preliminary hearing are generally redacted in a summarized form as requested by Article 140 (2). However, the judge, **upon request of one of the parties of the trial**, orders the hearing (during which an interrogation may or may not take place ex Article 422 (4) to be recorded using an audio- audiovisual recorder. The suspect and the accused are always assisted by a lawyer, thereby their duty is to inform them of the possibility of requesting a recording. As it was already mentioned, the decision on the way of documentation is mostly taken *ex officio* and a high degree of discretion is given to the public official in his choice. See sections 2.1.1 and 2.1.10 for details on how each authority makes the decision on the way of documentation, and possible audio- or audiovisual recordings.

### 2.1.5. Rules on recording certain elements of the interrogation

It was not possible to find any other regulation on the way a recording should be made; however, from the legislation and the praxis it is possible to imply the following:

If the suspect or accused that is interrogated outside the hearing (e.g. by the public prosecutor or by the judge at the guarantee interrogation) is deprived of liberty, Article 141 bis prescribes that the interrogation be recorded; therefore, it is possible to imply that also the parts when he is informed of his rights are recorded.

The evidentiary hearing is audio or audiovisual recorded in the praxis, so it is possible to imply that also the parts when the suspect is informed of his rights are recorded.

During the hearing the judge has the possibility to choose the best way to document the trial; therefore, if he decides to use audio or audiovisual recording, his warnings to the interrogated person will also be recorded.

According to the law interrogations by the police forces, the validation hearing and the preliminary hearing are not obligatorily audio-recorded; however, in the praxis differs from the law and tends to the use of audiorecording.

### 2.1.6. Detailed rules on audio/audiovisual recording

It was not possible to find any other regulation on the way a recording should be made. There are no exact rules that regulate when exactly the recording should begin and end, what should the camera cover, and whether it can be stopped by the member of the authority or upon the request of the affected person. However, according to Article 139 (2), whenever an audio recording is made, in the summarized minutes it is indicated when the registration started and when it stopped.

The only strictly mandatory audio recording or audiovisual recording is the one prescribed by Article 141 *bis* c.c.p.: as a matter of fact, this is the only article prescribing that when the audio recording or audiovisual recording has not been done, the statements made by the person under interrogation

<sup>8</sup> [Video of the State Police](#) and [video of a magazine](#) showing the functioning of the System [Technical content of the Project](#)

<sup>9</sup> [Video of the Carabinieri](#) explaining the functioning of the System.

cannot be used. The same article provides that, in case of unavailability of technical devices or personnel, external equipment and staff must be used, pursuant the provisions about experts ("*periti*") and technical consultants ("*consulenti tecnici*").

The only technical excuse that gives the possibility to avoid to carry out the audiorecording is mentioned in Article 140 (1) of the c.c.p., according to which, if audio recording instruments are not working or available, the **summarized minutes** can be made without any audio recording. See section 2.1.1 for details. The technical equipment used in hearing chambers are digital recording devices called RT 7000D and supplied by society Radio Trevisan.

#### 2.1.7. Availability of audio/audiovisual recordings for the person affected

Audio recordings, audiovisual recordings and transcriptions made during the proceeding are included in the files of the proceeding (Article 139 (6)c.c.p.), thus accessible as any other file of the case. The Procedural parties (the suspected, the defendant, the plaintiff) can examine any file and request full or partial copies, either directly or through their attorney. The legislation does not contain explicit prescription on the timely fashion of providing the recordings, such as other documents. According to Article 49 (1) disp. att. c.c.p., tapes of audio recordings and audiovisual recordings are stored in specific containers that are numbered and sealed. No other more specific provision exists with regard to the access to audio recordings or audiovisual recordings.

According to one of our previous researches that regarded also the right of access to the materials of the case<sup>10</sup>, the law regulates extensively such right, but the Doctrine has often raised concerns over the lack of clarity of such discipline. The law does indeed require that suspects or accused persons who are arrested or detained are provided with access to documents relating to the case and Article 99 of the extends the rights of the suspect/accused person to his/her lawyer, hence extending also the right of access to the materials of the case.

Article 116 of the sets down a general right of access to the acts relating to the case, namely that anyone who has an interest in the proceeding (not only the parties) can ask the judge to obtain (at his/her own expenses) copies or extracts of the acts. Other articles regulate the accessibility to acts and documents concerning precautionary measures, the complete discovery of acts and documents inherent to the preliminary investigations after their conclusion and the accessibility to acts and documents inherent to the criminal process after their deposit to the Registry (respectively *ex* Articles 293, 386, 388 and 391; Article 451 *bis* paragraph 2; Article 416 (2), 419 (2), 447, 450 (6), 454, 552 (4) and 557 of the c.c.p.). Materials of the case may include documents, photographs, video and audio-recordings as well as informative by police officers and prosecutors.

One critical issue is represented by the fees required for copies to be made: the extractions of copies remain at the expense of the concerned party (with the only exception of suspects or accused persons who benefit of legal aid from the State). This represents a significant obstacle to an effective access to all materials of the case which are essential for the right of defence.

#### 2.1.8. Privacy or data protection considerations.Storage and destruction of the audio/audiovisual recordings of interrogations

According to Article 49 (1) disp. att. c.c.p., tapes of audio recordings and audiovisual recordings are stored in specific containers that are numbered and sealed. The article 23 of d.p.r. 30 sept. 1963, n. 1409 provides that all dossiers for definitive judgments must be kept for 40 years. Moreover, on the outer side of each container there are the necessary data to identify the recording (Article 49 (2) disp. att. ). Paragraph 3 also states that the tapes can be stored also separately from the other acts of the case, in order to avoid their deterioration.

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<sup>10</sup> Report on the implementation of Directive 2012/13/EU on the Right to Information in Criminal Proceedings - Italy, Standard 7.

The general rules on the publication of acts are:

- 1) According to Article 329 (1) of the , all the acts of investigation made by the prosecutor and the judicial police are covered by the secrecy, until the accused person can be aware of it and, in any event, not beyond the closure of the preliminary investigations. That's because the secrecy is necessary to guarantee the efficiency of the investigation.
- 2) This rule should be linked with the Article 114 that provides first of all, the publication, by means of the press or by other means of dissemination, of **acts covered by secrecy** and secondly the publication, including partial, of acts no longer covered by secrecy until preliminary investigations have been completed or until the end of the preliminary hearing.
- 3) In addition, the same article does not permit the publication, even partial, of the dossier for the debate (if it is to be carried out), except after the judgment of the first instance and those of the documents of the Prosecutor's court, except after the pronouncement of second instance. In any case, the publication of the acts used for disputes is always permitted.

#### 2.1.9. Consequences of a failure to record audiovisually or by audio an interrogation

In the Italian legal system, it is in force the principle of the express provision of nullity (Article 177 ). According to this principle, failure to comply with the provisions set for the acts of the proceeding is a cause of nullity only in the cases provided by law. As regards the procedures for recording the acts, the provides for two cases of procedural invalidity. The first case is governed by Article 142, according to which the minutes are null if there is absolute uncertainty as to the persons who participated or if they are not signed by the public official who drafted them. The second case is provided by Article 141 *bis* which states the penalty of exclusion of the questioning (conducted outside the hearing) of a person who is detained, when his statements are not documented fully by means of audio or audiovisual recording.

#### 2.1.10. Recording by other means

As we said the only obligation according to which an interrogation must be recorded audiovisually is provided by Article 141 bis and concerns the hypothesis where the person to be heard is detained. Indeed, according to Article 134 of the , the live transcription is considered the ordinary instrument of documentation of the acts of criminal proceedings. That means that audiovisual recording is limited to "absolutely indispensable" hypothesis, such as those provided by Article 141 bis c.c.p.. In such cases the ordinary instrument is the audiovisual reproduction and the summarized minutes are not necessary.

#### **Police forces** (Article 357)

The criminal police has the obligation to document every activity it carries out (Article 357 (1) and to make all the documents available to the Public Prosecutor (Article 357 (4)).

The ordinary way of documentation is the simple note ("*annotazione*"), which can also be concise (Article 357(1)), but some acts listed in Article 357 (2) must be documented by the **minutes** (Article 357.2), such as reports, complaints, petitions submitted orally and spontaneous statements made by the suspected person.

In the police activity, there is not any case to which the obligation of recording provided for by Article 141 *bis* is applicable, since the questioning of those who are deprived of liberty must be carried out by the Public Prosecutor and cannot be delegated to the police forces.

#### **GIP (Preliminary Investigations Judge)**

The **confirmation of the arrest or police stop** (Article 391) takes place in a hearing that is held in closed session with the necessary participation of the lawyer of the arrested or stopped person). In all cases, the statements of the suspect are documented in the way provided for the hearing in chambers. The proceedings in chambers take place without the presence of the public (Article 127 (6)). In these proceedings the minutes are done, **normally**, as prescribed by Article 140(2), which means in a

**summarized form.** However, a full transcript can always be ordered. In the praxis the it was found that audiorecording is used also for validation hearings.

The transcription of the audio recording is carried out by the judiciary personnel or, if the judge so disposes, by someone who is not in the State administration (Article 139 (4)). If both parties consent, the judge can dispose no transcription to be made (Article 139 (5)). However, according to the Court of Cassation, if the transcription has not been made, this does not affect the validity of the act, even if there was no consent of the parties. Nevertheless, if the transcription of the statements gathered during a trial hearing has not been made and the summarized minutes refer entirely to the audio recording, which is faulty, this implies the nullity of the act<sup>11</sup>.

Audio recordings, audiovisual recordings and transcriptions made during the proceeding are included in the dossier of the proceeding (Article 139 (6)), thus accessible as any other material of the case. Please refer to answer n. 7 for the details on the access to the materials of the case.

#### 2.1.11. Situation of vulnerable persons

The Italian State has not implemented the Recommendation 2013/C 378/02.<sup>12</sup> In Italy, the notion of vulnerability cannot be separated from the notion of vulnerable victims of crime. In fact, the notion of vulnerability has been introduced with the transposition law (d.lg. n. 212 of 15 December 2015) of the EU Directive 29/2012, on the rights, support and protection of victims of crime.<sup>13</sup> This means that **the concept of vulnerability is not used in case of accused persons.** In the case of minors their vulnerability is ascertained through their age and when they are suspected or accused of having committed a crime, the code of criminal procedure for minors apply. This means that their vulnerability has a different legal basis than the general notion of vulnerable victims of crime.

As already considered in our previous researches on victims of crime<sup>14</sup>, **Article 90 quater c.c.p.** (added to the by Article 1 of L. 212/2015) prescribes the **conditions of particular vulnerability.** Such condition can be deduced from the person's state: age, state of infirmity or psychic deficiency but also from the type of crime, or from the modalities and circumstances surrounding the crime. The assessment of the condition takes into account: whether the event is committed with violence to the person or with racial hatred, if it is due to organized crime or terrorism, even international, or trafficking in human beings, if the crime is related to discrimination, and/or if the injured person is emotionally, psychologically or economically dependent on the offender.

For the implementation of the Directive on the victims of crime, the Italian legislator has made a series of interventions on the provisions of the with Law 212/2015.

- **Article 134 (4):** as already mentioned, after the reform of 2015, this article states that the audiovisual recording is always possible when proceeding to the recording of the particularly vulnerable victim's statement.
- **Article 190-bis. 1-bis:** after 2015, this article forbids that a particularly vulnerable person is questioned a second time, if s/he has already testified in another moment of the trial (unless the questioning regards facts or circumstances that are different from those of the previous questioning or if the judge or one of the parties finds it necessary on the basis of specific exigencies).
- **Article 351 (1)-ter and Article 362 (1)-bis:** these provisions were modified to protect minors and vulnerable persons with reference to the activity of the police forces. The officers, during people's questioning, must be accompanied by a psychological or psychiatric expert who will assist the subject by supporting her for the duration of the trial. Furthermore, the police officers have to

<sup>11</sup>Court of Cassation, Judgement no. 42505/2010

<sup>12</sup> §13 of Commission Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings 2013/C 378/02 states that "any questioning of vulnerable persons during the pre-trial investigation phase should be audiovisually recorded".

<sup>13</sup> Bricchetti, R., Canzio, G. (a cura di); (2017), *Codice di procedura penale*, Giuffrè Editore, p. 593.

<sup>14</sup> Report on the Access to Justice for victims of violent crime suffered in pre-trial and immigration detention by the implementation of Directive 2012/29/EU on the minimum standards on the rights, support and protection of victims of crime and of Directive 2004/80/EC on the compensation to crime victims - Italy

assure that the person does not have contact with the person suspected or accused of the crime and that there is no proceeded to any further interrogation of the vulnerable person unless there is an absolute necessity for the investigations.

- **Article 392 (1-bis):** this provision has been modified to extend the “evidentiary hearing” (*incidente probatorio*) to include the offended person particularly vulnerable.
- **Articles 398 (5-bis) and 398 (5-ter):** if the person to be heard is a minor or an adult vulnerable person, it is used a protected modality to hear their statements. In these cases, the modality to document this particular procedure is through the audio recording or audiovisual recording; meanwhile a summarized written recording should be made. If this provision is not followed, the law does not state any measure of nullification nor of non-usability.<sup>15</sup>
- **Article 398 (5 quater):** this provision has been modified to take better consideration of the persons of particularly vulnerability. In fact, this article specifies that not only the persons of particular vulnerability are entitled to benefit from a special procedure for on what concerns the place, the time and the particular measures (reference to Article 398 (5-ter) and 398 (5-bis)) at the time of the evidentiary hearing but they can also benefit from special measures when being interrogated for testimony or cross examination (reference to article 498 (4)-quater).<sup>16</sup>

## Types of vulnerabilities

### a) Incapacity

The criminal procedure code takes into consideration the state of conscious and aware participation to the trial by the accused. Article 71 regulates the hypothesis of suspension of the procedure due to the juridical incompetence of the accused. The judge or the parties can order an examination aimed at verifying the existence of the capacity for conscious participation in the process. After a negative assessment on the capacity of the defendant the trial must be suspended (Article 70 c.c.p.) unless the case is acquitted or the judge rules a non-prosecution sentence.

### b) Disability

Italian legislation defines the disabled person with the Law n. 104/1992 Article 3: “he / she who has a physical, psychic or sensory disability, whether stabilized or progressive, which causes difficulties in learning, in relationships or in work integration and which can result in a process of social disadvantage or marginalization”. Handicaps are divided into three categories: physical, psychic and sensory. Specific forms of sensory disability are regulated by the criminal procedure code, in which the ability to understand and stand into trial remains unaltered.

### Deaf, mute and deaf-mute people.

Article 119 of the c.c.p. regulates the participation in the proceedings by the deaf, mute and deaf-mute people.

The deaf person needs to receive questions, warnings and admonitions in written form, and s/he can answer orally. Questions, warnings and admonitions to the mute person can be placed orally and s/he responds in written form. Questions, warnings and admonishment to the deaf-mute person are presented in written form and s/he can answer by writing (paragraph 1). The second paragraph provides that the deaf, the mute and the deaf-mute - if they cannot read and write - may require the presence of an interpreter. However, with the sentence n. 341/1999 the Constitutional Court declared the constitutional illegitimacy of the provisions in this last paragraph, referring to the restriction to require the help of an interpreter only in cases of inability to read and write by the deaf, deaf and deaf-mute. The Court has established, instead, that they can always and under any circumstance request the interpreter.

### c). Minors

Although in the Italian legal framework the concept of vulnerability mainly concerns victims of crimes, in case of minors the Italian legislation also covers suspects and witnesses besides victims. With the

<sup>15</sup> Court of Cassation, Judgement no. 32580/08; Bricchetti, R., Canzio, G. (a cura di); (2017), *Codice di procedura penale*, Giuffrè Editore, p. 2825.

<sup>16</sup> Report on the Access to Justice for victims of violent crime suffered in pre-trial and immigration detention by the implementation of Directive 2012/29/EU on the minimum standards on the rights, support and protection of victims of crime and of Directive 2004/80/EC on the compensation to crime victims - Italy



Decree of the President of the Republic n. 448 of 1988 "Approval of the provisions on the criminal trial against young offenders" (hereinafter c.c.p. min.), the Italian legislator wanted to include specific rules on the criminal proceedings for minors of the 18 years. The legislator, through these provisions, decided to offer more protection and guarantees to the individual that is accused or suspected of committing a crime when he/she had not yet reached the age of majority.

In the proceedings before the Juvenile Court (the specific Court that deals with crimes committed by minors) the rules established by the code of criminal procedure in force for adults apply where there is no specific discipline in the c.c.p. min. In the procedural aspects concerning the arrest phase and the subsequent trial, a series of protections are provided for the minor in addition to those provided for the adult accused.

The juvenile judge has at disposal the same means of proof and research of the proof that the ordinary judge has (summary testimonial information, interrogations, searches, interceptions, comparisons, surveys, documentary evidence, etc.), but these means must be used by the Public Prosecutor with a different approach, which is an appropriate approach to the personality of the child and his educational needs.

For example Article 9 (2) of the c.c.p. min. establishes that the judge and the prosecutor can obtain the same information either by listening to people close to the child (parents, relatives et cetera) or hearing an expert advice.

### **3. Statistical information**

After completing the desk research, we have submitted the FOI requests to several administrations: to the Department for justice affairs - Office of the head of Department of the Ministry of Justice, to the Ministry of Interior (for requests that regarded police forces) and to the Ministry of Defence (for requests that regarded Carabinieri, which is a militarized body under the Ministry of Defence). Also, we filed similar requests to six tribunals distributed on the Italian territory: Milan, Venice, Rome, Naples, Palermo and Reggio Calabria.

The results of the requests are very interesting even though not from a statistical point of view because the received data was not comparable nor complete. First of all, it is important to point out that the Department of the Ministry of Justice (hereafter: Ministry) which received the request partially answered to the request, partially rejected the request and partially forwarded the requests to all Courts of Appeal, which also forwarded them to all Tribunals. In a few cases also the Procure (the offices of the Public Prosecutors) received the request. As the number of answers that we received from all administrations was very high and as it would have been impossible to sort and catalogue them all, we have chosen to consider only those that arrived within the first month from the filing of our requests. In particular the number of answers that we have considered has been of 46: 18 of these were refusals to answer to our queries or the procedure did not go beyond the appointment of a person responsible for the procedure itself and 28 were partial answers to our queries.

In each Tribunal one employee was appointed as responsible of the FOI requests and we received some phone calls from several of them, as they needed some clarifications on the requests in order to meet them in the best way. This has been a great opportunity for us to receive a first-hand account of the work inside the tribunals, since (as it will be explained later) many of the information are not available from a statistical point of view. However, this case has taken place only in a minority of cases; in fact, unfortunately most of the Tribunals rejected the request. Due to the incomplete and random dataset, the data we gathered is not representative.

Unfortunately, with regard to interrogations that take place during the hearings there is no statistical information and in order to meet our requests, the appointed employee would have had to search in each single paper file how many interrogations had been made and in which way they were recorded. Nevertheless, from all of them we gathered the information that the majority of court hearings are audio recorded (both in big and small tribunals) and normally (even if not always as it is prescribed by law) with a written summarized recording. With this regard, a data from the Tribunal of Bologna might be of interest, in fact, the Tribunal pointed out that in 2017, out of 1169 court hearings, 1089 were

audio recorded and those that were not audio recorded were the close hearings taking place in the form of camera di consiglio. The Tribunal of Trapani indicated that all court hearings are audio recorded and that for hearings during which poofs are presented a transcription is made.

In this context we were informed that the Ministry has a centralized contract with an external contractor - Consorzio Ciclat - that manages audio- and audiovisual recording services in all Italian tribunals. With regard to the functioning of this technology, we were told that after a recording is done, it is put on a platform and made available to the judge. The written transcription of the recording is automatically done by the system.

Finally, with regard to vulnerable persons, their number is not recorded because it is unlawful to collect the data, but in one case the number of evidentiary hearings – *incidenti probatori* (a protected way to collect the testimony of vulnerable victims) – was given.

### **Number of rooms**

Several tribunals indicated the number of courtrooms (or the number of rooms where *interrogatori di garanzia* take place) and that they are equipped with audio recording systems<sup>17</sup>. The Frosinone Tribunal pointed out that their staff are trained to use the audio recording systems while when it is necessary to make an audiovisual recording, an external company is employed.

Small tribunals<sup>18</sup> that don't have audiovisual recording systems rely on bigger tribunals when they need to take the statement of a child for example. In those cases the interrogation is executed in a bigger tribunal that is equipped with recording systems.

### ***Interrogatori di garanzia***

Several tribunals sent data related only to the *interrogatorio di garanzia* (Article 294 c.c.p.) a particular activity of the judge of the preliminary investigations (see section 2.1.1. for more details). The scope of the interrogation is to verify the presence of the conditions of applicability of the pre-trial detention measure prescribed by Article 273-275 c.c.p. and can confirm, modify or revoke the measure. As this interrogation does not take place during a hearing, it has to be fully recorded ex Article 141 bis c.c.p.. As written in several answers of to our requests<sup>19</sup>, this particular procedure is recorded in the statistical system called SIRIS and in some cases it was indicated that interrogations were either audio or audiovisually recorded. Where it was indicated, it looked like no copies of the recordings were requested.

The Tribunal of Oristano pointed out that the *interrogatorio di garanzia* takes place either in prison or at the Tribunal. The prison has a dedicated courtroom and in the Tribunal they take place in the studies of the judges. In both cases the recording is done with a mobile audio recording system.<sup>20</sup>

### ***Trials per direttissima***

Some Tribunals<sup>21</sup> reported the numbers of trials carried out in the form of *giudizio direttissimo*<sup>22</sup>, and/or the number of rooms in which they are carried out and added that they are equipped with audio recording systems. The Tribunal of Tivoli indicated that trials *per direttissima* are always audio recorded.

<sup>17</sup> FOI received from Ascoli Piceno, Pesaro, Sassari, Frosinone, Monza, Matera, Reggio Emilia, Chieti, Trapani, Tivoli, Siracusa, Velletri, Patti, Cosenza (which indicated that the rooms used are not equipped with audiorecording systems).

<sup>18</sup> For example the Urbino Tribunal.

<sup>19</sup> FOI received from Naples, Pesaro, Urbino, Sassari, Frosinone, Chieti, Trapani, Tivoli

Those that provided data but did not indicate if the interrogation were audio recorded are: Matera, Velletri, Bologna (which reported the number of interrogations and stated that they take place in a room not equipped with audio recording systems)

<sup>20</sup> Similar answers were given by Varese, Pordenone, Monza (which pointed out that this kind of interrogation is always recorded unless the suspect decides to exercise his/her right to silence, in any case a summarized written recording is always carried out; the audio recording is included in the case file with a CD and the transcription is carried out only upon request), Termini Imerese (which added that the personnel of the company that does the audio recording is also present at the interrogation - either taking place in the prison or at the Tribunal - and that the company also carries out the written transcription and hands over the audio recording).

<sup>21</sup> FOI from Tribunals of Monza, Bologna, Tivoli.

<sup>22</sup> A form of fast trial taking place in cases of flagrancy.

## Validation hearings

The Tribunal of Trapani<sup>23</sup> indicated the number of validation hearings and that they were not audio or audiovisually recorded, as they are carried out in the closed hearing called *camera di consiglio* for which the recording is not obligatory. The Tribunal of Tivoli which pointed out that the recording is made only upon indication of the appointed judge.

## Evidentiary hearings (*incidenti probatori*)

The Tribunal of Trapani also sent the number of evidentiary hearings that are used to collect the testimonies of vulnerable victims of crime and indicated that they are all audiovisually recorded.

## Tribunals for Juveniles

The Tribunal for Juveniles of Piemonte and Valle d'Aosta answered to our requests by stating that, just like the ordinary tribunals, it is not possible to count how many interrogations are done in each case because they are not recorded in an IT system. With regard to the interrogation that takes place at the validation hearing, it usually takes place in a courtroom at the local CPA (Centro di Prima Accoglienza - Reception Center) that is not equipped with an audio recording system. The *interrogatorio di garanzia* takes place at the Juvenile Tribunal which is equipped with an audio-recording system. If a protective modality is required to interrogate a minor, the interrogation is usually carried out in a room of the Turin Municipal Police that is equipped with an audiovisual recording system.

The Tribunal for Juveniles of Naples also sent the number of *interrogatori di garanzia*, that are always audio recorded, and the number of interrogations made with the protective modality (that always involve victims of crime), that are always audiovisually recorded. With regard to the rooms used, there are four rooms for *interrogatori di garanzia* and one mobile audio recording system and the interrogations of victims with the protective modality are carried out in an ad hoc room with a fixed system.

The Tribunal for Juveniles of Bologna answered that for *interrogatori di garanzia* the law does not prescribe an audiovisual recording and therefore they are only audio recorded with a mobile audio recording system. They usually take place at the local CPA or at the local Juvenile Prison (IPM - Istituto Penale per Minorenni). During the rest of the trial, the interrogation takes place in the courtroom with a fixed audio recording system.

Only in one case, the Tribunal for Juveniles in Ancona has pointed out that up until 2016 the recording of *interrogatori di garanzia* was done with an audio recording which was saved on a CD, but that since 2017 the recording has been done with a stenotype machine and the external contractor produces the integral written record of the interrogation.

## *Procure della Repubblica*

The *Procure* that received the request generally turned it down and only two of them provided us with an answer. The Procura of the Tribunal of Bolzano answered that in their case all rooms used by prosecutors for interrogations are equipped with audio recording systems. The Procura of the Tribunal of Trento answered that during the investigations interrogations are minuted and that audio or audiovisual recording systems are used only in the specific cases prescribed by the law.

## 4. The practice

### Methodology of the survey

In order to get information on the different ways of documentation in the criminal proceeding, *eleven* persons have been interviewed. They had been selected among three categories of stakeholders, involved in the criminal justice system:

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<sup>23</sup> The Tribunal of Bologna also indicated the number of validation hearing.

- 4 defence lawyers
- 1 representative of a lawyers' association,
- 3 different members of the Judiciary (1 Public Prosecutor, 1 Judge for the Preliminary Investigations and 1 Judge of the hearing),
- 3 formerly accused persons or former suspects.

#### **4.1. Ways of documentation employed in practice**

##### *a) during the Preliminary Investigations*

The information given to the police forces during the Preliminary Investigations are normally documented by minutes, without any audio or audiovisual recording. In practice, lawyers often negotiate with the police the content of the minutes so that they be more favourable to their client. Only in rare cases, during very complex investigations, the police forces are ordered by the Public Prosecutor to carry out an audio recording of the statements made during the interrogations.

The interrogations conducted by the Public Prosecutor are normally documented through minutes. The audio recording is made only in rare cases, when the Prosecutor believes that it is necessary and when it is mandatory according to the law (e.g. Article 141 *bis*). The audiovisual recording is always ordered for the documentation of the statements of the particularly vulnerable victims, identified on the basis of the legal definition (Article 90 *quarter*, see under subchapter 2.1.11).

The *interrogatorio di garanzia*, carried out by the Judge for the Preliminary Investigations, is always audio (or audiovisually) recorded when the interrogated person is deprived of liberty (Article 141 *bis*). Normally an audio recording is used: only in rare complex cases audiovisual recording is preferred.

The statements made by witnesses during the "evidentiary hearing" ("*incidente probatorio*"), in front of the Judge for the Preliminary Investigations, are documented through an audiovisual recording when the person is particularly vulnerable.

##### *b) during the hearing*

All the statements made during the hearing in front of the Judge (Judge of the Preliminary Hearing or Judge of the Hearing) – by the accused person or by the witnesses – are documented through summarized minutes, along with an audio recording.

The practice described up to now has remained almost the same from the end of the 80s, after the introduction of the new Code of Criminal Procedure. The only legislative modification that the interviewed persons remember (and to whom also the practice immediately adapted) is about the documentation of the statements made by the minors and by the victims considered particularly vulnerable according to the law.

#### **4.2. Criteria for choosing the way of documentation**

The choice to employ an audio or audiovisual recording for the documentation of the statements often depends on the complexity of the proceeding, on the offence investigated and on the particular vulnerability of the person.

The vulnerability is considered only with reference to victims, while no assessment is made about the vulnerability of the suspect or the accused person. The most frequent cases of vulnerable victim are minors and victims of sexual and family offences.

#### **4.3. Technical equipment and its use**

The recorders employed by police forces, Prosecutor offices and Courts are, as the interviewees had defined, semi-professional devices (see under section 2.1.6.) and the quality of the recordings is generally good. However, even though there are no clear regulations on the way a recording should be made, one of the lawyers interviewed pointed out that the words of the lawyer are not always clearly intelligible.

Based on the experiences of our respondents, during the audiovisual recordings, the camera does not capture the authority: it captures only the person that is interrogated.

Usually, the recordings integrally document the interrogation from start to end, with no pauses. However, one of the formerly accused persons that have been interviewed remembers that in one case only his answers have been recorded.

The recorders are available in a sufficient number: only in very rare cases, in the experience of the interviewed persons, it has not been possible to carry out the audio recording because of the unavailability or malfunctioning of the technical equipment.

The devices needed for listening to (or watching) the recordings which are available to the offices are quite old, but still working according to the respondents experiences.

#### **4.4. Powers of the defence and access to the recordings**

The possibility of requesting an audio (or audiovisual) recording instead of the mere minutes is not clearly stated nor explicitly excluded by the law, but, as a matter of fact, lawyers are not used to make such a request.

The lawyer can listen to the recordings for free in a specific room, while obtaining digital copies requires quite high fees to be payed. However, for suspects or accused who benefit of legal aid from the state (and their lawyers), copies are free.

No one of the lawyers which have been interviewed has ever requested a copy of the recordings. As a matter of fact, they all agree that the transcriptions are sufficient for their defence activity.

#### **4.5. Use of the recordings in the proceeding**

According to the Public Prosecutor who has been interviewed, for the study of the case and for all the subsequent acts, it is common to refer to the transcripts only. The recordings are re-played only in case of doubts, because normally the Prosecutor carries out the interrogation himself/herself – and therefore he/she can make his/her assessments during the interrogation – and, however, even in the case of an interrogation delegated to the police forces, the transcription of the audio recording also includes a description of the most evident emotional states.

Also the Judge of the Preliminary Investigations and the Judge of the hearing usually refer to the transcripts only. The recordings are re-played only in a few exceptional cases, when there is the need of more carefully assessing the reliability of the statements made (for example, in case of confessions).

All the members of the Judiciary who have been interviewed have told that, in re-listening to the recordings, they pay attention to the tone of the sentences and to the pauses during the statements, for better assessing the reliability of the speaker.

#### **4.6. Case study**

The following is what could be defined a typical case that shows how audio recording or video recording would benefit a non-Italian speaker in challenging the quality of the interpretation of the validation hearing.

Mr. J.A. was arrested in Rome in the morning of May 23<sup>rd</sup> 2018 on the charges of selling counterfeited goods on the street without a permit. In particular, he was caught by a police patrol in the act of selling the goods, which were seized by the police. He was arrested in flagrante delicto and was taken to the police station, where he was identified as a Nigerian citizen with a temporary residence permit. He spoke poor Italian, being his mother tongue a Nigerian dialect. He was handed the Letter of rights in English, which he could only understand orally, and which was not translated to him nor explained in a language that he could understand. He didn't have a lawyer so an ex officio lawyer was appointed; however, the lawyer didn't go to the police station, since his client didn't have to be questioned by the police. Since the validation hearing would have taken place in the morning of the following day, and since the police holding cells were out of order, he was taken to the Regina Coeli prison located in the Rome city center, where he spent the day and the night. In the morning, Mr. J.A. was brought to the Rome Tribunal where he met his lawyer. The first consultation with his lawyer was translated by an

interpreter of the Tribunal, who knew the Nigerian dialect spoken by Mr. J.A., but who was not a native speaker neither of the dialect nor of the Italian language. It was during this first consultation that Mr. J.A. learnt the charges for his arrest, he had thought he had been taken into custody because of some problems with his residence permit. After less than 10 minutes of consultation in which the lawyer instructed his client with the answers to the judge's questions, the confirmation hearing started. It was evident that what Mr. J.A. was saying during the hearing was not translated completely by the interpreter, since Mr. J.A.'s lengthy explanations were reduced to very short sentences. There was another interpreter in the room, who said that the interpretation was very poor and at times even wrong. The validation hearing was audio recorded; however, only the voice of the interpreter was taped, hence there is no record of what was actually said by Mr. J.A. Because of the misinterpretation of several sentences, the judge understood that the defendant had no fixed home, while in reality he had one, and decided for a pre-trial detention measure instead of a more lenient home arrest. Only later, the lawyer was able to file a request to review the measure and his client was indeed freed and sent home while awaiting trial.

Currently in the Italian system there are no tools to challenge the quality of the interpretation; however, if the statements of a person who doesn't speak Italian were recorded, it would be possible to show, if doubts should arise at a later stage of the proceeding, the real content of his statements.

## **5. Attitudes of relevant stakeholders**

### **5.1. Usefulness of audio or audiovisual recording**

The opinions gathered with reference to the usefulness of documenting, through audio or audiovisual recording, the statements made by the subjects involved in criminal justice are extremely discordant.

On this point, **the lawyers** interviewed have expressed two diametrically opposed opinions.

According to the first opinion expressed, the documentation with the summarized minutes is not suitable to faithfully report the declarative acts. So, it is considered always useful for the defence that any form of recording of the statements made during the proceeding is carried out. Others believe, instead, that audio or audiovisual recordings cannot always be considered useful for defence purposes, on the other hand, they might be harmful.

In particular, it has been highlighted that in all cases in which the law recognizes to the suspect of accused the assistance of a lawyer, the lawyer's control over the statements recorded in minutes is thought sufficient to protect the rights of the accused.

The audio or audiovisual recording of the acts (especially those that take place in front of the criminal police) could, on the contrary, harm the position of the suspect. The Italian criminal justice system uses in fact a double dossier system, which means that the prosecutor interrogates the suspect in order to find elements showing whether the investigation must be pursued. Nonetheless, once before the judge, the matter is entirely re-examined and the minutes of the statements given by the suspect or accused during the investigation case do not enter the casefile of the judge. The ration of the system is that to avoid that the judge might already form his/her idea on the suspect before the trial. Also, usually during the trial all the recorded acts are transcribed therefore, in order to prevent that the recording of the statements that were given during the investigations are inserted in the trial casefile, it would be necessary to provide a prohibition of the transcription. In this way, the recordings would have the only aim of providing the evidence of possible violation of the suspect's rights.

Within this context an extremely negative opinion was expressed with reference of audiovisual recording. This method of documenting the acts is, in fact, considered excessively invasive for the declarant.

**The Public Prosecutor** underlined that in the trial there is no real problem of documentation of the statements made by the accused and the witness because the contradictory sufficiently guarantees the genuineness of the statements and the defence needs of the accused.

Regarding the preliminary investigation phase, the Public Prosecutor believes that the audio or audiovisual recording of the suspect's statements is not decisive for the effective protection of his rights because the suspect is assisted by a lawyer and rarely decides to make statements, being able to exercise his right to silence; the audio or audiovisual recording is, instead, very useful for all the statements made by witnesses or, more generally, by persons aware of the facts because it allows the judge and the Public Prosecutor to have an important tool available to evaluate, even afterwards, the credibility of the declarant. The same opinion has been expressed by the judge of the trial phase.

**The judge for preliminary investigations** is, instead, of a different opinion. He thinks that the audio/ audiovisual recording is always useful as an instrument to protect the declarant (suspect or witness) from possible pressures exerted by the interrogator and, above all, as an aid to the judge, who, thanks to the recording, can more adequately assess the credibility of the declarant. In his experience, the possibility of reviewing the videotape of the statements of a suspect has been of fundamental importance for the revocation of a restrictive measure of personal freedom initially laid out on the basis of a confession which then proved to be completely unreliable.

Finally, there are a few subjects on which all the stakeholders agreed: that the audio recording is useful for the documentation of the complaints and the information rendered, during the preliminary investigation phase, especially concerning victims in proceedings **relating to sexual offences or crimes committed in the family context**. This may guarantee the genuineness of the evidence more adequately. On the one hand, after some time, the victim tends to enrich or impoverish the version provided during the earlier phases of the criminal procedure; on the other hand, in proceedings relating to sexual offences or crimes committed in the family context, the statements of the victim represent the most important proof or the only evidence on which based the verdict of guilty or innocent of the accused. Some (two lawyers and the judge for preliminary investigations) also believe that in such cases video recording would be useful.

Moreover, there is a convergence of opinions regarding the usefulness of the audio recordings of the **statements made by foreigners at all stages of the procedure**, since these would allow a greater guarantee of the right to an interpreter. The actual practice is to record the sole voice of the interpreter, which does not allow a subsequent verification (possible through a technical consultant) of the correspondence between the statements made in the procedure and the interpretation made. Contrary to that practice, verification would be possible by a "direct" recording of the words pronounced by the declarant.

Two of the three interviewed persons, who were charged in various criminal proceedings, believe that the audio or audiovisual recording of the statements is useful because it represents a valid additional protection for the suspected or accused person. The third thinks, on the contrary, that the recording of his statements did not entail any additional protection and that if he had been taped he would have felt less protected.

From the point of view of the opinions expressed as to the usefulness of the audio or audiovisual recordings, it is necessary to report the experiences of the interviewees with reference to the subsequent use of the files containing the recordings made.

According to the experience of the interviewees, once the recording was transcribed, the judges or the prosecutors haven't felt the need to listen again to the audio file or to watch the video. Yet, in exceptional cases, only the judge for preliminary investigations and the prosecutor claimed to have, used the audio file or the video, in particularly complex proceedings or to resolve a doubt about the reliability of the transcribed statements.

Finally, regarding the opinion that the interviewed subjects have about the way in which the other "justice operators" perceive current practices and, more generally, approach the audio or audiovisual recordings, the general vision is that for the lawyers the recording is positive, while for the judges and

defendants it is indifferent. With regard to the criminal police recording the statements is perceived as an unnecessary burden on their work.

## **5.2. Opinions about the introduction of a legal obligation of audio/ audiovisual recording**

Also on the advisability of the introduction of a general obligation to document with audio/ audiovisual recording the statements made during all the phases of the criminal proceedings, the interviewees opinions varied on a wide scale.

The former defendants interviewed have not been able to express an opinion on the matter.

Lawyers, judges and the Prosecutor have highlighted how the moment in which the failure to record the statements could entail a *vulnus* for the defendant's rights is that of the activities that take place in front of the judicial police. In particular, the reference is at the time of collection of complaints by the offended persons (especially if coming from subjects defined as vulnerable according to law). For these acts, some (two lawyers and the judge for preliminary investigations) consider necessary an audiovisual recording obligation.

More generally, the interviewees would welcome the introduction of an audio recording obligation of the statements made by witnesses in the course of preliminary investigations, due to the lack of a real implementation of the right to the assistance of a lawyer.

The public prosecutor emphasizes, however, that the resources are not sufficient to introduce such a generalized obligation and that registration is really necessary only in certain cases where the testimony has decisive importance for the reconstruction of the fact or the witness is particularly vulnerable (and tends to provide different versions of the facts).

As for the statements of the suspects / defendants, a first opinion, supported by two of the lawyers interviewed, positively sees the introduction of the obligation to record all the statements made during the proceedings.

The other lawyers interviewed, instead, expressed an opinion clearly contrary to the introduction of a generalized obligation to record all the statements made by the suspect / accused. They believe, however, that it would be necessary to provide for an obligation of the judicial police or, in any case, of the person who proceeds to the interrogation to carry out the recording at the request of the lawyer. This would allow to ensure the rights of the defendant in "delicate" situations, such as interrogations under particular tension (e.g. particularly insistent interrogators or criminal cases of particular interest for the media, around which there is a pressure of public opinion).

The public prosecutor believes that the recording of the statements of the suspect is not decisive for the effective protection of his rights, which is guaranteed by the presence of the lawyer and by the possibility of exercising the right to silence.

The judge for preliminary investigations is in favour of the full videotaping of all statements made during the proceedings (both by the suspect / accused, and by the persons aware about the facts, etc.) because this method of documentation could contribute to reduce judicial errors, allowing a more in-depth assessment of the information acquired during the course of the proceeding.

Furthermore, he is in favour of the extension of the special evidentiary hearing to all cases in which it is probable that the acquisition of witness statements may be no longer possible during the trial due to their subsequent unavailability. In this regard, he proposes the establishment of a "duty/round of special evidentiary hearing" within the GIP offices to guarantee the possibility of immediately acquiring the statements of the person aware about the facts.

Finally, he deems it necessary to install fixed cameras in all the rooms of the police stations, in order to document the activities carried out within them, for a greater protection of the person arrested or otherwise heard.

At last, with regard to the documentation of the hearings, all the persons interviewed believe that the current practice is adequate to ensure the rights of the accused person, except for the case of the foreigners. The practice of recording the sole voice of the interpreter is not, in fact, assessed as suitable to guarantee the procedural rights of the defendants properly.

The need to change the methods of documentation of statements made by foreigners was also highlighted by the representative of the Association of Office Defenders.



### 5.3. Initiatives

The Association of Office Defenders has never dealt with the subject of audiovisual recording and, therefore, has never carried out research on the subject nor has it developed proposals or pilot projects. However, the representative of the Association interviewed believes that it is necessary to deepen the issue with reference to foreigners.

#### 6. Possibilities of introducing (increased) audiovisual recording of interrogations and the analysis of factors facilitating and hindering it

In order to make an assessment of the possibility of an incremented employment of audiovisual recordings in the criminal proceedings, it is necessary to consider a series of elements that have come out from our research.

The need of a wider use of audiovisual recordings does not seem particularly urgent for the protection of the accused person's rights during the **court hearing**, since it is public, it grants the right to the cross-examination and, in practice, there is a large employment of audio recordings, which seems generally suitable for adequately guarantee the rights of the defendants.

In the hearings concerning **foreigner persons accused**, however, the way how the audio recording is practically made can have an impact on the effectiveness of the right to an interpreter. As a matter of fact, the practice of recording the only voice of the interpreter entails that a control of the conformity between the statements of the accused and what the interpreter says at the (recording) microphone is completely impossible.

The hearings in chambers deserve a more careful reflection, since, even if the presence of the lawyer is mandatory in almost every case, in these proceedings the hearing is not public.

The phase of the proceeding in which it is absolutely necessary to increase the audiovisual recordings is the **investigative** one: as a matter of fact, that is the time when the employment of any form of recording is less popular and the risk of violations of the **suspect's** rights is higher. During the investigations, the audiovisual recording of the activity of police forces and Public Prosecutor might certainly represent a fundamental source of deterrence with reference to possible violation of the suspect's right to physical and moral integrity. On the other hand, in this phase of the proceeding, a more accurate documentation of the statements entails larger risks for the suspect's defence. As a matter of fact, the Italian criminal proceeding follows the "*double dossier system*", which normally prevents that the elements collected during the investigations could be used for the decision. As often highlighted by the persons who have been interviewed for the research, there is a risk that a larger documentation could facilitate the entry in the court hearing of those statements that were given during the investigations, otherwise excluded from the material available to the Judge. The same Code, in some cases, prescribes a prohibition of any documentation of the statements, in order to protect the suspect (*see Article 350 (5) c.c.p.*).

Also the audiovisual recording of the statements given by the **victim** and the **other persons aware of the facts** may be useful, in two respects: on one hand, it could make possible a more accurate assessment of the reliability of the author of the statements and, on the other hand, it could represent a higher protection of the moral integrity of the person and, therefore, of the truthfulness of the statements. However, it is also necessary to consider the risk that the audiovisual recording could end in being so invasive, that it could inhibit or condition the speaker.

In any case, the increasing of the employment of the audiovisual recording in the criminal proceedings requires a huge investment, since the equipment available for the offices at the moment would not be sufficient.

## **7. Recommendations**

In the light of all the reflections made up to now, *five* recommendations can be made:

### **1) Permanent audiovisual recording inside places of deprivation of liberty**

Installing audiovisual cameras in police and Carabinieri stations and in the cells of Tribunals would represent an effective protection from possible abuses and therefore a real guarantee of the physical and moral integrity of the suspect. It would supervise everything happening inside the police stations (not documented otherwise) and it would exclude, at the same time, any discretion in the choice of the way of documentation of the investigative acts.

### **2) Mandatory audiovisual recording of the interrogations of persons deprived of liberty**

At the moment, for the interrogations of persons deprived of liberty, a general obligation of recording with audio or audiovisual devices is provided. Since the obligation is alternative, it is met by audio recording. As a matter of fact, in the practice, audio recording is certainly preferred compared to the audiovisual recording.

Considering the particular vulnerability of person deprived of liberty, it would be important to establish an absolute obligation of audiovisual recording, since it would better guarantee the person's rights deprived of liberty.

#### **3.A) Audio recording of the interrogations and statements given to the Public Prosecutor and to the police forces.**

It could be useful to introduce an obligation to audio record those activities that, today, are generally documented by summarized minutes, i.e. all the statements given to the Public Prosecutor (outside of prison) and to the police forces. The audio recording, in these cases, would have a deterring function, with reference to possible violations of the moral integrity of the speaker.

The Italian criminal justice system uses in fact a double dossier system, which means that the prosecutor interrogates the suspect in order to find elements showing whether the investigation must be pursued. Nonetheless, once before the judge, the matter is entirely re-examined and the minutes of the statements given by the suspect or accused during the investigation case do not enter the casefile of the judge. The rationale of the system is that to avoid that the judge might already form his/her idea on the suspect before the trial.

Usually all the recorded acts are transcribed therefore, in order to prevent that the recording of the statements that were given during the investigations are inserted in the trial casefile, it would be necessary to provide a prohibition of the transcription. In this way, the recordings would have the only aim of providing the evidence of possible violation of the suspect's rights.

#### **3.B) Obligation, upon the lawyer's request, to order the audio recording of the interrogations and other statements to the police forces.**

A good alternative to the introduction of a general obligation of audio recording could be the provision of an obligation for the authority which carries out the interrogation of ordering the audio recording upon the lawyer's request. This could allow to the defence to manage the worst situations, when it is more difficult for the lawyer to protect his client (e.g. authorities particularly persistent, cases exposed to the media, about which there is a pressure from the society). At the same time, this solution would overcome the risks connected to the recommendation 3.A.

### **4) Absolute obligation of audiorecording during the hearings**

The law provides a series of exceptions to the obligation of audiorecording. These derogations are so wide that it would undermine the real content of the obligation.

Considering the wider use of the audiorecording of the hearings, the introduction of an obligation with no possibility of waivers would be desirable and largely implementable.

**5) Explicit provision of an obligation to record the statements of the non-national and of the interpreter's words.**

In order to make the audio recording an effective protection of the accused person's right, it is necessary to explicitly provide an obligation to record both the foreigner's statement in his/her language and the interpreter's voice. Only this way, as a matter of fact, a later control about the conformity between the accused person's statements and the words of the interpreter could be possible.