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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION

**ON THE PROCEDURE FOR APPOINTING JUDGES
TO THE CONSTITUTIONAL COURT**

OF THE SLOVAK REPUBLIC

on the basis of comments by

Mr Richard CLAYTON (Member, United Kingdom)

Mr Michael FREND (Member, Malta)

Mr Christoph GRABENWARTER (Member, Austria)

Mr Ben VERMEULEN (Member, the Netherlands)

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I. Introduction

1. By a letter of 16 May 2014, the Minister of Justice of the Slovak Republic, Mr Tomas Borec, requested an opinion on the procedure for appointing judges of the Constitutional Court.
2. Mr Richard Clayton, Mr Michael Frendo, Mr Christoph Grabenwarter and Mr Ben Vermeulen acted as rapporteurs for the opinion.
3. *This opinion was discussed at the Sub-commission on Democratic Institutions on And subsequently adopted by the Venice Commission at its ... Plenary Session (Venice, ...).*

II. Background

4. On 4 July 2014 the terms of three judges of the Constitutional Court will elapse.
5. In its session from 3 April 2014 to 15 May 2014, the National Council of the Slovak Republic adopted a resolution in which it proposed six candidates for the position of Constitutional Court judges to the President of the Slovak Republic.
6. The term of office of the incumbent President of the Slovak Republic elapses on 15 June 2014. At noon on the same day, the newly elected President of the Republic (directly elected in March 2014 for a term of five years) will take up office.

III. Scope of the opinion

7. The Minister of Justice of the Slovak Republic put the following questions to the Venice Commission:
 - (1) whether it is within the power of the incumbent President to appoint three new constitutional judges before his term of office ends on 15 June 2014;
 - (2) if the incumbent President appoints three new judges before his term of office ends, whether the newly elected President who assumes office on 15 June 2014 may refuse to accept the submission of the oath by the judges appointed by the outgoing President, and instead appoint three other persons from the list of candidates;
 - (3) whether the newly elected President may reject all of the proposed candidates and require the National Council to submit a new list; and
 - (4) whether the newly elected President may recall the President of the Constitutional Court or the Vice President from their new office and appoint a new President or Vice President.
8. This opinion is based on an English translation of the Constitution and the Act of the National Council of the Slovak Republic of January 20, 1993 on the Organisation of the Constitutional Court of the Slovak Republic, on the Proceedings before the Constitutional Court and the status of its Judges. Some issues raised may be due to inaccuracies of the translation.

IV. Constitutional and Legal framework relating to the appointment of judges of the Constitutional Court

9. According to Article 102.1.s) of the Constitution,

“the President of the Republic shall appoint and recall judges of the Constitutional Court of the Slovak Republic, the President and Vice-President of the Constitutional Court of the Slovak Republic and accept the oath of judges of the Constitutional Court of the Slovak Republic”.

10. Article 134 of the Constitution sets out the procedure for appointing judges of the Constitutional Court; it reads as follows:

“(1) The Constitutional Court shall be composed of thirteen judges.

(2) The judges of the Constitutional Court shall be appointed by the President of the Slovak Republic for a twelve-year term on a proposal of the National Council of the Slovak Republic. The National Council of the Slovak Republic shall propose double the number of candidates for judges that shall be appointed by the President of the Slovak Republic.

(3) A judge of the Constitutional Court must be a citizen of the Slovak Republic, eligible to be elected to the National Council of the Slovak Republic, not younger than forty years and a law-school graduate with fifteen years of experience in the legal profession. The same person cannot be re-appointed as a judge of the Constitutional Court again.

(4) A judge of the Constitutional Court shall take the following oath before the President of the Slovak Republic:

“I swear on my honour and conscience that I will protect the inviolability of natural human rights and rights of a citizen, the principles of rule of law, uphold the Constitution, constitutional laws and international treaties that were ratified by the Slovak Republic and were promulgated in the manner laid down by a law and decide cases to the best of my abilities and conscience independently and impartially.”

(5) Having taken this oath, the judge shall assume the judicial office.”

11. Article 135 of the Constitution reads as follows:

“The Constitutional Court shall be headed by a President who may be substituted by a Vice President. The President and the Vice President shall be appointed by the President of the Slovak Republic from among the judges of the Constitutional Court.”

12. Art 138.2 regulates in specific terms the limited grounds on which the President of the Slovak Republic can recall a judge of the Constitutional Court:

“The President of the Slovak Republic shall recall a judge of the Constitutional Court:

- a) on the basis of a final condemning judgement for a wilful criminal offence or if he/she was lawfully convicted of a criminal offence and the court did not decide in his/her case on probationary suspension of the imprisonment sentence,*
- b) on the basis of a disciplinary decision by the Constitutional Court for conduct which is incompatible with holding the office of a judge of the Constitutional Court,*
- c) if the Constitutional Court has announced that the judge has not participated in proceedings of the Constitutional Court for over a year, or*
- d) if he/she is not eligible for election to the National Council of the Slovak Republic.”*

13. Article 139 of the Constitution reads as follows:

“In the case a judge of the Constitutional Court resigns from the office, or he or she is recalled, the President of the Slovak Republic shall appoint another judge for a new term from two nominees presented by the National Council of the Slovak Republic.”

14. Pursuant to § 11.2 of the Act of the National Council of the Slovak Republic of January 20, 1993 on the Organisation of the Constitutional Court of the Slovak Republic, on the Proceedings before the Constitutional Court and the status of its Judges¹ (hereinafter “the Act of 1993”), “[a] Judge’s employment contract shall come into effect on the day of taking the oath”. According to § 12.1 of the Act of 1993, “[a] judge’s office shall be terminated upon the expiration of the period for which he was appointed”.

V. Questions raised in the Request

A. Whether it is within the power of the incumbent President to appoint three new constitutional judges before his term of office ends on 15 June 2014

15. The President of the Slovak Republic is chosen in direct elections (Article 101.2 of the Constitution), is not accountable to the National Council (see *a contrario* Articles 106 and 107 of the Constitution) and has considerable powers (Article 102). Most of his or her powers are exercised individually; only a few shared powers require the countersignature of the Prime Minister (Article 102.2).

16. The President of the Republic is therefore not merely the symbolic Head of the State. He/she has his/her own democratic mandate and possesses substantial individual powers. He/she is to be regarded as a ‘guardian or defender of the Constitution’ (Article 104.1), ensuring that the state powers remain within the boundaries of the Constitution, not being bound by orders but performing his/her office according to his/her conscience and convictions (Article 101.1). Evidently, when applying his or her powers enumerated in Article 102.1 of the Constitution, the President has to respect and uphold the constitutional standards.

17. The procedure for appointment of new judges to the Constitutional Court (Article 134 of the Constitution) is composed of three steps:

- a) The selection by the National Council of double the number of candidates to each vacant post
- b) The choice by the President of the Republic of the actual judge out of these candidates
- c) The taking up of judicial office by the judge through an oath given to the President of the Republic.

18. Art 134 is silent about the precise timetable by which the National Council selects the candidates for vacant judicial positions and the President subsequently chooses the judges from among the candidates proposed by the National Council; Art 134 therefore confers on the National Council and the President a discretionary power as to when to make their decisions.

19. It is a common feature of all constitutions of Europe that there are time limits for certain acts of Government, Parliament or the Head of State, but also a number of acts where there is no such time limit. This situation leads to the assumption that many Constitutions give the state organs a certain discretion as to when they should act. This is in particular true when it comes to nomination and election of other state organs. However, this discretion is not unfettered. A general rule would be that, in the absence of a strict time-limit, organs should act within reasonable and adequate time. Reasonableness and adequacy must be determined by values and basic principles of a constitution.

¹ http://www.concourt.sk/en/Act_38_1993/a_38_1993.pdf

20. This applies in a normal situation where the President remains the same during all stages of the procedure, but it also applies in a situation where a succession is underway at the Head of the State during the procedure of nomination of judges.

21. The Venice Commission observes that in the Slovak Republic the mandate of the constitutional judges expires on the last day of their term (§12.1 of the Act of 1993). In order not to shorten their constitutional mandate, the new judges may thus take their oath only after the expiry of the term of their predecessors. On the other hand, as there appears not to be any possibility to extend such term (there is no default mechanism in the Slovak Constitution whereby constitutional judges would remain in office until the new appointments are made²), should the oath not be taken immediately, a seat on the Constitutional Court would remain vacant, which could impair the functioning of the Court.

22. In order to avoid such situation, step c) of the appointment procedure - the taking of the oath, which is the moment on which the term of office of the appointed judges starts (§ 11.2 of the Act of 1993) - should therefore take place immediately after the expiry of the term of the previous judges.

23. It follows that steps a) and b) of the appointment procedure must be taken within an appropriate time-frame to allow for the swearing in of the new judges to take place on or immediately after 4 July 2014.

24. In relation to the argument that the current President of the Republic would not be allowed to appoint judges of the Constitutional Court whose term of office will start under the tenure of the new President because that would amount to an interference in the powers of the new President, the Venice Commission observes that the texts of the Constitution and the Act do not limit the presidential powers in the final phase of his or her term of office, even when the new President has already been elected. There is no provision in the Constitution restricting the powers of the President during this phase, which would be comparable to Article 115.3 of the Constitution³ restricting the powers of a caretaker Government. Nor may the election of the new President be regarded as some sort of a 'vote of less confidence', weakening the democratic mandate and powers of the incumbent President, which is based on his election for a fixed term of office.⁴

25. In conclusion, the Venice Commission is of the opinion that the incumbent President would be acting in accordance with the Constitution in selecting the three judges from the pool of six candidates proposed by the National Council. However, in the given time frame,

² Study CDL-STD(1997)020 on the composition of Constitutional Courts: *"Where no appointment has been made, default mechanisms should be put in place in the interest of the court's institutional stability. It is true that not every possible failure requires a special remedial provision and that it may normally be resolved by a constitutional system capable of assimilating conflicts of power. Nevertheless, default mechanisms already exist in certain elective (Germany, Portugal, Spain) or semi-elective (Bulgaria) appointment systems, in which the importance of the stability of the court is such that a possible political failure to appoint a constitutional judge would be prevented from affecting this stability"*, p. 15.

³ Article 115 of the Constitution reads:

(1) In the event that the National Council has passed a vote of no-confidence or overruled a motion for a vote of confidence, the President shall dismiss the Government.

(2) [...]

(3) If the President of the Slovak Republic recalls the government in accordance with section (1), then by a decision promulgated in the Collection of Laws, the President shall charge that government with further performing its competences until a new government is appointed, but solely those competences set out in Article 119.a.b.e.f.m.n.o.p.r.; in addition, however, the performance of government competences set out in Article 119.m.r requires the prior approval of the President in each individual case.

⁴ Furthermore, the three judges are chosen from a list of six judges adopted by parliament, the National Council, which also is a source of democratic legitimacy.

the incumbent President also enjoys discretion *not* to appoint the three judges and leave this to the new President, as there would appear to be sufficient time for the latter to appoint them until 4 July 2014 (based on the proposals of the National Council of 3 April and 15 May – see answer to question 3).

26. Should the incumbent President choose to make the choice himself at this late stage, it would appear to the Venice Commission that, in the best interest of a stable democracy and of the independence of the Constitutional Court, the incumbent President could publicly coordinate his steps with the newly elected President.

B. If the incumbent President appoints three new judges before his term of office ends, whether the newly elected President who assumes office on 15 June 2014 may refuse to accept the submission of the oath by the judges appointed by the outgoing President, and instead appoint three other persons from the list of candidates

27. Solemnly taking the oath before the President of the Slovak Republic is the last step of the procedure for a judge to be able to assume the judicial office (see under question 1 above).

28. The Constitution does not expressly empower the President to refuse a judge - appointed in accordance with the Constitution - to take the oath. And there is nothing in the Constitution which would suggest by implication that he would have such a power.

29. The only possible exceptions to the obligation of the President to accept the oath of the newly appointed judges would arguably be if it has become clear that they do not fulfil the requirements of Article 134.3 of the Constitution⁵ or if certain facts equivalent to the grounds for recall in Article 138.2.a) and d) of the Constitution became known only after the selection by the National Council and the appointment by the President. It goes beyond the scope of this opinion to assess this matter in detail. What matters is that these extraordinary situations would apply (or not) irrespective of the fact that a succession of the incumbent President is underway.

30. In conclusion, the Venice Commission is of the opinion that the newly elected President has no power under the Constitution to refuse to accept the submission of the oath by the judges appointed by the outgoing President, nor does he have the power to appoint three other persons from the list of candidates submitted by the National Council.

C. Whether the newly elected President may reject all of the proposed candidates and require the National Council to submit a new list

31. Art 134.2 of the Constitution entrusts the National Council with “[proposing] double the number of candidates for judges [of the Constitutional Court] that shall be appointed by the President of the Slovak Republic”.

32. The fact that the term of the President of the Republic expires before the term of the National Council has no consequence on the legitimacy of the decision taken by the parliament which has been democratically elected at a different time than the President.

33. There is no provision in the Constitution that justifies a rejection of the proposal. The only particular feature in the situation under examination is that the National Council did not

⁵ See the Judgement of the Constitutional Court of the Slovak Republic of 23 September 2009 (Ref. No. PL. ÚS 14/06).

know to which physical person its proposal would be addressed, but the organ “President” has not changed.

34. It follows, in the Venice Commission’s view, that neither the wording of the Constitution, nor the logic behind having a list of candidates submitted by the National Council give any power to the newly elected President of the Slovak Republic to reject all of the proposed candidates and require the National Council to submit a new list.

D. Whether the newly elected President may recall the President or the Vice President of the Constitutional Court from their new office and appoint a new President or Vice President

35. The Venice Commission observes that, pursuant to Article 102 of the Constitution, the President of the Republic has the power to appoint and recall the President and Vice President of the Constitutional Court. No criteria are indicated. Neither the Constitution nor the Act of 1993 expressly state the term of the mandate of the President and the Vice President of the Constitutional Court. It can be drawn from this silence that the term coincides with their mandate as judges.

36. A distinction should be made between the mandate as judge and the mandates as President and Vice President of the Constitutional Court. Article 138.2 deals with the recall of judges in general and does not refer to the recall from the function of President or Vice President of the Court, which is specifically regulated in Article 102. If a President or Vice President were recalled from that office under Article 102 of the Constitution, they would not lose their status as judge of the Constitutional Court and would remain in office until the end of their constitutional mandate.

37. The specific tasks of a President and a Vice President are administrative and distinct from their purely judicial decision-making tasks.

38. The most important safeguard of judicial independence of Constitutional Courts is the irrevocability of judges and the rules against arbitrary dismissal (grounds for dismissal limited to exceptional cases previously regulated by law)⁶. However, purely administrative functions correctly carried out by judges (such as Presidents) do not directly relate to judicial decision making, which is at the centre of judicial independence. At the same time, the borderline between the administration of a court and the administration of justice (judicial decision making) might in practice not always be so clear and can be a sensitive issue, which could relate to judicial independence. For example, the threat to recall a judge from his or her position as president of the Court might influence his or her decisions. It follows that the criteria have to be more stringent for dismissals than for appointments.

39. In the opinion of the Venice Commission, therefore, it would be incompatible with the constitutional requirement of independence of the Constitutional Court if the President of the Slovak Republic were empowered to recall the President and/or the Vice President of the Constitutional Court at any time and without any objective reason.

40. It is true that the President of the Republic’s discretionary power to recall the President and Vice-President of the Constitutional Court from office is broader than his or her constitutionally regulated and limited power to dismiss a constitutional judge (Article 138.2). However, objective reasons would still need to be given.

⁶ Venice Commission, Report on the Composition of Constitutional Courts, Science and Technique of Democracy, no. 20 (1997), p. 18.

41. The Venice Commission is therefore of the opinion that, unless there are objective reasons to do so, the newly elected President cannot recall from office the President or the Vice President of the Constitutional Court.

VI. Conclusions

42. The Venice Commission concludes that:

- (1) the incumbent President of the Republic has the power, in accordance with the Constitution, to appoint three new constitutional judges before his term of office ends on 15 June 2014; however, in the given time frame, he also enjoys discretion not to appoint the three judges and leave this to the newly elected President, as there would appear to be sufficient time for him to appoint them until 4 July without jeopardising the stability and uninterrupted functioning of the Constitutional Court;
- (2) the newly elected President has no power under the Constitution to refuse to accept the submission of the oath by the judges appointed by the outgoing President, and to appoint three other persons from the list of candidates;
- (3) the newly elected President has no power under the Constitution to reject all of the proposed candidates and require the National Council to submit a new list; and
- (4) the newly elected President cannot recall from office the President or the Vice President of the Constitutional Court without objective reasons.

43. The Venice Commission remains at the disposal of the authorities of the Slovak Republic, should they require further assistance.