

# **The right to information within the criminal proceedings in the European Union. Comparative examination. Critical opinions**

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## **Abstract**

*In the present study we have examined the provisions of Directive 2012/13 / EU of the European Parliament and the Council on the right to information in criminal proceedings and a compared examination relating to the provisions of Romanian law regarding ensuring the right to information within the Romanian criminal proceedings. The innovations and the value of the work consist of the examination of the European legal instrument, the comparative examination and the critical opinions and the proposals of de lege ferenda. As recognized in the jurisprudence of the ECHR, the right to information of the person suspected or accused of committing a crime or arrested for committing a crime on the territory of another Member State is part of the right to a fair trial, being necessary its compliance throughout the criminal trial, on the territory of each Member State. At the same time the European legislative act establishes a general procedure that needs to be respected by each Member State, which entails the obligation for Member States to ensure at least the same rights as for the citizen or the conditions under which a national of another Member State is suspected, accused or arrested for the commission of a crime. This paper continues the research conducted in the field of International and European judicial cooperation in criminal matters, which have resulted in the publication of papers in well-known publishing houses in the country and abroad, in national and international specialized journals or conference proceedings. The work can be useful to both theorists and practitioners in the field of judicial cooperation in criminal matters regarding the rights of certain categories of people and to the Romanian or European legislator for amending and supplementing the legislation.*

**Keywords:** *person suspect, accused or arrested in another Member State, the Romanian law, the European legal instrument.*

**JEL Classification:** K14, K33

## **1. Introduction**

In the bilateral or multilateral international relations, the world states have conducted cooperation activities in a variety of areas, focusing on the economic, cultural, environmental, political, military and legal domains.<sup>2</sup>

The scientific and technical progress in the recent years and the expansion of the democratization process across several states, created the possibility of easy movement of people and goods from one State to another or from one continent to

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another. The unquestionably beneficial effect for the whole world in terms of economic development has created some advantages towards global proliferation of crime.<sup>3</sup>

The growing danger caused by the growth of cross-border crime, the need to prevent and combat more effectively in an organized framework at global level, led to the adoption of international zonal, regional and global instruments that would unify the efforts of world states<sup>4</sup>, such as international treaties that allow the judicial authorities to cooperate in investigations and their inquiries on individuals or legal entities for breach of criminal law<sup>5</sup>.

In the recent Romanian doctrine it was claimed that an overview of the manifestation forms of international crime highlights primarily the diversity of methods of action, the organization and logistics, often perfected of those involved in such events.<sup>6</sup>

In this particularly complex context, led on the one hand by the unprecedented increase in crime of all kinds, and particularly terrorism, and on the second hand to the need of improving the international judicial cooperation in criminal matters in order to reduce the effects of cross-border crime, one of the priorities set by the European Union was to develop an area of freedom security and justice on its territory.

Of course, this can not be achieved without the protection of personal data of persons involved in procedures covered cooperation. To this end, not only did 2006 EU Directive comply with these rules, but more than in 2008, the European Union issued a Framework Decision on Personal Data Protection to ensure that personal data used in the work of police and judicial cooperation in criminal matters are protected<sup>7</sup>.

As argued in the doctrine and in the preamble of several legal instruments governing the provisions regarding the international judicial cooperation in criminal matters adopted at EU level, achieving this desideratum is conditioned by

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<sup>3</sup> Rusu, I. & Balan-Rusu, M.-I. (2013). *The European Arrest Warrant, Romanian and European Legislation, Doctrine and Jurisprudence*. LAP Lambert Academic Publishing, Deutschland/Germany, Danubius University, p. 12.

<sup>4</sup> Boroï, Al. & Rusu, I. (2008). *Cooperarea judiciară internațională în materie penală, Curs master/International Judicial Cooperation in criminal matters, Master Course*. Bucharest: C.H. Beck, p. 2.

<sup>5</sup> S. Comm. *On Foreign Rel., Mutual Legal Assistance Treaties with the European Union: Report*, S. Exec. Rep. No. 110–13, at 3 (2008) [hereinafter MLAT Report] *apud* V.M. Kendall, *Greasing the Palm: An Argument for an Increased Focus on Public Corruption in the Fight Against International Human Trafficking*, Cornell International Law Journal, vol. 44, issue 1, 2011, p. 45.

<sup>6</sup> Boroï, Al. (coord.); Rusu, I. & Rusu, M.-I. (2016). *Cooperarea judiciară internațională în materie penală, Tratat/The international judicial cooperation in criminal matters. Treaty*. Bucharest: C.H. Beck, p. 7.

<sup>7</sup> Council Framework Decision 2008/977, art. 1(1), 2008 O.J. (L 350) 60, 64 (EC), in E.M. Simbro, *Disclosing Stored Communication Data to Fight Crime: The U.S. and EU Approaches to Balancing Competing Privacy and Security Interests*, Cornell International Law Journal, vol. 43, issue 3, 2010, p. 608.

respecting the principle of mutual recognition of judgments and other decisions of judicial authorities.

Incidentally, this principle should become the cornerstone of judicial cooperation in civil and criminal matters within the European Union since the increased mutual recognition complemented by the necessary approximation of legislation would facilitate the cooperation between competent authorities and the legal protection of individual rights.

Given its importance in achieving the established object in accordance with the Tampere conclusions, the Council adopted, on 29 November 2000, a program of measures for implementing the principle of mutual recognition of judgments in criminal matters.<sup>8</sup>

In the very introduction it states that mutual recognition principle *has as aim strengthening the cooperation between Member States and enhance the protection of individual rights*.

The implementation of the principle of mutual recognition of decisions in criminal matters presupposes that each Member State has confidence in the criminal justice systems of other Member States. Regarding the scope of mutual recognition, it depends largely on a number of parameters, which include mechanisms for protecting the rights of the suspected or accused persons and common minimum standards necessary to facilitate the application of the principle of mutual recognition<sup>9</sup> (The Preamble of the examined European legal instrument paragraphs (1)-(3)).

On the other hand it is necessary within the proceedings for recognition and enforcement of judgments adopted by the judicial authorities of another Member State, to be respected art. 47 of the Charter of Fundamental Rights of the European Union, art. 6 of the European Convention on Human Rights which establish the right to a fair trial (which includes also the right to defense), art. 48 par. (2) of the Charter which guarantees the right to defense, and art. 6 of the Charter and art. 5 of the ECHR which establish the right to liberty and security of person.

Given the importance and need to respect the procedural rights, at 30th November 2009 the Council adopted a resolution on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings.<sup>10</sup>

In a phased approach, the Roadmap proposes measures concerning:

- The right to translation and interpretation (measure A);
- The right to information on rights and about the charges (measure B);
- The right to legal advice and judicial assistance (measure C);
- The right to communicate with relatives, employers and consular authorities (measure D);

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<sup>8</sup> Published in OJ C 12 of 15.01.2001, p. 10.

<sup>9</sup> The Preamble of the European legal instrument, par. (1) - (3).

<sup>10</sup> Published in OJ C 295 of 04.12.2009, p. 1.

- Special guarantees for the suspected or accused persons who are vulnerable (measure E).

Welcoming the Roadmap on 11 December 2009 the European Council made it part of the Stockholm Programme - An open and secure Europe serving and protecting citizens.<sup>11</sup>

The first measure taken under the Roadmap (under Measure A) has been solved with the adoption of Directive 2010/64 / EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.<sup>12</sup>

A second measure, the right to information on rights and about the charges was transposed into the European law with the adoption of Directive 2012/13 / EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.<sup>13</sup>

This European legal instrument to which this examination refers establishes common minimum standards to be applied in the field of information about rights and the accusation, which will be made known by the persons suspected or accused of committing a crime, in order to strengthen mutual trust among Member States.

We appreciate that in its essence, the European legal instrument insists on respecting the rights provided for in art. 6,47 and 48 of the Charter, as well as those in art. 5 and 6 of the European Convention on Human Rights, as interpreted by the European Court of Human Rights.

## 2. Purpose and scope

As it can be inferred from the interpretation of the title, the European legislative act under examination establishes a set of rules on the right to information of suspects or accused persons about their rights in criminal proceedings and prosecution that it is brought.

Also, the European legislative act establishes a series of rules concerning the right to information of persons targeted by a European arrest warrant on their rights.

Regarding the scope, we mention that these provisions shall apply from the moment a person is informed by the competent authorities of a Member State of the fact that he is suspected or accused of a criminal offense until the conclusion of the proceedings, which means adopting a judicial definitive decision (including following a court decision in a declared legal appeal).

Under the situation where the national law of a Member State provides a sanction for minor offenses by another authority, other than a court having jurisdiction in criminal matters and the application of such a sanction may be appealed before such a court, the provisions of the examined European legal

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<sup>11</sup> Published in OJ C 115 of 04.05.2010, p. 1.

<sup>12</sup> OJ L 280 of published 26.10.2010, p. 1.

<sup>13</sup> Published in the OJEU no. L 142/1 of 01.06.2012.

instrument will apply only to the proceedings conducted before that court following the exercise of such ways of appeal (art. 1 and art. 2 of the European legal instrument).

### 3. The right to information about the rights

Under the European legal instrument, the Member States shall ensure compliance of the suspected or accused persons, at least of the following rights in the same way as it applies in the national law:

- The right to a lawyer;
- Any entitlement to free legal advice and the conditions for obtaining such advice;
- The right to be informed of the accusation, in accordance with art. 6;
- The right to interpretation and translation;
- The right to remain silent.

At the same time, we highlight the need for all the information concerning the rights referred to above to be provided orally or in writing, in a simple and accessible language, taking into account any particular need of the vulnerable suspected or accused person (art. 3 of the European legislative act).

A brief analysis of the rights mentioned above, enables us to see that they are taken from other legal instruments adopted at the level of the Council of Europe or within the European Union.

The right to be assisted by a lawyer represents in its essence the right to defense, which is included in the right to a fair trial (as expressed often by the European Court of Human Rights), as expressly provided for in the provisions art. 6, par. (3) b) and c) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Also, the right to protection is expressly mentioned in the provisions of art. 47, par. (2) and art. 48 par. (2) of the Charter of Fundamental Rights of the European Union.

The right to free legal advice is mentioned in article, 6 par. (3), letter c) from the Convention for the Protection of Human Rights and Fundamental Freedoms and in art. 47, par. (3) of the Charter.

Regarding the right to be informed of the accusation, it is also prescribed by the provisions of art. 6, par. (3), letter a) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The right to interpretation and translation is provided in article 6, paragraph (3), letter e) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Last right under the provisions of European legal instrument, namely the right to remain silent is provided in article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and article 47 of the Charter.

Understanding and the application of the provisions concerning the rights referred to above should be examined in the light of the way these rights are reflected in the national law of each Member State.

As for the Romanian law, after an overview of the way these rights are provided for in the Romanian law allows us the following observations: - the right to be assisted by a lawyer is expressly provided for in article 10, par. (1) Code of Criminal Procedure, art. 89, par. (1) Code of Criminal Procedure and art. 83, letter c) Code of Criminal Procedure;

- The right to free legal advice is provided for in article 91, par. (1) Code of Criminal Procedure and art. 83, letter g<sup>1</sup> Code of Criminal Procedure;

- The right to be informed of the charges set out in article 10 par. (3) Code of Criminal Procedure, and art. 83, letter a<sup>1</sup> Code of Criminal Procedure;

- The right to interpretation and translation is provided in article 12, par. (3) Code of Criminal Procedure and art. 83, letter f) Code of Criminal Procedure;

- The right to remain silent is provided in article 83, letter a) of Code of Criminal Procedure.

In conclusion it may be asserted that the rights specifically mentioned in the European legal instrument are provided for in the Romanian Code of Criminal Procedure (entered into force after the adoption of the European legal instrument), which means that it is no longer necessary to adopt another law that expressly provides those rights.

#### **4. The rights on the arrest**

Regarding the detained or arrested persons, they must be provided promptly with a written Letter of Rights. This note can be read by the persons concerned and maintained throughout the period of detention.

This written notice will include in addition to the information listed above, also information about the following rights as they apply under the national law:

- The right of access to case materials;
- The right to have informed the consular authorities and one person;
- The right of access to urgent medical assistance; and
- The maximum number of hours or days of which the suspect or accused person may be deprived of liberty before getting to a judicial authority.

Also, this notice will include basic information about any possibility, under the national law, to contest the lawfulness of the arrest, to obtain a review of detention or to ask for provisional release. The Letter of Rights shall be drafted in simple and accessible language, to be understood by the suspect or accused person against whom it was ordered the detention or arrest. The note must be written in a language that the person understands.

People who are arrested under a European Arrest Warrant will be provided promptly with a Note of rights, including information about their rights under the

law implementing the Council Framework Decision 2002/584/JHA<sup>14</sup> in the enforcement Member State.<sup>15</sup>

In the Romanian law these rights are provided for in the Criminal Procedure Code and in other laws.

The institution of arrest is provided for in art. 223-240 of the Code of Criminal Procedure and the rights of persons arrested on the access to case materials, access to emergency medical care and the right to inform the consular authorities and one person is provided in art. 4, 5, 9, 10, 11, 12 and 83 of the Code of Criminal Procedure and also in other laws.

Regarding the right to be informed of the maximum number of hours or days for which the suspect or accused person may be deprived of liberty before getting to a judicial authority, we consider that the Romanian law does not require it, as any suspect or accused person is before the judicial bodies, prosecutor or the court at an early stage.

However, if we only consider the retention, which can be ordered by the criminal investigation bodies of police, we note that it is regulated in art. 209-210 of the Code of Criminal Procedure, the maximum being of 24 hours, after this period the person is brought before a court unless it is released.

It can be appreciated that the Romanian law provides all the rights to which the European legal instrument, the authorized judicial authorities are obliged to inform the arrested person on his rights.

### **5. The right to information about the accusation**

In all circumstances, on the territories of Member States the suspected or accused persons will receive information about the criminal act of which they are suspected or accused of committing. This information will be supplied promptly accompanied by the details necessary to guarantee the fairness of the proceedings and the effective exercise of the right to defense.

In terms of suspected or accused persons detained or arrested, they will be informed of the reasons for detention or arrest, as well as the criminal act of which they are suspected or accused.

However, until this case goes to the court, the person concerned shall provide information on the accusation, including the nature and legal classification of the offense committed and the form of its participation.

Also, any change in the course of the proceedings will be notified to the person concerned.

In the Romanian law the right to information about charges is expressly provided for in article 10, par. (3) and art. 83 letter a<sup>1</sup>) Code of Criminal Procedure.

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<sup>14</sup> Published in OJ L no. 190 of 18 July 2002.

<sup>15</sup> We consider here the provisions of Title III of Law no. 302/2004 on international judicial cooperation in criminal matters, published in the Official Monitor of Romania, Part I, no. 594 of 1 July 2004, republished, as amended and supplemented, the last occurring by the adoption of Law no. 300/2013, published in the Official Monitor of Romania, Part I, no. 772 of 11 December 2013.

## 6. The right to access to case materials and other provisions

In the situations where a person is detained or arrested in any phase of the criminal proceedings (prosecution, preliminary chamber procedure or judgment regarding the Romanian law), the judicial authorities shall provide to the arrested persons or their lawyers the documents relating to the case, which are essential in order to have the possibility for contesting the legality of the detention or arrest.

Also, in order to ensure the right to defense, the competent authorities shall ensure to the suspected or accused persons or their lawyers the access to at least all the evidence in their possession, whether for or against the suspected or accused persons, in order to guarantee the fairness of the proceedings and to prepare the defense.

The access to the mentioned above evidence means will be given in due time, in order to allow the effective exercise of rights of defense and the latest for the submission of the file to the trial court. If other means of evidence will come into the possession of the competent authorities, it will be granted access to them in a timely manner.

Notwithstanding the above provisions, provided that this does not prejudice the right to a fair trial, the access to certain materials may be refused if such access may lead to serious risk to the life or fundamental rights to another person, or if the refusal is strictly necessary for protecting an important public interest, such as in cases where the access could prejudice an ongoing investigation or seriously harm the internal security of the Member State in which the criminal proceedings take place.

In accordance with the national law of each Member State, it is necessary that the decision to refuse access to certain materials to be made by a competent authority or it can be subject to judicial control.

The access to evidence will be given free of charge.

The Member States shall take the necessary legislative measures to ensure that the suspected or accused persons or their lawyers have the right to appeal according to the procedures of national law, for possible failure or refusal of the competent authorities to provide information under the provisions of the examined European legislative act.

Also, without bringing prejudice to the judicial independence and differences in the organization of the judiciary systems across the Union, the Member States shall take measures to ensure the training of judges, prosecutors, police and judicial staff involved in criminal proceedings for the enforcement and application of the provisions of the examined judicial act.

The Member States shall take the necessary measures to ensure that the European regulatory provisions of the Act come into force until 2 June 2014.



## 7. The Romanian law and the right to information in criminal proceedings. Comparative examination

A brief comparative examination of the provisions of the European legislative instrument and the provisions of the Romanian law that regulates the right to information in criminal proceedings allows us to formulate the following observations which in essence refer to how the Romanian legislator provided in national law the need to respect this fundamental right.

Regarding the right to information of suspected or accused person, we mention that it is brought into our attention through a report following rights:

- The right of not giving any statement during trial, letting him know that if they refuse to testify they will not suffer any adverse consequence, and if they make statements, they could be used as evidence against him;
- The right to be informed on the crime for which he is being investigated and its legal classification;
- The right to see the file, under the law;
- The right to have a lawyer of his choice, and if he doesn't chose one in cases of compulsory assistance, the right to appoint a lawyer ex officio;
- The right to propose managing evidence as provided by the law, to raise exceptions and to draw conclusions;
- The right to make any other claims related to settling the criminal case and a civil case;
- The benefit of an interpreter free of charge when he does not understand, he does not speak well or he cannot communicate in Romanian;
- The right to appeal to a mediator in cases provided by law;
- The right to be informed of his rights;
- Other rights provided by law.

These rights are circumscribed fully to the provisions of art. 6 (right to a fair trial) of the Convention for the Protection of Human Rights and Fundamental Freedoms, being transposed into the Romanian law in the way of the Romanian legislator, by a slight extension, an aspect which does not contravene the European legislation, being even recommended.

At the same time, it can be noticed that compared with the European law, the Romanian legislator has provided such rights in a clearer way, with a slight extension.

The European legislator insists in respecting the special rights also in the case of the arrested person or the person subject to the execution of a European Arrest Warrant.

No doubt that in his view the European legislator took into account the special situation in which these categories are, in terms of their ability to defend themselves with knowledge of certain rights which have to be respected by the judiciary bodies.

A comparative examination with the Romanian law in this area allows us to express an opinion according to which also this time the Romanian legislator has provided the obligation of the Romanian judicial bodies to enforce these rights.

These rights are provided for in article. 88 (lawyer), art. 89 (legal assistance to the suspect or defendant), art. 90 (mandatory legal assistance to the suspect or defendant), art. 91 (public defender), art. 92 (the rights of the suspect or defendant's lawyer), art. 94 (inspection of the file), art. 95 (right to file a complaint) and art. 96 (representation) of the Code of Criminal Procedure.

Also, the right to access the emergency medical assistance is expressly provided for in Law no. 254/2013 on the execution of sentences and custodial measures ordered by the court in criminal proceedings<sup>16</sup>, and the organization and operation regulations of the detention places or detention.

As a general conclusion, we consider that the Romanian legislator has transposed into its national law provisions on the right to information in criminal proceedings in a manner which can ensure the rights of the person suspected or accused of committing a crime or a person detained or arrested for committing a crime and to persons subject to the execution of a European arrest warrant.

### **8. Conclusions, critical opinions and proposals of *de lege ferenda***

The examination of the European legal instrument governing the right to information in criminal proceedings, gives us an opportunity to make critical opinions against the regulating way conceived by the European legislator and proposals of *de lege ferenda*, designed to help improve the European legislative system of this particularly sensitive area.

A first critical remark that we formulate regards the option of the European legislator to adopt several legislative acts that govern the fundamental rights of the person suspected or accused of committing a crime on the territory of a State other than that of his nationality or other rights of a person arrested for an offense in another Member State.

We consider here the Council Resolution of 30 November 2009 on the Roadmap for strengthening the procedural rights of the suspected or accused persons in criminal proceedings, for which it established the gradual adoption of five measures (A-E), which concern the following: the right to translation and interpretation (measure A), the right to information on rights and about the charges (measure B), the right to legal advice and legal aid (measure C), the right to communicate with relatives, employers and consular authorities (measure D), and special guarantees for suspected or accused persons who are vulnerable (measure E).

This roadmap was adopted by the European Union in order to ensure that these rights of people who commit offenses in the territories of Member States,

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<sup>16</sup> Published in the Official Monitor of Romania, Part I, no. 514 of August 14, 2013.

other than that of which they are citizens, having as aim for these persons to enjoy the same rights as the nationals of each Member State.

Such an approach will establish the promotion of five legislative acts, each of which aims at ensuring the defense of some procedural rights.

As a proposal of *de lege ferenda* we believe that it would have been more useful if the European legislator would have adopted one a single legislative act that would include provisions on the enforcement of the five categories of procedural rights expressly mentioned in the five measures (A-E).

Such an approach is not without interest even after the adoption of the five laws that basically would lead to their termination and the adoption of a single piece of legislation that would include clear provisions for the five categories of procedural rights.

A second critical remark regards the way the European legislator has provided the compliance of the special rights for persons arrested under a European Arrest Warrant.

We should mention that in the framework legislative act (Framework Decision 2002/584 / JHA) there are expressly provided procedures to be followed, considering that the issuance and execution of a European arrest warrant can happen both for prosecution and for conducting the trial or enforcement of a criminal law sanction of deprivation of liberty.

We appreciate that it was not required to provide a Note on the rights, as anyway, the person is assisted by a lawyer during the course of proceedings for recognition and enforcement in any Member States.

Even in these circumstances, the concerns of the European legislator to establish a coherent legislation regarding the rights of suspected, accused or arrested persons, should be appreciated, as it establishes in the Member States a single procedure to be fulfilled.

As a general conclusion, we consider that at the moment this legislative act is useful, its adoption is necessary, except that in a not too distant future it is necessary to adopt a single piece of legislation containing provisions with respect to all rights of the person suspected, accused or arrested in another Member State.

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6. V.M. Kendall, *Greasing the Palm: An Argument for an Increased Focus on Public Corruption in the Fight Against International Human Trafficking*, „Cornell International Law Journal”, vol. 44, issue 1, 2011.

## II. Legislation

1. Based on the conclusions of the Tampere Council adopted, on 29 November 2000, a program of measures to implement the principle of mutual recognition to judgments in criminal matters, published in OJ C 12 of 15.01.2001;
2. On 30 November 2009 the Council adopted a resolution on a Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings, published in OJ C 295 of 04.12.2009, p. 1;
3. Stockholm Programme - An open and secure Europe serving and protecting citizens, published in OJ C 115 of 04.05.2010;
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6. Framework Decision 2002/584 / JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, published in OJ L no. 190 of 18 July 2002;
7. Title III of Law no. 302/2004 on international judicial cooperation in criminal matters, published in the Official Monitor of Romania, Part I, no. 594 of 1 July 2004, republished, as amended and supplemented, the last occurring by Law no. 300/2013, published in the Official Monitor of Romania, Part I, no. 772 of 11 December 2013;
8. Law no. 254/2013 on the execution of sentences and custodial measures ordered by the court during the criminal trial, published in the Official Monitor of Romania, Part I, no. 514 of 14 August 2013;
9. Criminal Procedure Code.