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REFLECTION ON THE EU DIRECTIVE ON THE STRENGTHENING OF CERTAIN ASPECTS OF THE PRESUMPTION OF INNOCENCE AND OF THE RIGHT TO BE PRESENT AT THE TRIAL IN CRIMINAL PROCEEDINGS

Abstract

The authors of this paper reflect on the EU Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings and its impact on the Macedonian criminal procedure system. The presumption of innocence is settled by the ECtHR jurisprudence as one of the basic standards that lie in the heart of the fair trial concept. The article discusses the issue of public references to quilt and the obligation of the Member States to take the necessary measures to ensure that, for as long as a suspect or an accused person has not been proved guilty according to law, public statements made by public authorities, and judicial decisions, other than those on guilt, do not refer to that person as being guilty. Also, there is the question of the burden of proof for establishing the guilt of suspects and accused persons, and the requirement that it lies on the prosecution. At the same time, the right to remain silent and not to incriminate oneself, specifically closely related to the presumption of innocence, opens the question about the drawing of adverse inferences when the defendant remains silent or fails to answer a certain question. Notwithstanding the fact that the Court asserts these rights as fundamental, in a number of rulings it becomes clear that they can be restricted and that they are not treated as an absolute.

Keywords: EU directive, suspect, presumption of innocence, right to silence, right to be present at trial, criminal procedure, Law on Criminal Procedure, Republic of North Macedonia.

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I. KEY CHARACTERISTICS OF THE EU DIRECTIVE 2016/343 ON THE STRENGTHENING OF CERTAIN ASPECTS OF THE PRESUMPTION OF INNOCENCE AND OF THE RIGHT TO BE PRESENT AT THE TRIAL IN CRIMINAL PROCEEDINGS

The Directive on the Strengthening of Certain Aspects of the Presumption of Innocence and of the Right to be Present at the Trial in Criminal Proceedings[1] is part of the cluster of several EU Directives[2] targeting for harmonization of the minimum rights of the suspects and accused persons during criminal proceedings. These directives were the result of a path that started with the programme of measures to implement the principle of mutual recognition of decisions in criminal matters, adopted in 2000. Then, in 2009, the Council adopted a resolution on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, which the European Council welcomed and made it part of the Stockholm Programme — An open and secure Europe serving and protecting citizen. These directives explicitly establish the rights of the suspects and accused persons in the criminal proceedings. They encompass the minimum standard that should be met in all criminal justice systems in EU countries.

The subject matter and the purpose of this Directive are to enhance the right to a fair trial in criminal proceedings by laying down common minimum rules concerning certain aspects of the presumption of innocence and the right to be present at the trial. According to the scope of application, as portrayed in Article 2, the Directive applies to natural persons who are suspects or accused persons in criminal proceedings. It applies at all stages of the criminal proceedings, from the moment when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence until the decision on the final determination of whether that person has committed the criminal offence concerned has become definitive. At the same time, it is underlined that "at the current stage of development of national law and case-law at national and Union level, it is premature to legislate at Union level on the presumption of innocence with regard to legal persons. This Directive should not, therefore, apply to legal persons. This should be without prejudice to the application of the presumption of innocence as laid down, in particular, in the ECHR and as interpreted by the ECtHR and by the Court of Justice, to legal persons".[3]

[1] DIRECTIVE 2016/343/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016L0343.

[2] DIRECTIVE 2010/64/EU on the right to interpretation and translation in criminal proceedings, DIRECTIVE 2012/13/EU on the right to information in criminal proceedings, DIRECTIVE 2012/29/EU on establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, DIRECTIVE 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, DIRECTIVE (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings and DIRECTIVE (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.

[3] DIRECTIVE 2016/343/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016L0343.

II. DIFFERENT ASPECTS OF THE DIRECTIVE

i. Presumption of innocence

The first feature of the Directive is the guarantee that the Member States must ensure the presumption of innocence for the suspects and accused persons. The right to presumption of innocence encompasses the right of the defendant to be presumed innocent until proved guilty according to law, as well as to be treated as one.[4] The presumption of innocence and the right to a fair trial are enshrined in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 14 of the International Covenant on Civil and Political Rights, as well as in Article 11 of the Universal Declaration of Human Rights.

This right is firmly associated with the question about public references to guilt, as the presumption of innocence would be violated if public statements made by public authorities, or judicial decisions other than those on guilt, referred to a suspect or an accused person as being guilty, for as long as that person has not been proved guilty according to law. According to the Directive, Member States shall take the necessary measures to ensure that, for as long as a suspect or an accused person has not been proved guilty according to law, public statements made by public authorities, and judicial decisions, other than those on guilt, do not refer to that person as being guilty. In this sense, the term "public statements made by public authorities" should be understood to be any statement that refers to a criminal offence and which emanates from an authority involved in the criminal proceedings concerning that criminal offence, such as judicial authorities, police and other law enforcement authorities, or from another public authority, such as ministers and other public officials. Also, defendants must not be presented as being guilty, in court or public, through the use of measures of physical restraint, such as handcuffs, glass boxes, cages and leg irons.[5] At the same time, the Directive stipulates that the competent authorities should also abstain from presenting suspects or accused persons in court or in public while wearing prison clothes.

But, the obligation not to refer to suspects or accused persons as being guilty should not prevent public authorities from publicly disseminating information on the criminal proceedings where this is strictly necessary for reasons relating to the criminal investigation.

ii. Burden of proof

The burden of proof for establishing the guilt of suspects and accused persons is on the prosecution, and any doubt should benefit the suspect or accused person. The presumption of innocence would be infringed if the burden of proof were shifted from the prosecution to the defence, without prejudice to any *ex officio* fact-finding powers of the court, to the independence of the judiciary when assessing the guilt of the defendant, and to the use of presumptions of fact or law concerning the criminal liability of a defendant. The Directive requests for such presumptions to be confined within reasonable limits, taking into account the importance of what is at stake and maintaining the rights of the defence, and the means employed should be reasonably proportionate to the

[4] A. Stumer, The Presumption of Innocence – Evidential and Human Rights Perspectives, Hart Publishing, Oxford and Portland, Oregon, 2010.

[5] Unless the use of such measures is required for case-specific reasons, either relating to security, including to prevent suspects and defendants from harming themselves or others or from damaging any property, or relating to the prevention of defendants from absconding or from having contact with third persons, such as witnesses or victims.

legitimate aim pursued. Such presumptions should be rebuttable and in any event, should be used only where the rights of the defence are respected.

iii. Right to remain silent and right not to incriminate oneself

The right to remain silent is an important aspect of the presumption of innocence and should serve as protection from self-incrimination. Defendants must not be forced, when asked to make statements or answer questions, to produce evidence or documents or to provide information, which may lead to self-incrimination. The right to remain silent and the right not to incriminate oneself should apply to questions relating to the criminal offence that a person is suspected or accused of having committed and not, for example, to questions relating to the identification of a suspect or accused person.

The right to remain silent and the right not to incriminate oneself imply that competent authorities must not compel defendants to provide information if those persons do not wish to do so. But, it is understandable that the exercise of the right not to incriminate oneself shall not prevent the competent authorities from gathering evidence which may be lawfully obtained through the use of legal powers of compulsion and which has an existence independent of the will of the suspects or accused persons.

As the ECtHR says, the right to silence is closely related to the privilege against self-incrimination. While the privilege, concerns the threat of coercion to make an accused yield certain information, the right to silence concerns the drawing of adverse inferences when an accused fails to testify or to answer questions.[6]

A particularly important, and at the same time considerably complex aspect of the right to remain silent is the issue of drawing adverse inferences from the defendant's silence. The Directive stipulates that the exercise of the right to remain silent or the right not to incriminate oneself should not be used against a defendant and should not, in itself, be considered to be evidence that the person concerned has committed the criminal offence.

Namely, maybe a little strange, but, if we oppose the normative existence of the right to silence and its use as a legitimate tactic of the defence, to its actual effect in practice, we'll have to deduce that it turns out to be the contra-productive approach. Hence, the practice shows that this kind of defence causes even greater persuasion of the procedure authorities in the defendant's guilt. Even though, one must have in mind that sometimes the innocent ones will also have a good motive to remain silent. But, since the court does not establish the existence of a specific reason that would justify the silence, the question arises why the defendant did not actively oppose the accusations. If the judge fails to find an explanation, then he will interpret that the defendant, for some reason, is striving to avoid the answers. Therefore, this would mean that the judge, either way, infers from the silence, regardless of the legal solutions. Following this logic, silence as a procedural tactic itself inevitably entails the conclusion that the defendant wants to divest the procedure authorities of certain information that probably would point to his guilt.[7]

This reasoning, which is often encountered, is strong enough to support the thesis that it is almost impossible for the one who makes the decision to stay out from the influence of such logic. Practically, this shows that the idea that the law allows the court to draw inferences from the defendant's silence under certain conditions is much closer to the practice, given that the judges

[6] A. Ashworth: Self-incrimination in European Human Rights Law – A Pregnant Pragmatism?, available at: http://cardozolawreview.com/Joomla1.5/content/30-3/ASHWORTH.30-3.pdf, p. 754.

[7] С. Кнежевић, Заштита људских права окривљеног у кривичном поступку, Центар за публикације, Правни факултет Ниш, 2007, p. 94.

do that even when the law prohibits such possibility. Since this prohibition is not able to change anything in practice, Damaška is right when he says that this is an example for attaching such power to the legal norms that they do not have, and therefore for this situation, he uses the term "fetishism of the law".[8] After all, he says, what is the point of adopting legal rules that are of symbolic nature and in practice incite the courts to hypocrisy?[9]
Such prohibition will only contribute to preventing the silence to be mentioned in the judgment's explanations, but they will fail to isolate the silence from the decision reaching process of someone's guilt. In the same manner, McEwan says that it is not completely clear whether defendants who will choose to exercise their right to silence, necessarily protect their interests, having in mind that in certain circumstances remaining silent opposed to the accusation, is the same thing as pleading guilty.[10]
Moreover, in the cases in which this issue was raised i.e. where the ECtHR was dealing with the right of silence, and the extent to which, it was compatible with this right for a court to draw adverse inferences from the accused's failure to answer questions, the Court went on to state that the right of silence is not absolute in the sense that there may be circumstances in which it is consistent with the right to a fair trial for a court to draw adverse inferences from a defendant's silence.[11]

iv. Right to be present at the trial

The last aspect covered by the Directive is the one, which provides that the Member States must ensure that defendants have the right to be present at their trial. As exceptions from this rule, two situations are specified in the Directive, defining under which circumstances the trial can be held in the absence of the defendant: if the defendant has been informed, in due time, of the trial and of the consequences of non-appearance and does not, nevertheless, appear or if the defendant, having been informed of the trial, is represented by a mandated lawyer, who was appointed either by him or by the State.
Informing a defendant of the trial should be understood to mean summoning him in person or, by other means, providing that person with official information about the date and place of the trial in a manner that enables him or her to become aware of the trial. Informing the defendant of the consequences of non-appearance should, in particular, be understood to mean informing that person that a decision might be handed down if he does not appear at the trial.
Where Member States provide for the possibility of holding trials in the absence of the defendant but it is not possible to comply with these conditions, because he or she cannot be located despite reasonable efforts having been made, Member States may provide that a decision can nevertheless be taken and enforced. But in that case, they must ensure that when the defendant is informed of the decision, in particular when he is apprehended, he is also informed of the possibility to

[8] See: M. Damaška, Okrivljenikov iskaz kako dokaz u suvremenom krivičnom procesu, Narodne Novine, Zagreb, 1962, p. 31-38, 71.
[9] See: M. Damaška, Nemo tenetur prodere se ipsum, in: Dokazno pravo u kaznenom postupku: oris novih tendencija, Pravni Fakultet u Zagrebu, 2001, p. 55-69.
[10] See: J. McEwan, Evidence and the Adversarial Process – The Modern Law, 2nd Edition, Hart Publishing, Oxford, 1998, p. 168.
[11] See: D. Ilic Dimoski, The Impact of the European Court of Human Rights Jurisprudence on the Privilege Against Self-Incrimination, Proceeding from the Conference: The Europeanisation of Criminal Law and Protection of Human Rights in Criminal Proceedings and the Process of Execution of Criminal Sanctions", Faculty of Law in Split / Faculty of Law in Osijek, Split, 2017.

challenge the decision and of the right to a new trial or another legal remedy. Such information should be provided in writing. The information may also be provided orally on condition that the fact that the information has been provided is noted in accordance with the recording procedure under national law.
At the same time, competent authorities in the Member States should be allowed to exclude a suspect or accused person temporarily from the trial where this is in the interests of securing the proper conduct of the criminal proceedings.

III. THE INFLUENCE OF THE DIRECTIVE ON THE STRENGTHENING OF CERTAIN ASPECTS OF THE PRESUMPTION OF INNOCENCE AND OF THE RIGHT TO BE PRESENT AT THE TRIAL ON THE MACEDONIAN CRIMINAL PROCEDURE – CONCLUDING OBSERVATIONS

A number of research studies in the Republic of North Macedonia attempt to verify whether, under the new concept of criminal procedure, the defence has an honest chance to rebate state accusations as guaranteed by the relevant international instruments, including those recently endorsed in the EU.[12] Although when getting into an analysis of the stage of transposition of this Directive, or whether our criminal procedure provisions are in accordance with the Directive, we will refer to the current Law on Criminal Procedure (LCP)[13], let us note that there is a new Proposal on the LCP[14], which although has not yet been adopted, has a significant number of provisions that are amended and changed, some of which regarding the rights of the suspects and accused persons, derived from the EU Directives.
The presumption of innocence of Art. 2 of the LCP, and in accordance with Art. 13, para. 1 of the Constitution of the Republic of North Macedonia implies that any person charged with a criminal offence shall be presumed innocent until his or her guilt is established by a valid and final court verdict. Also, state authorities, media and all other entities shall be obliged to observe this rule, and their public statements about the ongoing procedure shall neither violate the rights of the defendant and the injured party nor harm the judicial independence and impartiality.[15] Following the rule of presumption of innocence, the LCP provides for decision making in a manner that is more favourable for the defendant meaning the Court shall decide on the predicament of the existence or non-existence of the facts that characterize the criminal offence on which the application of a certain provision of the Criminal Code depends, in a manner more favourable for the defendant (in dubio pro reo).[16]
Although the right to presumption of innocence is tightly associated with the question about public references to guilt in the statements made by public authorities, or judicial decisions other than those on guilt, it appears important to note one further aspect – about the presumption of innocence and journalistic ethics in the Republic of North Macedonia. Namely**,** when the Republic of North Macedonia is concerned, one must reference the sensationalism in reporting on court cases, the

[12] For a detailed analysis of the rights of the defence in the Republic of North Macedonia in the light of the EU Directives see: D. Danilovska Bajdevska / N. Naumovska (Eds.), Effective Defence in Criminal Proceedings in the Republic of Macedonia, Foundation Open Society – Macedonia, Skopje, 2014.
[13] Law on Criminal Procedure, Official Gazette no. 150/2010, 100/2012, 142/2016, 198/2018.
[14] Proposal on the Law on Criminal Procedure,
https://ener.gov.mk/Default.aspx?item=pub_regulation&subitem=view_reg_detail&itemid=49560.
[15] Article 2 of LCP, Official Gazette no. 150/2010, 100/2012, 142/2016, 198/2018.
[16] Article 4 of LCP, Official Gazette no. 150/2010, 100/2012, 142/2016, 198/2018.

publication of the identity of the suspects, showing pictures of detentions, etc., directly violates the constitutional principle of presumption of innocence under which a person charged with a criminal offence shall be presumed innocent until proved guilty by a final court decision.
Moreover, in most cases, the media report on the names of the suspects at a very early stage of the proceedings, very shortly of right after the criminal charges, when neither indictment has not yet been submitted, nor the court procedure hasn't started yet.
In addition, it seems that it is forgotten that in the Code of Journalists, journalists commit themselves that the manner of informing about court proceedings must be free from sensationalizations and that in the judicial procedures the principle of presumption of innocence should be respected, next, it should be reported about all the parties involved in the procedure and not to suggest a verdict (Article 8 of the Code of Journalists). For instance, the Council of Honor of the Association of Journalists of Macedonia (AJM) reacts to the reporting of several media for the case "Pajazina" ("Spider web"), "Monstrum" ("Monster"), etc. The Council of Honor indicates that this kind of information is contrary to the ethical principles outlined in the Code of Journalists. The rules for reporting on suspects foresee that their faces should not be disclosed, and when broadcasting television recordings, the faces should be protected (with blurring).[17]
The right to remain silent is a key aspect of criminal defence rights. In criminal proceedings, it is considered to be a fundamental right and implies that defendants are not obliged to admit the criminal offence or give a statement to acknowledge the existence and credibility of facts presented in the course of relevant proceedings, as well as answer questions raised by the police, the public prosecution or the court. Therefore, defendants are not obliged to give any statement that would contribute to a clarification of facts in the case, be it in the course of pre-trial procedure or at court hearings.[18] In this sense, legal provisions stipulate that defendants enjoy this right from the moment of their first interrogation. This is further confirmed by rules governing suspect interrogation, according to which before being interrogated, persons summoned for interrogation must be informed *expressis verbis*, i.e. in a clear manner, about their right to remain silent, while minimum defence rights include the right not to be coerced to make incriminating statements for themselves or their relatives or to admit guilt. Hence, one of his minimal rights in the context of the maxim *nemo tenetur se ipsum* is the right not to be compelled to testify against himself or to plead guilty.[19] Omitting to be advised of this, as a consequence has the exclusion of his statement. Consequently, the law leaves no opportunity to prove that the defendant, although not instructed, was yet aware of this right.[20]

Another guarantee for the right to remain silent is the fact that persons responding to police invitation or forcefully apprehended by the police, who have refused to make a statement, cannot be re-summoned on the same grounds. According to legal solutions in effect, defendants are

[17] А. Груевска Дракулевски / Б. Мисоски / Д. Илиќ Димоски: Начелото на презумпција на невиност и новинарската етика: случајот Република Македонија, Proceeding of the Faculty of Law Iustinianus Primus, Skopje, 2018.
[18] Dilemmas are raised by the legal provision from Article 12 of the Constitution of the Republic of North Macedonia according to which, persons summoned, apprehended or deprived of liberty cannot be requested to make a statement are a matter of the past with the interpretation that the legal provision in question expressly allows the right to remain silent, i.e. prohibits the coercion of persons to make or sign a statement, which does not mean that the person cannot be interviewed. Indeed, this is not a completely restrictive interpretation of the constitutional provisions and should be assumed as a principled approach in terms of fundamental rights and freedoms, but it is more realistic and ultimately adequate to legal solutions and practices identified in comparative and international law. See: Гордан Калајџиев, *Правична постапка*, Докторска дисертација одбранета на Правниот факултет во Скопје, 2004) 268.
[19] Article 206 of LCP, Official Gazette no. 150/2010, 100/2012, 142/2016, 198/2018.
[20] Such an example is found in Germany.

advised that any statements they give can be used in criminal proceedings led against them. Additional guarantees are secured by the fact that, although suspects might have waived these rights voluntarily, their interrogation cannot start without a written statement on waiver of particular right signed by them. Action taken contrary to these principles might result in the withdrawal of such statements from court trials.

The legal provisions in the 2010 LCP provide for the defendant to receive instruction, that if he gives a statement, it can be used in the proceedings against him. As an additional guarantee, the law provides that even though the defendant may voluntarily waive these rights, his interrogation may not start, until he signs a waiver of rights. Acting contrary to this results in the exclusion of the statement.

Concerning one of the most controversial issue - the drawing of adverse inferences from the defendant's silence - Macedonian law does not contain a provision that allows the judge and other authorities of the procedure to draw adverse inferences from the defendant's silence, as for example, English law does. But, at the same time, it does neither contain provisions to the effect that the authorities must not ask the defendant for the reasons for remaining silent, of provisions that prohibit the complete silence of the defendant or his failure to answer certain questions to be treated as evidence.

Therefore, although this means that the court should not consider the silence as concluding for defendant's guilt, yet there is no guarantee that in practice this does not happen, especially if we have in mind that many consider that innocent person when faced with the accusations against him, would use the opportunity to offer an explanation. In this context, the authors of the Report of the “Monitoring of the cases of organized crime and corruption", indicate that: "Some of the monitored cases showed that domestic jurisprudence has no clear attitude towards the controversial question whether from the defendant’s silence adverse inferences may be drawn, but the most of the actors in the procedure believe that the court took into account the silence, but did not explicitly emphasized it in the judgment’s reasoning."[21]

Although it can be established that from the normative point of view, the criteria and guarantees are met for exercising the right not to incriminate oneself, yet it is certain that if the defendant decided to use his right to silence, there will be psychological pressure to speak, often practised by the police.

Regarding the right to be present at the trial, Macedonian LCP is harmonized with the Directive’s provisions referring to the right to be present at trial. Namely, if the defendant is regularly summoned, but fails to appear at the main hearing, and fails to justify his absence or the circumstances clearly show that he is avoiding receiving the summons, the court shall order for the defendant to be brought before the court forcibly. If the defendant cannot be brought immediately, the court shall decide to cancel the main hearing and order for the defendant to be brought before the court forcibly at the next hearing.[22] If it is obvious that the defendant who has been regularly summoned avoids appearing at the main hearing, or if the Court has already made two attempts for his proper summons, and all circumstances show that he is obviously avoiding receiving the summons, the court may order for the person to be detained.[23]

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[21] Г. Калајџиев / Б. Мисоски / А. Г. Дракулевски / Д. Илиќ, Судската ефикасност во справувањето со организираниот криминал и корупцијата, Коалиција Сите за правично судење, Скопје, 2013, p. 36.

[22] If the defendant justifies the absence before he is brought before the court, the presiding judge shall cancel the order for forcible bringing of the defendant.

[23] Article 365 of LCP, Official Gazette no. 150/2010, 100/2012, 142/2016, 198/2018.

The defendant may be tried in his absence only if he has fled or is otherwise inaccessible to the state institutions, in the event when there are especially important reasons for the person to be tried, although he is absent. Upon a motion by the plaintiff, the court enacts a decision to try the defendant in his absence. Any appeal does not prevent the enforcement of the decision.[24]
At the same time, the LCP provides for repetition of the procedure for a person convicted in absence, stipulating that any criminal procedure whereby a person was convicted in the absence (according to Article 365 of LCP) and there is a possibility for the person to be tried in his or her presence shall be repeated also apart from the conditions prescribed in Article 364 of this LCP if the defendant or his or her counsel puts a motion for repetition of the criminal procedure within one year as of the day when the convicted person learned of the conviction in his or her absence. Apart from this situation, in any event, the court shall allow for repetition of the criminal procedure if there is an ongoing procedure for the extradition of the person convicted in his or her absence and if the state where the person resides is asking for guarantees that the person shall be granted the right to be tried again in his or her presence.[25]
At the same time, the LCP instructs that the court shall not allow for a defendant to be tried again in his or her absence when the person's motion for repetition of the criminal procedure due to a trial in absence was granted if the person becomes unavailable to the law enforcement entities during the repeated procedure.[26]

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[24] Article 365 of LCP, Official Gazette no. 150/2010, 100/2012, 142/2016, 198/2018.
[25] Article 456 of LCP, Official Gazette no. 150/2010, 100/2012, 142/2016, 198/2018.
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