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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

SLOVAKIA

**DRAFT OPINION
ON QUESTIONS RELATING
TO THE APPOINTMENT OF JUDGES
OF THE CONSTITUTIONAL COURT**

on the basis of comments by

Mr Richard Clayton (Member, United Kingdom)
Mr Michael Frenco (Member, Malta)
Mr Christoph Grabenwarter (Member, Austria)
Mr Ben Vermeulen (Member, Netherlands)

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Table of Contents

I.	Introduction	3
II.	The request	3
III.	Relevant constitutional provisions	4
IV.	Framework for the appointment of judges of the Constitutional Court and factual situation	5
	A. Chronology	5
	B. Current situation of the Constitutional Court	8
	C. Procedure for appointing judges of the Constitutional Court	9
V.	Relevant elements.....	9
	A. Interpretation of the Constitution ÚS 4/2012:	9
	B. Opinion CDL-AD(2014)015 of the Venice Commission:.....	11
VI.	Procedure before the Constitutional Court.....	11
	A. Announcement of the ruling after the hearing	12
	B. Distribution of jurisdiction between the plenary session and the senate.....	12
VII.	Analysis.....	13
	A. Continued functioning of the Constitutional Court	13
	B. Comparative elements on the composition of Constitutional Courts	14
	C. The margin of discretion of the President in appointing constitutional judges	16
	D. <i>Res iudicata</i>	16
VIII.	Conclusion	18

I. Introduction

1. By letter of 8 December 2016, the President of the Slovak Republic requested the Venice Commission to give an opinion on three questions concerning the appointment of judges of the Constitutional Court of the Slovak Republic.
2. The Commission invited Mr Richard Clayton, Mr Michael Frenco, Mr Christoph Grabenwarter and Mr Ben Vermeulen to act as rapporteurs for this opinion.
3. On 31 January 2017, a delegation of the Commission, composed of Mr Clayton and Mr Grabenwarter, accompanied by Mr. Schnutz Dürr from the Secretariat, visited Bratislava on 31 January 2017 and met with (in chronological order) the President of Slovakia, Mr Andrej Kiska, the President of the Constitutional Court, Ms Ivetta Macejková, the Speaker of the National Council of the Slovak Republic, Mr Andrej Danko, the Chairman of the Constitutional and Legal Affairs Committee of the National Council, Mr Robert Madej, and the legal advisor of the Prime Minister, Mr Eduard Bárány.
4. Already on 7 November 2016, upon invitation by the Minister of Foreign Affairs of Slovakia, Mr Miroslav Lajčák, the President of the Venice Commission, Mr Gianni Buquicchio, accompanied by Schnutz Dürr, had met with (in chronological order) the President of Slovakia, Mr Andrej Kiska, the Prime Minister, Mr Robert Fico, the President of Parliament, Mr Andrej Danko and the President of the Constitutional Court, Ms Ivetta Macejková, in order to discuss the issue of appointment of judges to the Constitutional Court. During that visit President Kiska announced that he would request an opinion from the Venice Commission if the problem of the appointment of the judges of the Constitutional Court were not settled soon.
5. The present opinion was prepared on the basis of contributions by the rapporteurs and on the basis of unofficial translations of the decisions of the Constitutional Court (CDL-REF(2016)008). Inaccuracies may occur in this opinion as a result of incorrect translations.
6. *This opinion was adopted by the Venice Commission at its ... Plenary Session (Venice, ...).*

II. The request

7. The President of Slovakia requested the Venice Commission to reply to three questions:
 1. The first question can be summarised as follows: The Constitutional Court has decided in 2012 that the President is – under certain circumstances – entitled not to appoint the candidate for the Prosecutor General of the Slovak Republic who is proposed by the National Council of the Slovak Republic. The question is whether the President has the same competence with regard to the appointment of judges of the Constitutional Court who are proposed by the National Council as well.
 2. The second question can be summarised as follows: How does the obligation of the President to ensure due performance of constitutional bodies by his decisions play a role with regard to the appointment of judges of the Constitutional Court?
 3. The third question can be summarised as follows: What is the relation between a later decision of a senate of the Constitutional Court and an earlier interpretation of the Constitution of the Slovak Republic by the Constitutional Court sitting in plenary session?
8. The first two questions are interlinked. The President of the Slovak Republic, Mr Kiska, in essence asked the Venice Commission whether the decision of the Constitutional Court of 24 October 2012, PL ÚS 4/2012, concerning the appointment of the Prosecutor General, also applies to appointments of Constitutional Court judges. The material substance of the issue is

whether the President is constitutionally obliged to appoint candidates in the Constitutional Court who he believes do not fulfil the legal criteria or the requirement of 'constitutional fitness'.

9. If the answer to these two first questions is affirmative, the President would like to know whether a decision by a Constitutional Court Senate (Ruling of 17 March 2015, III. ÚS 571/2014-266), composed of three judges, would be competent to give an interpretation which differs from the binding interpretation of the plenary session of the Constitutional Court Plenary, given in the decision of 24 October 2012.

III. Relevant constitutional provisions

10. According to Article 101.1 of the Slovak Constitution, *"the President is the head of state of the Slovak Republic. [...] The President performs his office according to his/her best conscience and conviction, and is not bound by any orders."* Article 104.1 of the Constitution requires that the President is sworn in by taking an oath inter alia stipulating that the President will discharge his duties in the interest of the citizens and *"will uphold and defend the Constitution and other laws"*. Article 102.1.s of the Slovak Constitution states that *"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."*

11. Article 134 of the Constitution determines 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."

12. Article 138.2 of the Constitution regulates the 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. As to generally binding interpretations of the Constitution, Article 128 of the Constitution states that *“[t]he Constitutional Court provides an interpretation of the Constitution or constitutional laws in disputed matters. The decision of the Constitutional Court on interpretation of the Constitution or a constitutional laws promulgated in a manner established for promulgation of laws. The interpretation is generally binding as of the day of its promulgation.”*

15. Article 131.1 of the Constitution requires that the matters listed in specific provisions of the Constitution, including interpretations based on Article 128, *“are decided by plenary meetings of the Constitutional Court. The plenary meeting of the Constitutional Court decides by more than one-half of all judges. If such majority is not reached, the motion is rejected.”*

16. According to Article 131.2 of the Constitution: *“The Constitutional Court decides on the remaining matters in panels of three judges. The panel decides by a more than one-half of its members.”* This includes decisions on complaints by individuals.”

17. As concerns the appointment of the Prosecutor General (Attorney-General), Article 150 of the Constitution reads: *“The Office of public prosecutors shall be headed by the Attorney-General who shall be appointed and recalled by the President of the Slovak Republic on the advice of the National Council of the Slovak Republic.”*

IV. Framework for the appointment of judges of the Constitutional Court and factual situation

18. Due to the complexity of the case, it is useful to give a chronology of the relevant events since 2012.

A. Chronology

- 24 October **2012** Following the refusal by the former President of Slovakia to appoint the candidate elected by Parliament for the position of Prosecutor General, the Constitutional Court gave its decision no. PL ÚS 4/2012. The Court decided in this binding Interpretation of the Constitution that the President could refuse the appointment when the candidate did not fulfill the legal requirements or when there were substantial facts casting doubts on the ability of the candidate to fulfill his or her function without degrading the seriousness of the constitutional body (for more details, see section V.A below).
- 3 April & 15 May **2014** The National Council elected six candidates for three vacant posts in the Constitutional Court (Ms Jana Baricová, Mr Jan Bernát, Ms Eva Fulcová, Mr Miroslav Ďuriš and Mr Juraj Sopoliga and Mr Imrich Volkai).
- 16 May 2014 The Minister of Justice of the Slovak Republic, Mr Tomas Borec, requested an opinion of the Venice Commission on the procedure for appointing judges of the Constitutional Court and notably whether the outgoing President of Slovakia could appoint judges of the Constitutional Court after his successor had already been elected.
- 13 June 2014 The Venice Commission adopted its opinion on the procedure for appointing judges to the Constitutional Court in times of the Presidential transition in the Slovak Republic (CDL-AD(2014)015). (For more details,

- see section B below.)
- 15 June 2014 The term of office of the President of the Slovak Republic, Mr Ivan Gašparovič, ended without him having appointed the judges. The term of office of President Kiska started.
- 2 July 2014 Following hearings of the candidates by a presidential advisory panel of five constitutional experts, President Kiska announced that he would appoint one of the six candidates, Ms Jana Baricová, as a judge of the Constitutional Court but that he refused to appoint any of the other five candidates, because in his view they failed to meet the constitutional qualifications for being appointed.
- 10 July 2014 President Kiska appointed Ms Jana Baricová as a judge of the Constitutional Court
- 15 September 2014 The non-appointed candidates submitted complaints to the Constitutional Court.
- 23 October 2014 The Second Senate¹ of the Constitutional Court accepted the complaint of Mr Jan Bernát (Ruling II. ÚS 718/2014) and of Mr Imrich Volkai (Ruling II. ÚS 719/2014) stating in these Rulings that the legal views expressed in Interpretation 4/2012 “are relevant in the complainant’s case”. The two candidates withdrew their complaints and the Court stayed the proceedings in these cases.
- 17 March 2015 The Third Senate of the Constitutional Court held a hearing in joint proceedings on the complaints of three other candidates (Ms Fulcová, Mr Ďuriš and Mr Sopoliga). At the end of that hearing, the Senate in an oral pronouncement gave its Finding² No. III. ÚS 571/2014, which held that the non-appointment as judges of the Constitutional Court had violated the fundamental rights of the complainants guaranteed in the Slovak Constitution and the International Covenant on Civil and Political rights because the lack of adequate individualized, specific arguments why they did not meet the constitutional requirements. The reasoning of the Finding included *inter alia*: “*The President’s power not to appoint a candidate for constitutional office in case of the existence of a serious reason relating to the candidate which casts serious doubt on his/her ability to carry out that office in a way not diminishing the authority of the office and of the whole institution of which he/she is to be a supreme representative or which does not contradict the mission of this institution, if this reason could interfere with the proper functioning of constitutional bodies, as follows from the interpretation pronounced in case ref. PL ÚS 4/2012, relates to exceptional reasons which are so severe that they disqualify the candidate for this particular office in terms of constitutional law.*”³ According to the Third Senate, “*none of such serious or extraordinary circumstances ensue from the reasoning statements of the President’s decisions not to appoint the complainants judges of the Constitutional*

¹ According to Article 131.2 of the Constitution, the Constitutional Court decides on (individual) complaints in a formation of three judges. The English translation of the Constitution uses the term “panel” but the delegation of the Venice Commission was informed that the term “Senate”, which is also used in the English translation of the Act on the Constitutional Court, better reflects the Slovak original term “senát”.

² The oral Finding was published in an abridged transcript of the recording of the public hearing dated 17 March 2015, as well as in a short written version. Procedural decisions of the Slovak Constitutional Court are “Rulings”, whereas decisions on the merits are “Findings”.

³ The audio recording of the hearing is available in Slovak language at the web-site of the Constitutional Court at https://www.ustavnysud.sk/c/document_library/get_file?uuid=8752ad07-68c7-4b91-999e-9900fb056fbf&groupId=10182.

- Court. Reasoning of the contested decisions limit themselves to more or less general statements of failure to meet the criteria of professional competence by the complainants without any adequate individualisation and specification”.*
- 15 May 2015 The Constitutional Court delivered in writing the detailed explanatory statement of its Finding No. III. ÚS 571/2014 on 15 May 2015 (published on the web-site of the Court on 25 May 2015). The Finding distinguished the appointment of the Prosecutor General from that of judges of the Constitutional Court because the nature of appointments of judges of the Constitutional Court is different from other appointments (Prosecutor General, Vice-President of the National Bank, etc.), and ruled that *“it can be concluded that Article 134 para. 2 of the Constitution and Article 139 of the Constitution clearly imply the obligation of the President to appoint from the double the number of candidates exactly one half as the judges of the Constitutional Court. [...] The President can, or is even obliged to select the most suitable judges for the Constitutional Court from among the candidates elected by the National Council”.*
- 27 May 2015 In reply to articles in the press concerning differences between the version of the Senates’ Finding of 17 March 2015 and that of 15 May 2015, the Press and Information Department of the Chancellery of the Constitutional Court made press release 31/2015, informing the public that *“according to a statement made by the members of the Third Chamber of the Court, the written version of the finding delivered to the President and other parties to proceedings, which is always the decisive one, is not in any substantial contradiction with the oral pronouncement of the finding.”*
- 11 August 2015 The President of Slovakia requested a generally binding interpretation of Article 2.2 in connection with Article 128 of the Constitution and of Article 134.2 of the Constitution, in connection with Articles 101.1 and 102.1.s of the Constitution relating to the appointment of judges of the Constitutional Court.
- 28 October 2015 By a majority of seven to four judges, the plenary session of the Constitutional Court adopted Ruling PL US 45/2015, rejected as the request of 11 August 2015 of the President for a generally binding interpretation of the Constitution, because that would merely amount to an interpretation of ordinary law and not of the Constitution. In this Ruling the Constitutional Court stated that the decision of 24 October 2012, No. 4/2012, was not applicable and that the Finding of 17 March 2015, No. 571/2014 of the Third Senate already had finally settled the case. The Court stated that *“the President is obliged to appoint the exact half of the double number of candidates for judges of the Constitutional Court and therefore the President is not permitted to appoint less than half of the candidates for judges of the Constitutional Court because he believes in the existence of serious reason relating to the candidate which casts serious doubt on his/her ability to carry out the office of a judge of the Constitutional Court of the Slovak Republic in a way not diminishing the authority of this judicial office and of the Constitutional Court.”* The Court did not deal with the issue raised by the President that the 17 March 2015 pronounced version of the Senate’s Finding fundamentally differed from the version published on 15 May 2015.
- 2 December 2015 The National Council elected two candidates for another vacant office in the Constitutional Court (Ms Jana Laššakova and Mr Mojmir Mamojka).
- 16 March 2016 The Venice Commission adopted a declaration with *inter alia* expressed concern about problems and delays in the appointment of judges of the

- Constitutional Court of Slovakia.⁴
- 6 July 2016 President Kiska rejected in writing the candidacies of Ms Fulcová, Mr Ďuriš, and Mr Sopoliga (which he considered the only remaining candidates elected in 2014 because Messrs Bernát and Volkai had withdrawn their complaints and thus accepted the decision of the President). President Kiska also rejected the two candidates who had been elected by Parliament for the new vacancy (Ms Laššakova and Mr Mamojka).
- 5 September 2016 Ms Fulcová, Mr Ďuriš, Mr Sopoliga and Mr Bernát (who had withdrawn his first complaint) introduced complaints to the Constitutional Court.
- 13 September 2016 One of the newly rejected candidates (Ms Laššakova) introduced a complaint to the Constitutional Court. This case and the cases brought on 5 September are currently pending before the Third Senate of the Court.
- 14 September 2016 With Ruling I ÚS 757/2016 the Third Senate admitted for further proceedings the complaints by Ms Fulcová, Mr Ďuriš, Mr Sopoliga and Mr Bernát and Ms Laššakova.
- 27 October 2016 The President of Slovakia introduced an initiative to start disciplinary proceedings against the three judges of the First Senate because in their Ruling I ÚS 757/2016 they allegedly wilfully violated the procedural rights of the President by deciding on admissibility without a preliminary hearing and by admitting a case *inter alia* from a person who had already withdrawn an earlier complaint (Mr Bernát). On the same day, President Kiska introduced a request for the exclusion of the judges of the Third Senate for bias because their Ruling I ÚS 757/2016 had been devoid of justification and the President had not been served the complaints before the Ruling was made.
- 7 November 2016 Upon invitation by the Minister of Foreign Affairs of Slovakia, the President of the Venice Commission visited Bratislava and met with with (in chronological order) the President of Slovakia, the Prime Minister, the Speaker of the National Assembly and the President of the Constitutional Court in order to discuss the issue of appointment of judges to the Constitutional Court.
- 8 December 2016 President Kiska requested an opinion of the Venice Commission on questions relating to the appointment of the judges of the Constitutional Court.
- 14 December 2016 The President of the Constitutional Court decided not to institute disciplinary proceedings against the judges of the First Senate pointing out that a preliminary hearing on admissibility as requested by the President of the Slovak Republic was no longer required since constitutional amendments of 2001 and subsequent amendments to the Act on the Constitutional Court and its Rules of Procedure.
- 24 January 2017 The Second Senate of the Court decided in Ruling II. ÚS 62/2017 that the judges of the First Senate are not biased and can decide on the pending complaints.
- 31 January 2017 Visit of a delegation of the Venice Commission to Bratislava (see above).

B. Current situation of the Constitutional Court

19. According to the Slovak Constitution, the Constitutional Court is composed of 13 judges. With the departure of three judges in 2014, out of which only one was replaced through the appointment of Ms Jana Baricová, the number of judges at the Constitutional Court fell to eleven judges. Following the retirement of another judge in 2015 who was not replaced either, the Court currently operates only with ten instead of thirteen judges.

⁴ <http://www.venice.coe.int/webforms/events/?id=2193>.

20. The delegation of the Venice Commission was informed that while the average of submissions to the Constitutional Court in the years 2007 to 2012 was about 11.500. However, since then this number increased to 16.800 submissions in 2015 and to 15.200 submissions in 2016. The Court saw a considerable increase in the length of proceedings which is also due to the absence of three judges. This is visible in the average length of proceedings which was 6.23 months in 2013 and which increased to 8.15 months in 2014, to 9.02 months in 2015 and to 11,87 months in 2016. As a consequence, the right to a fair trial within reasonable time under Article 48.2 of the Slovak Constitution and Article 6.1 ECHR is endangered according to the Court.

21. According to the Constitutional Court, in cases decided in plenary session, it is difficult to find the required majority of seven judges among the ten remaining judges. There have been several cases when the Court could not take a decision in the plenary because it did not achieve the minimum number of seven votes required for decisions in the plenum.

22. This situation led the Venice Commission to express concern *inter alia* about problems and delays in the appointment of judges of the Constitutional Court of Slovakia.

C. Procedure for appointing judges of the Constitutional Court

23. The procedure for the appointment of new judges to the Constitutional Court is composed of three steps:

1. the selection by the National Council of double the number of candidates to each vacant post (Article 134.2 of the Constitution);
2. the choice by the President of the Republic of the judge(s) out of these candidates (Article 134.2 of the Constitution);
3. taking the oath by the judge, sworn in by the President of the Republic (Article 134.4 of the Constitution, after which the judge takes up office (Article 134.5 of the Constitution).

24. According to Article 134.3 the Constitution, for each vacancy, Parliament elects two candidates and it is then the President of Slovakia who appoints one of the two candidates.

25. One of the constitutional criteria to become a judge at the Court are "fifteen years of experience in the legal profession". For the Slovak Parliament, this criterion relates to various types of experience in the legal profession whereas for President Kiska candidates have to have shown a specific interest in constitutional law and they should be strongly motivated to become judges at the Court.

26. The delegation of the Venice Commission was informed that the candidates undergo a thorough hearing before the Constitutional and Legal Affairs Committee of the National Council. Each Member of Parliament, including MPs who are not member of the Committee can participate in the hearings and ask questions to the candidate. The final vote in the plenum of the National Assembly is by secret ballot.

V. Relevant elements

A. Interpretation of the Constitution ÚS 4/2012:

27. In 2012, the then President of Slovakia, Mr Gašparovič, refused to appoint the candidate elected by Parliament for the position of Prosecutor General, Mr Čentéš. Upon request by a group of members of the National Council for a generally binding interpretation of the

Constitutional on the basis of Article 128 of the Constitution, the Constitutional Court gave its decision no. PL ÚS 4/2012-77 on this matter.

28. According to Article 128 of the Constitution, the Constitutional Court may provide an interpretation of the Constitution or constitutional laws in disputed matters. Such a decision of the Constitutional Court on the interpretation of the Constitution of a constitutional law is promulgated in a manner established for promulgation of laws. The interpretation is generally binding as of the day of its promulgation.

29. On 24 October 2012, the Constitution Court decided that the President could refuse the appointment when the candidate did not fulfill the legal requirement or when there were substantial facts casting doubts on the ability of the candidate to fulfill his or her function without degrading the seriousness of the constitutional body.⁵ This decision was adopted with nine votes in favour and four judges against who provided dissenting opinions. The President of the Court provided a concurring opinion, which argued for a wide application of this decision.

30. In Decision ÚS 4/2012 the Constitutional Court stated *inter alia*:

“45. [...] While the selection of the candidate for the appointment of Prosecutor General from among all potential individuals is the role of the National Council [...], the President in discharging his duties expresses an opinion on a specific individual. The sense of his discretion therefore not only lies in the candidate selection on its own from among all individuals who meet statutory requirements, but in examining the suitability of the selected individual to exercise the office, in terms of the criteria that correspond to the aforementioned fundamental obligation of the President to ensure due performance of constitutional bodies. That obligation is in general projected in the discharge of his powers.

46. The above means that the President does not have an option not to appoint a candidate for the office of the Prosecutor General due to any reason. Even though the scope of his discretion goes beyond the examination of whether the candidate, proposed to the President by the National Council satisfies statutory requirements, any other grounds, based on which the President would decide not to appoint, have to withstand just with regard to his obligation to ensure due performance of constitutional bodies. Therefore, the President should above all consider whether certain circumstances pertaining to the candidate do not raise relevant doubts about the candidate’s ability to exercise the office in a manner not diminishing the high esteem of a constitutional office or that of the entire body. Yet, these circumstances do not have to lie only in a certain authoritative statement of a violation of legal obligation [...]. In the instance of the power in question that means, that it is fully in line with the status of the President – with regard to the requirement of impartiality of public prosecution and of the Prosecutor General, as well as generally with regard to the significance of that office in the constitutional system, to consider – when assessing the proposed candidate – all circumstances which may be deemed relevant for due performance of that office.”

31. On the basis of these arguments the Constitution Court gave the following Interpretation:

“President of the Slovak Republic has a duty to deal with the proposal of the National Council of the Slovak Republic to appoint the Prosecutor General of the Slovak Republic pursuant to Article 150 of the Constitution of the Slovak Republic and, where the latter has been elected in a procedure in accordance with law, to either appoint the nominated candidate within a reasonable period of time, or inform the National Council of the Slovak Republic that he will not appoint that candidate.

The President may not appoint a candidate only where the latter fails to satisfy the qualifications for being appointed set out by law, or due to circumstances of failing to meet the legal requirements for being appointed or, due to serious circumstances pertaining to the candidate which raise relevant doubts about the candidate’s ability to exercise the office in a manner not

⁵ See in more detail below, section A.A.

diminishing the high esteem of a constitutional office or that of the entire body, whose supreme representative that person would become, or in a manner not conflicting with the very mission of the body where – due to those circumstances – the due performance of constitutional bodies might be impaired (Article 101 para. 1 – sentence 2 of the Constitution of the Slovak Republic). The President shall give the reasons of non-appointment which may not be arbitrary”.

32. The question arises whether this Interpretation relating to the appointment of the Prosecutor General also applies to the appointment of judges of the Constitutional Court and whether and to what extent the President has a discretionary power in this respect.

B. Opinion CDL-AD(2014)015 of the Venice Commission:

33. Upon request by the Minister of Justice of Slovakia, the Venice Commission adopted its Opinion on the procedure for appointing judges to the Constitutional Court in times of the Presidential transition in the Slovak Republic on 13 June 2014.⁶ The issue then was whether the outgoing President of Slovakia could appoint judges of the Constitutional Court after the election of his successor and whether the new President could reject all candidates elected by the National Council during the mandate of his predecessor.

34. The relevant parts of the opinion read as follows:

“29. The only possible exceptions to the obligation of the President to accept the oath of the newly appointed judges might be if it has become clear that they do not fulfil the requirements of Article 134.3 of the Constitution⁷ 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. [...]

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 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”.

35. As mentioned in the Opinion, a further examination of the discretionary power of the President with regard to the appointment of judges of the Constitutional Court would have gone beyond the scope of the opinion.

VI. Procedure before the Constitutional Court

36. During the analysis of the questions raised by the President of the Slovak Republic, the Venice Commission could not fail noticing specific features of the legislation governing the procedures of the Constitutional Court. The Commission would like to raise these issues and make recommendations, from a comparative perspective, how these procedures could be improved.

⁶ CDL-AD(2014)015.

⁷ See the judgments of the Constitutional Court of the Slovak Republic of 23 September 2009 (Ref. No. PL. ÚS 14/06) and of 24 October 2012 (Ref. No. PL. ÚS 4/2012-77) concerning the competence and duty of the President to refuse to appoint a candidate who does not fulfil the constitutional and legal requirements for the function.

A. Announcement of the ruling after the hearing

37. The very question raised by the President of the Slovak Republic whether there is a difference between the oral pronouncement of 17 March 2015 and the written version of 15 May 2015 could only come up because there is a time lag between these two steps. This issue could easily be avoided from the outset. According to §30.6 of the Act on the Organisation of the Constitutional Court of the Slovak Republic, on the Proceedings before the Constitutional Court and the status of its Judges, *“the findings of the Constitutional Court and the rulings of the Constitutional Court shall be announced publicly after the oral hearing”*. It is obvious that the finding or ruling cannot be ready for publication right after the hearing. Otherwise, the hearing itself would be meaningless and nothing that was said during the hearing could have an impact on the decision of the Court.

38. The Slovak Constitutional Court is not the only Constitutional Court that announces its conclusions before the full judgment is released. In some cases, weeks or even months (two months in this case) can separate the announcement of the conclusions from the publication of the full judgment. The Commission learned that in other countries, judges disagreed on how the judgment should be drafted after the conclusion had been announced and that Court had great difficulty to prepare the judgment after the conclusion had already been announced.

39. However, the separation of announcement and full judgment is even more problematic for the parties, as it creates uncertainty as to how the conclusions were reached. The public expects the executive and legislative powers to implement the judgment right after the conclusion is known, but they cannot do so because the judgment's full reasoning is missing. In its Opinion on the draft Law on the Constitutional Court of Ukraine⁸, the Venice Commission welcomed the introduction by the Ukrainian law of an obligation to publish the full judgment right after its announcement. The Venice Commission recommends that §30.6 of the Act on the Constitutional Court be amended. The findings or rulings should be publicly announced only when the full text of the decision is available in writing.

B. Distribution of jurisdiction between the plenary session and the senate

40. Another issue is that Article 131 of the Slovak Constitution clearly assigns cases either to the plenary session or to a senate of three judges, depending on the type of proceedings. Accordingly, (individual) complaints are always decided by senates of three judges. It seems that the legislator was aware of the problem of possible divergent interpretations of the Constitution by the senates. According to § 6 of the Act of the National Council of the Slovak Republic of 20 January 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 reads: *“If a Senate in connection with its decision-making activity comes to a legal opinion, different from the legal opinion already expressed in the decision of one of the Senates, then this Senate shall submit the motion for unification of different legal opinions to the Plenary Session of the Constitutional Court for judgement. The Plenary Session of the Constitutional Court shall decide on unification of different legal opinions by the ruling. The Senate shall be bound in its further activity by the ruling of the Plenary Session of the Constitutional Court.”* However, this rule is not sufficient to overcome the problem.

41. When the Court had to decide on the complaints of three candidates against their non-appointment by the President of Slovakia, these were (individual) complaints under Article 127 of the Constitution and had to be decided by a senate of three judges according to Article 131.2 of the Constitution. Even though this case was of major constitutional significance, a senate of

⁸ CDL-AD(2016)034, Ukraine - Opinion on the draft Law on the Constitutional Court, para. 65.

three judges had to decide on it. Furthermore, § 6 of the Act was not applicable as there was no issue of a divergence with the decision of another senate.

42. The Venice Commission recommends that a senate should be able to transfer a case to the plenary session if it relates to an issue of major constitutional significance. The plenary session should however be able to reject such a request from a senate.⁹

VII. Analysis

A. Continued functioning of the Constitutional Court

43. From the outset, the Venice Commission insists that the continuous functioning of the Constitutional Court as the final arbiter in constitutional issues is paramount for the democracy, the protection of human rights and the rule of law¹⁰. The non-appointment of judges of the Constitutional Court is an issue of major concern.¹¹

44. In Slovakia, the incomplete composition of the Constitutional Court the current situation could even lead to an excessive length of proceedings under Article 6 ECHR (see above section IV.B).

45. The delegation of the Venice Commission learned that all stakeholders, notably the President of Slovakia and the National Assembly, agree that a solution needs be found as soon as possible. They disagree, however, how this solution should be found.

46. At the centre of the dispute between the President of Slovakia and the Slovak Parliament is the question of the qualification of candidates for the office of judge at the Constitutional Court. The Constitution requires that candidates have been “*practicing law for at least 15 years*” (Article 134.3 of the Constitution). Whilst Parliament is confident that all candidates to be elected fulfil this requirement, the President is of the opinion that in order to be able to work as a constitutional judge specific knowledge of and interest in constitutional matters is required. He refers to the 24 October 2012 Ruling no. 4/2012 of the Constitutional Court, which allowed the President to reject a candidate for the post of Prosecutor General if there are “*serious facts related to his or her person that reasonably call into question his or her ability to perform the duties of constitutional office...*”. The President considers that the absence of specific constitutional knowledge constitutes such a serious fact, and that the candidates he refused to appoint do not fulfil this requirement of sufficient knowledge and interest in constitutional matters.

47. The delegation of the Venice Commission was informed that during the interviews with the President and his advisers, the candidates were asked whether they had published in the field of constitutional law or otherwise shown a special interest in constitutional law. The experience of one candidate, the President of the Chamber of Notaries, was referred to as an example of legal experience that was too remote from constitutional law to qualify as relevant experience.

48. The Venice Commission’s interlocutors in Parliament however insisted that the exam to become member of the Chamber of Notaries was one of the most difficult legal exams in

⁹ CDL-AD(2016)017, Georgia - Opinion on the Amendments to the Organic Law on the Constitutional Court and to the Law on Constitutional Legal Proceedings, para. 41.

¹⁰ CDL-AD(2016)001, Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland; CDL-AD(2006)006 Opinion on the Two Draft Laws amending Law No. 47/1992 on the organisation and functioning of the Constitutional Court of Romania.

¹¹ CDL-AD(2006)016, Opinion on possible Constitutional and Legislative Improvements to ensure the uninterrupted functioning of the Constitutional Court of Ukraine, para. 8.

Slovakia and that the experience of a notary lived up to the experience required by the Constitution.

49. The Commission notes that the President is not involved in the procedure of selecting candidates in the National Assembly and notably that the President is not represented during the hearings of the candidates. Instead, President Kiska established his own advisory panel that interviewed the candidates already elected by the National Assembly.

50. In order to enable the President to voice possible issues relating to the candidates at an early stage, it might be advisable to enable representatives of the President to participate in the hearings before the National Assembly and to ask questions to the candidates. Of course, the election would remain a competence of the National Assembly which would continue to elect the candidates by secret vote. A change of the Rules of Procedure of the National Assembly would be required for such a change, which could avoid misunderstandings between the President and the National Assembly at an early stage. Such cooperation could be seen as a good example for a loyal co-operation between State organs as recommended by the Venice Commission on several occasions.¹²

51. As concerns the criteria applicable for choosing judges of constitutional courts, a brief comparative overview might be useful.

B. Comparative elements on the composition of Constitutional Courts

52. The Venice Commission's study in the Composition of Constitutional Courts of 1997¹³ showed a wide range of eligibility requirements for constitutional judges:

"As expected, several answers differ according to whether the court in question is a constitutional court proper or a supreme court exercising, inter alia, constitutional jurisdiction. This applies in particular to the appointment requirements, whereby supreme courts are, in most cases, entirely made up of lawyers (Argentina, Canada, Denmark, Estonia, Greece, Iceland, Ireland, Malta, Norway). Finland forms a qualified exception: its Supreme Court and Supreme Administrative Court alter their composition in certain cases. In court-martial cases before the Supreme Court, two generals participate in the decision; where water rights and patent cases come before the Supreme Administrative Court, specialists in engineering take part in the decision. The supreme jurisdictions of Sweden also differ slightly: all members of the Supreme Court must be lawyers, whereas only two thirds of judges on the Supreme Administrative Court must have legal qualifications.¹⁴ Another exception is Switzerland's Federal Court (being also the final stage of appeal for ordinary jurisdiction), which does not require its judges to have had a legal education. In practice, however, the judges of the Federal Court are all lawyers. Up to five out of fifteen judges need not have professional legal qualifications on the Japanese Supreme Court.¹⁵

The general preference for lawyers may be observed in many constitutional courts as well (Albania, Austria,¹⁶ Bulgaria, Germany, Italy, Latvia, Lithuania, Poland, Portugal, Romania, Russia, Slovakia, "the former Yugoslav Republic of Macedonia"). At least some constitutional courts, however, expressly allow for non-lawyers to become members of the court in order to bring together the widest possible span of human experiences and to avoid an excessive specialisation of the court (Armenia, France, Liechtenstein, Turkey). In practice, however, these

¹² See Opinion CDL-AD(2016)001, Poland - Amendments to the Act of 25 June 2015 on the Constitutional Tribunal.

¹³ CDL-STD(1997)020, section 2.1. The Venice Commission is currently updating this study.

¹⁴ In practice all the judges are lawyers at this court.

¹⁵ In practice, only one or two judges are usually not lawyers.

¹⁶ The Constitution requires all members of the Constitutional Court to have a university law degree and to have at least ten years of experience in a profession for which such a degree is required.

courts are largely made up of lawyers. In Belgium half of the judges must be former members of parliament, though the overwhelming majority of them are lawyers.

Where legal qualifications are required, the kind of experience expected varies from long-standing service in the judiciary (Albania, Estonia¹⁷) to experience in any kind of legal profession (Argentina, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Czech Republic, Georgia, Hungary, Latvia, Lithuania, Norway, Romania, Russia, Slovakia, Slovenia, Spain, "the former Yugoslav Republic of Macedonia", Ukraine). In Belgium those judges who are not former members of parliament must be judges from the highest jurisdictions of the State, legal academics or auxiliary judges (assistants) of the Court. Some countries have a quota of recruitment from the judiciary (Germany, Portugal), or a requirement that the candidate have either judicial experience or legal professional experience, whereby the years of experience required are generally fewer for judges than for other lawyers (Canada, Ireland, Italy,¹⁸ Japan¹⁹). Similarly in Finland the experience in the judiciary required for appointment to the supreme jurisdictions need not be long if it is supplemented by experience as a law professor or prominent advocate. In Austria, the president, the vice-president, three effective and three substitute members of the Court (nominated by the Federal Government) must be selected from among judges, high officials and university law professors."

53. In some countries, the composition of constitutional courts thus can include even non-lawyers in order to bring together the widest possible span of human experiences and to avoid an excessive specialisation of the court. However, in practice these courts are largely made up of lawyers.

54. Article 134.3 of the Slovak Constitution places Slovakia firmly in the group of states which require legal experience, but do not require specific judicial experience.

55. While in practice many European constitutional court judges are professors of constitutional law, European constitutions, including the Slovak Constitution, do not require such specialisation.

56. A second typical origin of members of constitutional courts are the judges of the other courts who by the nature of their work in the ordinary courts do not specialise on constitutional law. In fact, constitutional courts often value a diverse composition, which brings into the Court experience from various fields of law, e.g. criminal law, which is one of the main fields where human rights come into play.

57. Another issue in comparative terms is the majority required for the election of the judges. While in Slovakia and some other countries²⁰ the judges are elected by a simple majority in Parliament, an election of constitutional judges by qualified majority allows depoliticisation of the process of the judges' election, because it requires that the opposition also has a significant position in the selection process.²¹ It is true that a qualified majority can lead to a stalemate between majority and opposition but this can be overcome through specific anti-deadlock mechanisms.

58. From a comparative perspective, the Venice Commission recommends considering the introduction of a qualified majority for the election of the candidates for the position of Constitutional Court judges in Slovakia.

¹⁷ In *Estonia*, because the Constitutional Review Chamber is a Chamber of the Supreme Court, the judges must already be judges of the Supreme Court.

¹⁸ In Italy, fewer years of experience are required of law professors, too.

¹⁹ Again, this principle only applies where legal qualifications are required at all.

²⁰ E.g. Poland.

²¹ Opinion on the Proposal to Amend the Constitution of the Republic of Moldova (introduction of the individual complaint), paras. 18-19.

C. The margin of discretion of the President in appointing constitutional judges

59. The President of the Slovak Republic is chosen in direct elections (Article 101.2 of the Constitution), he or she 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. Some shared powers require the countersignature of the Prime Minister (Article 102.2); others – for instance the appointment of Constitutional Court judges, Article 102.1.s in conjunction with Article 134.2 – require a proposal by Parliament, the National Council.

60. As concerns the power to appoint judges of the Constitutional Court, the President of the Republic therefore is not merely the symbolic Head of the State. He or she has his or her own democratic mandate and possesses substantial powers. According to the oath, he or she is obliged to “*uphold and protect the Constitution*” (Article 104.1 of the Constitution). The President ensures “*due performance of constitutional bodies*”, “*performs his office according to his/her best conscience and conviction, and is not bound by any orders*” (Article 101.1 of the Constitution). Evidently, when applying his or her powers enumerated in Article 102.1 of the Constitution, the President has to respect and uphold constitutional standards.

61. However, the President’s discretion is restricted by Articles 102.1.s, 134.2 and 139 of the Constitution, in that the President is obliged to appoint from the (double) number of candidates exactly one half as judges of the Constitutional Court. This obligation is also grounded in Article 124 of the Constitution, demanding the uninterrupted and proper operation of the Constitutional Court, requiring continuous constitutional control. Finally, the President is also bound by the criteria of appointment of Article 134.3 of the Constitution, in that it demands fifteen years of experience in the legal profession, and not a specific experience in constitutional law.

62. Nevertheless, these observations do not themselves give a direct reply to the question whether the President, in the light of his task under Articles 101.1 and 104.1 of the Constitution in conjunction with Article 102.1.1 of the Constitution, may reject candidates for the post of judge of the Constitutional Court and, if so, on what grounds.

D. *Res iudicata*

63. As follows from Articles 124 seq. and in particular from Articles 128 and 133 of the Constitution, the Constitutional Court of Slovakia is the final interpreter of the Constitution. According to Article 124 of the Constitution, the Constitutional Court is charged with the protection of the Constitution. Therefore, it is the task of the Constitutional Court to decide if two verbally similar constitutional provisions – in this case Articles 133.2 and 150 of the Constitution – interpreted against the background of the Constitution as a whole, have the same meaning or not. Likewise, it is the Constitutional Court which in the final run determines whether state organs have operated within the limits of the Constitution. This competence and duty of the Constitutional Court also applies to the President, as ensues also from Article 129.5 of the Constitution - even though according to Article 101.1 and 104.1 of the Constitution the President has an independent mandate as defender of the Constitution.

64. The Venice Commission cannot assume the role of a supranational ‘arbiter’ or of a fourth instance; it can only provide its view from a comparative and European perspective. Therefore it is essential to analyse how the Constitutional Court of the Slovak Republic approached the issue of the (non)appointment of the judges proposed by the National Council.

65. In its Ruling of 28 October 2015, PL. ÚS 45/2015, the plenary session of the Constitutional Court cited the written version delivered on 15 May 2015 of the 17 March Finding of the Third Senate, pointing out that “[t]he Constitutional Court, in the reasoning of finding in case ref. III ÚS

571/2014 concerning the President, finally unambiguously stated that: 'In the case of Prosecutor General, the President is proposed with only one candidate for one office. His power of decision includes the possibility to dismiss the proposed candidate upon some circumstances specified by the Constitutional Court. In case of judges of the Constitutional Court, the President is proposed with double number of required candidates for judges of the Constitutional Court. His power of decision – the limits of permitted and obliged choice – are laid down by the Constitution. The constitutional regulation of the powers of the President significantly differs in case of Prosecutor General and in case of judges of the Constitutional Court. Therefore, if the Constitution distinguishes, the interpretation and application has to differ, too.'

66. The Ruling continues: *"The reasoning of the finding in case ref. III ÚS 571/2014 clearly states that the interpretation in case ref. PL. ÚS 4/2012 does not apply to the appointment of judges of the Constitutional Court, because it applies only to the (non-) appointment of Prosecutor General of the Slovak Republic".*

67. Therefore, the Court decided that the President *"is obliged to appoint exactly a half of judges of the Constitutional Court from among the double number of judge candidates of the Constitutional Court, hence the President is not authorised to appoint less than half judges of the Constitutional Court from among the double number of judge candidates [...] where he believes that there are serious circumstances pertaining to the candidates which raise relevant doubts about their ability to exercise the office of judge of the Constitutional Court in a manner not diminishing the high esteem of the office of judge and that of the Constitutional Court".*

68. In conclusion, in its Ruling of 28 October 2015, no. 45/2015 the Plenary of the Constitutional Court held that the rejection of the candidates by the President violated the Constitution, that the appointment procedures for the Prosecutor General and the judges of the Constitutional Court differ and therefore the Ruling of 24 October 2012 concerning the Prosecutor General (no. 4/2012) does not apply here.

69. This is a case of *res iudicata*, according to which a final judgment by the highest competent court is conclusive. The Constitutional Court is the authority to give the final decision on the Constitution, even in constitutional disputes with the President.

70. In the context of the appointment of constitutional judges, the Constitutional Court can only find an unconstitutionality, but it cannot substitute itself as the appointing authority. The appointment remains of course a competence of the President of the Republic.

71. Currently a case is pending before the First Senate of the Constitutional Court based on complaints by five candidates. The decision in this case will be essential for the solution of the problem of appointments. The First Senate will have to decide whether the rejection of the candidates was justified and whether the detailed reasoning for the renewed rejection given by the President following the Finding in 571/2014 is justified in the light of the Constitution.

72. The First Senate of the Constitutional Court will also have to decide whether, following the withdrawal of their complaints after Rulings nos. 718/2014 and 719/2014, two of the persons elected still have the status of candidates. If ever the First Senate wishes to diverge from decisions of other Senates, it should revert to § 6 of the Act on the Constitutional Court.

73. The Venice Commission recommends that the finding of the Constitutional Court should be respected and implemented by all State organs.

VIII. Conclusion

74. According to the Constitution of the Slovak Republic, the Slovak Constitutional Court is the final arbiter in constitutional matters. It is not the task of the Venice Commission to review decisions of Constitutional Courts in interpreting 'their' Constitution in the same way a higher Court does. Therefore, in replying to the questions of the President of Slovakia, the Venice Commission cannot decide instead of the Constitutional Court. While the President of the Slovak Republic has an essential position and considerable powers under the Constitution, only the Constitutional Court can ultimately decide constitutional disputes in a manner that binds all parties.

75. The first two questions asked by the President have already found final answers from the Constitutional Court. While the arguments used in Ruling no. 4/2012 of 24 October 2012 may in general be employed in relation to the powers of appointment of the President, the Court qualified this Ruling as to the powers of appointment of Constitutional Court judges. In Ruling no. 45/2015 of 28 October 2015, the plenary session of the Constitutional Court stated that the Senate of the Constitutional Court in its Finding of 17 March 2015 no. 571/2014 already had decided that Ruling no. 4/2012 does not apply to the appointment of Constitutional Court judges. It is quite understandable that the President sought clarification after the 17 March 2015 Finding no. 571/2014 (see the Chronology above, para. 18). Furthermore, the written version of 15 May 2015 does not itself explicitly depart from the Ruling of 24 October 2012, no. 4/2012. However, there can be no more doubt since Ruling no. 45/2015 of 28 October 2015, that the President is not allowed to appoint less than half of the candidates proposed by the National Council, even if he believes there are serious doubts as to their ability to carry out the office of Constitutional judges. Although this Ruling is not a full-fledged interpretation under Article 128 of the Constitution, it shows the opinion in this issue of a majority of the judges of the Constitutional Court, the final arbiter in constitutional matters.

76. As a consequence to the reply to questions one and two above, it is not necessary to give a reply to the third question of the President of the Slovak Republic.

77. The Venice Commission recommends that all parties respect the future finding of the Constitutional Court in the case of the complaints which are currently pending.

78. The President did not ask the Venice Commission to make proposals *pro futuro*, when examining the situation of the appointment of judges of the Constitutional Court but the Venice Commission encountered several issues in the appointment procedure. In order to avoid similar situations in the future, the Venice Commission recommends considering the following proposals in a future reform of the Constitutional Court procedure:

1. Introducing a qualified majority (2/3) for the election of candidates for judges of the Constitutional Court (constitutional amendment required).
2. Enabling a senate of the Constitutional Court to refer cases of major constitutional importance to the Plenary. The plenary session should be able to reject such a request (constitutional amendment required).
3. Representatives of the President of Slovakia should be allowed to participate and ask questions during the parliamentary vetting procedure for candidates in order to avoid a second vetting procedure (amendment of the Rules of Procedure of the National Assembly).
4. The Constitutional Court should announce its decisions only when their written version is available (amendment of the Act on the Constitutional Court).

79. The Venice Commission remains at the disposal of the President of the Slovak Republic and the Slovak authorities in general for further assistance in this matter and notably the implementation of its recommendations related to the improvement of the constitutional and legal framework regulating the appointment of judges of the Constitutional Court.