MINISTRY
OF JUSTICE
OF THE SLOVAK REPUBLIC

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Dear Ms President,

First of all, let me begin by thanking you for the Opinion of the CCJE Bureau from December 9, 2020 [CCJE-BU(2020)3] (hereinafter "Opinion") and the time provided to us for the explanation of the judicial reform introduced by the Ministry for Justice of the Slovak Republic.
On the same day, December 9, the National Council of the Slovak Republic approved an amendment to the Constitution of the Slovak Republic, which differs in some respects from the draft amendment which the Bureau reviewed; hence I will, after this, also stress the measures agreed upon in Government, and which found their way into the passed amendment. I believe that some of these changes confirm the genuine commitment of the Slovak Republic and its Government to the rule of law principles.

Please allow me to emphasize the openness of our Government to the evaluation of the steps we have taken, which we believe will improve the independence, accountability, diversity and performance of the Slovak judiciary. The Government is aware of the dynamics in the evolution of standards of the judiciary at the European level, including the development of understanding of the role and character of the Judicial Councils (hereinafter "JC"), especially when there is a need to address some forms of populism. We are therefore ready to justify and prospectively adapt domestic measures in order not to instil doubts as to its interest in promoting the principles of rule of law. At the same time the Government believes that the peculiarities of the domestic situation and the history of its experience with the various legal institutions should be considered.

Before I clarify the parts of the judicial reform which are considered problematic in the opinion of the Bureau, I will briefly introduce the context of the constitutional amendment as part of the judicial reform and its complexity. I believe that this context shows that the Government strives to balance

the need for independence of the judiciary and judicial accountability.[1] In doing so it has adopted many standards recommended for example by the Venice Committee and CCJE itself. Then I will proceed to explain the mechanisms which are considered to be of a threat to the principle of judicial independence in the Opinion.

The context of the reform may be traced back to the murder of investigative journalist Ján Kuciak and his fiancée Martina Kušnírová. While investigating the murder the police seized the mobile phone of Marian Kočner.[2] The messages in the mobile phone sent through the Threema application between 2017 and 2018 were decoded. Their content shows that Mr. Kočner aimed to obstruct justice with the help of lawyers, including many judges and prosecutors.[3] The communication is supposed to have allowed him not only to obtain sensitive information about the assignment of cases, the ways judges tended to decide cases of interest to him and what might change their minds in his favour, but also to directly manipulate judicial decisions. The most infamous in the public view were the parts of communication with Monika Jankovská (a judge serving as Deputy Justice Minister) and Vladimír Sklenka (President of the District Court Bratislava I). They both used Threema to keep in very frequent touch with Marian Kočner, informing him about the court proceedings and serving as intermediaries in the process of bribing other judges. Mr. Sklenka is reportedly cooperating with the law enforcement authorities and his prosecution is currently suspended. Again based on the information gleaned from Threema, a series of investigative operations were undertaken by the Police in 2020. Operation "Tempest", in which thirteen judges were arrested, was carried out in March, and charges were brought against them and against the former Deputy Minister for Justice. Based on operation "Weeds" in September, two judges (one of them a former judge) were charged (two others are being further investigated) and in operation "Gale" in October six judges and the Deputy Minister for Justice were targeted with new charges. It is important to note that not only judges were the subject of those operations; lawyers in other legal professions were also charged, but judges formed the majority. Criminal prosecution and charges vary from the crime of interfering with judicial independence and bribery to abuse of power by a public official. One judge emeritus, Pavol Polka, has already pleaded guilty and his plea bargain was approved by the court in March 2021. A total of twenty judges, including judges emeritus and judges who stepped down or whose office was suspended, were prosecuted as a result of the above-mentioned investigation. It is also necessary to mention that many of them held positions of presidents of courts and that there appears to be an interconnected network of obstruction of justice, not only individual single acts of bribery or interference with judicial independence.

The Slovak judiciary at the same time suffered from especially low public confidence (see for instance Eurobarometer, 2020).

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[1] As to the context-dependency of the current judicial reforms, see e.g. Čuroš, Peter; Graver, Hans Petter: *Dissimilar Similarities: Structural Reforms of the Courts in Norway and Slovakia, VerfBlog,* 2020/11/26, https://verfassungsblog.de/dissimilar-similarities/.

[2] Mr. Kočner was later charged with ordering the murder of Mr. Kuciak and Ms. Kušnírová, but he was acquitted by the first instance court (the case is now pending before the Supreme Court of the Slovak Republic).

[3] The communication in Threema was admitted as legally-obtained evidence in the decision of the Specialised Criminal Court dated February 27, 2020, PK-1T/9/2019, which considered the criminal matter of forgery where the messages of Mr. Kočner played the role of evidence. Threema was decrypted with the assistance of Europol.

I.

The Constitutional amendment is part of a more complex plan of for reform of the judiciary, and I would like to draw your attention to various measures involved in this reform:

- Changes in the JC: based on the amendment the National Council, Government and the President may nominate only a non-judge as a member of the JC. This should promote the independence of the judiciary, as the link of representation is disconnected between the political actors and the judges. At the same time the amendment forms the legal basis for the election of judicial members of the JC from among a multiple constituency, which should allow for more diverse representation of the judiciary in the JC (compare e.g. CCJE Opinion no. 10 (2007), 27). Moreover, the Law on the JC states that the non-judges shall receive remuneration and judicial members have lower judicial workload (maximum half of the regular workload) (compare e.g. CCJE Opinion no. 10 (2007), 36). The competences of the JC were amended in such a manner that it is able autonomously to review (only with the required assistance of other state bodies) whether judges are able to perform their office properly (so-called integrity checks).
- Reform of the selection and appointment of judges of the Constitutional Court of the Slovak Republic (hereinafter "SCC"): among others the conditions for constitutional judges changed so that only persons of irreproachable moral character may become judges of the Constitutional Court, which should guarantee the proper performance of their office. The change of wording of the Constitution regarding the type of previous legal practice allows more diverse composition of the SCC (e.g. also excellent lawyers with experience from NGOs might qualify). The Constitution amendment also raises the majority needed for election of candidates for judges from a majority of MPs present to 3/5 of all MPs in the first vote. If the first round of election does not produce a sufficient number of candidates, the anti-deadlock mechanism of a majority of all MPs for election of a candidate was opted for. There are also other new anti-deadlock measures incorporated into the process of appointment of judges: a time limits for election has been introduced, the judge in office steps down after the "new" judge is appointed, and the President may appoint judges even if the list of candidates is not complete. These changes also incorporate for example the recommendations of the Venice Committee as summed up in the Compilation of Venice Commission opinions and reports relating to qualified majorities and anti-deadlock mechanisms dated June 27, 2018, CDL-PI(2018)003rev.
- Establishment of the Supreme Administrative Court of the Slovak Republic: this has been established with inspiration from the Czech Republic and the history of the First Czechoslovak Republic. Besides the typical workload it will serve as the disciplinary court for judges, prosecutors and prospectively other legal professions as well. It is expected that it will resolve problems in the current disciplinary system for the judiciary (e.g. vacant seats, delayed decisions)
- The retirement age of the judges: it is now set at 67 years of age. Previously there was the possibility of removing a judge when he or she became 65 years old based on a decision of the JC and the President of the SR. This means that the amendment introduced. *ex lege* removal in order to diminish the threat of subjectively-applied criteria and hence the risk of

politicization of this process (see e.g. Judgement of the CJEU in *C-619/18* - Commission v Poland, June 24, 2019)

- The new court map: is in the process of preparation, and currently it is in the round of discussions in the legislative process. The map aims to improve efficiency and specialisation in the judiciary.[4]

II.

II. A. Removal of a member of the Judicial Council before the end of their term of office

The removal of members of the Judicial Council has been a subject of discussion in Slovak constitutional doctrine for some time. On February 17, 2011 the SCC stated that the relationship between a member of the JC and the body which nominated him/her is based on trust, and it rejected the complaint of the removed member of the JC as manifestly ill-founded (IV. ÚS 46/2011). The SCC read the constitutional text on members of the JC who are "elected and recalled" as part of a legitimate constitutional design which does not violate the independence of the JC and its role. The SCC pointed out that independence may be achieved by means of various mechanisms: e.g. through the composition of the JC respecting the separation of powers (9-3-3-3) and preventing the captivation of the JC. The SCC judges found the design of the JC "reasonable", including the power to recall an elected/appointed member of the JC any time before the end of the term (because of lack of trust).[5] Later, another senate of the SCC wanted to reach a different conclusion in a similar matter (I. ÚS 454/2012), but the opinion of the senate did not gain a majority in the Plenum (see PLz. ÚS 4/2014). The SCC then promoted the idea of (free) removal of members of the JC for a long time. The change in the opinion of the SCC came on September 19, 2018 with a decision by the SCC Plenum (PLz. ÚS 2/2018), which stated that the removal of a member of the JC before the end of their term threatens the independence of the JC. However, again, the senate of the SCC which was then to decide based on this opinion of the Plenum initiated the change in the SCC's opinion. The matter did not reach any decision as to the merits because the removed member of the JC withdrew the constitutional complaint. It means that for seventeen years since the establishment of the JC it was understood that the member of JC may be removed before the end of their term of office. Then the SCC changed its opinion but this opinion became the matter of discussion again.

This short summary of how the matter of ir/removability of JC members before the SCC evolved indicates the motivation of the Government: its goal was to finally resolve the domestic dispute and eliminate doubts about the meaning of the phrase "recall" in the (former) Art. 141a para. 1 of the

[4] For short evaluation see e.g. Čuroš, Peter; Graver, Hans Petter: *Dissimilar Similarities: Structural Reforms of the Courts in Norway and Slovakia, VerfBlog,* 2020/11/26, https://verfassungsblog.de/dissimilar-similarities/. For the court map introduced by the Ministry see http://web.ac-mssr.sk/sudna-mapa-otazky-a-odpovede/. The English version of the crucial parts of the web-site will be available in a short time.

[5] SCC also stated that removal of a member of the JC is *"a balanced constitutional measure acceptable from the point of view of the principles of a democratic state governed by rule of law, as it manifests the reality of the system of checks and balances in the constitutional system of separation of power, and it fully respects the principle of judicial independence and independence of judicial decision-making"* (IV. ÚS 46/2011, p. 18).

Constitution. The Government believed there were strong arguments favouring the legitimacy of the existence of competence to remove members of the JC before the end of their term of office.

In fact, the disputes which arose before the SCC followed the removal of a member of the JC after a change in composition of the body which nominated them. There was no signal the Government was aware of suggesting that the possibility of removal was used as a tool to pressurize the members of the JC to perform their office in a specific manner, or as a tool to "punish" a "disobedient" member of the JC.

II. B. Transfer of a judge to another court

The amended wording of Art. 148 para. 1 second sentence of the Constitution is the following: "*The consent of a judge with the transfer is not needed when the system of courts is changed, but only if it is necessary to ensure the proper performance of the judiciary; details shall be laid down by the law.*"
The amended provision of the Constitution sets not only formal but also material conditions for the transfer. These are (i) change in the system of courts, (ii) necessity of the transfer in order to ensure proper performance or functioning of the judiciary, (iii) the transfer shall be regulated by law.
The law laying down the details might be challenged before the SCC by the state constitutional figures, including the President of the Judicial Council [Art. 130 para. 1, f)]. Hence the conditions of the transfer are overseen by the SCC. The Government has so far not reached the stage of finishing the discussion about the so-called new court map, and hence the law on conditions of transfer has not yet been drafted. However, it will strive to fulfil the standards proposed in the Opinion.

II. C. Judicial immunity and crime of "bending the law"

The adopted restriction of judicial immunity was motivated mainly by the introduction of a more precise definition of immunity. At the same time, the Government took into account that many limitations on immunity of public officials are per se intended to facilitate the effective prosecution of corruption. Because of various structures in the need for immunity regarding different constitutional officials, it is not uncommon (quite the contrary, in fact) that parliamentary immunities differ from the judicial ones.[6] Judicial immunity in Slovakia was first formulated in the Law on courts and judges (no. 335/1991 Coll.): in order to criminally prosecute a judge for crimes committed while he or she performs judicial office or in connection with his or her office, the assent of the body which appointed or elected them was needed. Hence, judges were criminally liable for crimes committed in their decision-making or in connection with it if their actions violated criminal law. In 2001 the constitutional amendment establishing the JC and reforming the appointment of judges stated that any criminal prosecution of a judge must first be approved by the SCC. The 2002 amendment of the Law on judges and lay magistrates (no. 385/2000 Coll.) established judicial immunity in the sense that a judge (or lay magistrate) shall not be prosecuted for their decision-making (section 29a). In 2014 this provision found its way into the Constitution (amendment no. 161/2014 Coll.). However, the Government is of the opinion that this formulation suffered from indeterminacy as it might have been interpreted as

[6] See e.g. Hoppe, Tilman. Public Corruption: Limiting Criminal Immunity of Legislative, Executive and Judicial Officials in Europe. *Vienna Journal on International Constitutional Law*, Vol. 5, No. 4/2011, 538. At the same time Hoppe importantly reminds that "[t]*here is one corruption offence that could be committed by a vote or decision protected by non-liability: abuse of function*" (p. 547).

preventing any kind of accountability or liability of judges (including disciplinary kinds). Simply put, it is and never was the case that judges were completely immune from any kind of prosecution when making decisions.

In searching for the new definition of immunity, we considered the need to protect the core of judicial independence, i.e. the legal opinion of judges. As for the specific formulation we were inspired by part of Art. 122 of the Croatian Constitution: *"Judges and lay magistrates who participate in court proceedings may not be held to account for an opinion or a vote given in the process of judicial decision-making unless there exists a violation of law on the part of a judge which constitutes a criminal offence."*[7]

As for the newly-established crime of "bending the law", which was adopted before the constitutional review, it is important to stress that only (i) a wilful decision by a judge which at the same time (ii) harms or benefits somebodies' interests, with (iii) fraudulent intent are problematic. Only a decision evidently and inexplicably running against the law (or its purpose) or judicial decisions can become an instance of this crime. The decisions which might be arbitrary ("arbitrárne") but not wilful ("svojvoľné") are not subject to the definition of this crime. The wilfulness of a decision must on principle be confirmed in a decision by the appellate court or the SCC.

The measure against the prospective abuse of criminal prosecution for "bending the law" was added to section 9 para. 2 of the Code of Criminal Procedure (no. 301/2005 Coll.) and to the Law on the JC (no. 185/2002 Coll., section 27hi). Criminal procedure against a judge in the case of abuse of the law must be terminated if the JC does not assent to it. The procedure before the JC is initiated by the judge himself or herself. The JC must provide reasoning for its decision. This check is valid until June 30, 2024. Before this date the Government will reconsider the need for its further existence. If the need is confirmed, we may keep it as a permanent mechanism.
Hence I believe that the adopted legislation also fulfils the criteria of Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe ("*The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to criminal liability, except in cases of malice*" (para. 68))

II. D. Assent of the SCC with pre-trial detention of a judge

The adopted mechanism reflects the decision of the SCC no. PL. ÚS 4/2020, in which the SCC declared partial assent with the pre-trial detention of five judges, although it did not declare its assent with the pre-trial detention of eight other judges. The SCC decided in this kind of case practically for the first time. It had, in the opinion of many lawyers active in the public discussion, supplemented the role of the court which reviews the fulfilment of conditions for the detention as to the merits. As the SCC basically reviewed the conditions for detention, its approach resulted in the pre-trial detention of a judge being reviewed twice. The SCC did not explain how it proceeded in protecting the independence of the judiciary in cases where assent with detention was not given. For this reason, within the

[7] English version at https://www.sabor.hr/sites/default/files/uploads/inline-files/CONSTITUTION_CROATIA.pdf). See also Hoppe, Tilman. Public Corruption: Limiting Criminal Immunity of Legislative, Executive and Judicial Officials in Europe. 546.

legislative process the Government discussed the prospective ways in which the current system of justice (judicial, prosecutorial, governmental) might obstruct justice in such a manner that might lead to pre-trial detention of a judge (decided by other judges) which aims to attack his or her independence. However, no such fictional or realistic example arose in the discussions, which included judges and some members of the JC. Hence the Government came to the conclusion that other current safeguards of the independence of the judiciary effectively prevent anyone from even theoretically establishing hypothetical conditions in which the assent of the SCC is indeed as an important and effective tool to protect independence of judiciary.

II. E. Review of constitutionality of constitutional laws

The proposal to reflect doctrinal criticism[8] of SCC decision no. PL. ÚS 21/2014 which struck down a new part of the Constitution (as it found implied power in the Constitution to do so) was raised during the legislative process by various Government ministers. It was then discussed at Government level and subsequently presented at the end of September before the Legislative Council of the Government. It is true that the specific proposal was presented to the public for merely two months ahead of the adoption of the amendment; however the discussion about the so-called material core of the Constitution and its protection has been going on in Slovak constitutional doctrine for many years.[9] The Government saw the decision not to give the power to the SCC to strike down constitutional laws as a legitimate part of the political decision on constitutional design. The Government did not adopt this change with the intention of weakening the rule of law or of absolving its decisions from constitutional review.

Dear Ms. President, let me again express our dedication to the principles of a state governed by the rule of law, and please do not hesitate to contact us if you have any questions about the reform of the judiciary in the Slovak Republic. We look forward to continuing with our dialogue.

Yours sincerely,

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[8] E.g. Káčer, Marek – Neumann, Jakub. *Materiálne jadro v slovenskom ústavnom práve: Doktrinálny disent proti zrušeniu sudcovských previerok* [Material core of the Constitution in the Slovak constitutional system: dissent against invalidation of judicial integrity checks]. Praha: Leges, 2019.

[9] This was the case especially after the Czech Constitutional Court struck down the constitutional law in 2009 (Pl. ÚS 27/09). See e.g. Procházka, R.: *Ľud a sudcovia v konštitučnej demokracii* [The people and the judges in constitutional democracy]. Plzeň: Aleš Čeněk, 2011; Breichová - Lapčáková, M.: *Ústava a ústavné zákony* [Constitution and constitutional laws]. Bratislava: Kalligram, 2013; Balog, B.: Materiálne jadro ústavy Slovenskej republiky [Material core of the Constitution of the Slovak Republic]. Bratislava: Eurokódex, 2014.