



**President of the Judicial Council  
of the Slovak Republic  
Štefan Harabin**

Bratislava, 17<sup>th</sup> June 2014

**Request of the Judicial Council of the Slovak Republic for an opinion and help addressed to  
the European Network of the Judicial Council (ENCJ)**

Honourable Mr. President,

Based on the decision of the Judicial Council of the Slovak Republic (Judicial Council) of 16 June 2014, I present you a request for an opinion on the Constitutional Act adopted by the National Council of the Slovak Republic on 4<sup>th</sup> June 2014. In the part relating to the judiciary the Act interferes with the independence of the judicial power and judges of the Slovak Republic. The Constitutional Act was already signed by the President of the Republic and it is anticipated to be published in the Collection of Laws of the Slovak Republic in the coming days, as it should come into effect on 1<sup>st</sup> September 2014. Implementing regulations have not yet been approved by the National Council of the Slovak Republic.

I. The mentioned Constitutional Act, although, extended powers of the Judicial Council of the following new competences (Art. 141a para 5, letters a), b), i) ):

- *a) to ensure discharging the duties of public control of the judiciary,*
- *b) to adopt an opinion on whether a candidate for appointment to the judicial office meets the requirements of judicial competence which guarantee that he/she will perform the judicial office properly,*
- *i) to monitor whether a judge meets requirements of judicial competence which guarantee that he/she will perform the judicial office properly throughout the entire term of a judicial office,*

The powers of the Judicial Council were thus extended (Art. 141a para 9 a 10)

*(9) The Judicial Council of the Slovak Republic shall adopt an opinion under paragraph 5 letter b) based on the documents from the state authority performing the role of protection of classified information and opinions of the candidate for appointment as a judge; details shall be established by the law.*

***(10) The disciplinary panel shall decide on the deprivation of the conditions on judge competence, that guarantee the judicial office will be performed properly throughout the entire term of his/her office; provisions of the Article 154d paragraph 1 to 3 are not affected.***

According to Article 154d of the Constitutional Act, the Judicial Council shall adopt an opinion on fulfilment of requirements of judicial competence of judge appointed to the judicial office before 1<sup>st</sup> September 2014 based on the input of the public authority established to protect classified information and on the statement of judge. In terms of reviewing the constitutionality in the Slovak legal order, we consider this provision as retroactive, contrary to Article 1 of the Constitution of the Slovak Republic, because it applies to judges into the past. In terms of judicial independence it is a serious violation of equity of powers and denial of the principle of existence of the judicial power as one of the three powers of the State.

#### **Article 154d**

***(1) The requirements of judicial competence which guarantee that the judicial office will be performed properly shall also apply to a judge appointed before 1<sup>st</sup> September 2014. Adoption of opinion on fulfilment of requirements of judicial competence, under first sentence, of a judge appointed to judicial office before 1<sup>st</sup> September 2014 shall be decided on the basis of the documentation from state authority performing the role of the protection of classified information and statement of the judge, by the Judicial Council of the Slovak Republic by its resolution. Details of the decision-making of the Judicial Council of the Slovak Republic on the adoption of the opinion on fulfilment of requirements of judicial competence which guarantee that the judicial office will be performed properly, including the manner of expression of opinion of the judge on the documentation shall be established by law.***

***(2) Complaint may be lodged against the resolution of the Judicial Council of the Slovak Republic in accordance with paragraph 1, whereas it shall be decided by the Constitutional Court; the details shall be established by law.***

***(3) If the judge appointed to the judicial office before 1<sup>st</sup> September 2014 does not meet the requirements of judicial competence which guarantee that the judicial office will be performed properly, under the final resolution of the Judicial Council of the Slovak Republic under paragraph 1 or under final decision of the Constitutional Court, by which the complaint was dismissed under paragraph 2, the Judicial Council of the Slovak Republic shall propose the President of the Slovak Republic to recall the judge. Failure to fulfil the requirements for judicial competence which guarantee that the judicial office will be performed properly shall be a reason for the withdrawal of the judge.***

***(5) Members of the Judicial Council of the Slovak Republic elected by their peers, elected by the National Council of the Slovak Republic, appointed by the President of the Slovak Republic and appointed by the Government of the Slovak Republic under the current***

*legislation shall be considered members of the Judicial Council of the Slovak Republic under the Constitutional Law; their membership shall be subject to the current legislation.*

The cited article of the Constitution is seen as particularly dangerous because it regulates -under the pretext of meeting the assumptions of judicial competence – the duty of judge already performing the judicial office. Obligation to undergo review of such requirements implies not only those who enter the justice system, but also those who already perform the judicial office. Requirements for the performance of the office shall be examined on the basis of input from the public authority in its role of protection of classified information. At this point it must be said that the approved constitutional law relates to the laws that the National Council has not still approved, and one of them is the Act 215/2004 Coll. on the protection of classified information as amended. According to the available text of the amendment of this law presented in the parliament, the state body which performs the role of protecting classified information is the National Security Authority, which collects information about a judge or a candidate for appointment as a judge from the information and records of the Police Force, the Slovak Information Service and the Military Intelligence of the Slovak Republic.

Presented objective of the adopted Constitutional Act was to increase the credibility of the judiciary and the need to increase its effectiveness. In that context, we therefore consider the review of requirements of the judicial competence, which is according to the constitutional regulation under the competence of the Judicial Council, as such a competence, in question of which the Judicial Council does not have a decisive influence. Although the documents submitted to the Judicial Council concerning the particular judge from the sources of the National Security Authority shall be evaluated independently, however without legal regulation of possibility or mechanisms of verifying the veracity or relevant capability of the source to provide truthful information. The judge himself in the proceeding before the Judicial Council has the opportunity to respond on the allegations and submitted information, but only after the information being collected and without the possibility of confrontation with the source of information, which we consider to be contrary to the principle of equality. After the decision is taken by the Judicial Council, the procedure continues in case of negative decision for the judge by his/her possibility to bring his/her constitutional complaint before the Constitutional Court (Article 129 para 7). The same opportunity applies on the Minister of Justice in the event of a positive finding submitted to the Judicial Council by the National Security Agency. The decision of the Constitutional Court on whether the judge satisfies the requirements of judicial competence shall be final and without any possibility of appeal and is an "instruction" for the Judicial Council to submit a proposal to recall a judge from his office to the President of the Republic (see Art. 154d paragraph. 3).

II. The Constitutional Act complemented powers of the Constitutional Act, when according to the Article 129 para 7:

*(7) The Constitutional Court shall decide on a complaint against the resolution of the Judicial Council of the Slovak Republic under Article 154d, para 2.*

III. The Judicial Act extended the powers of the President of the Republic of the possibility under Article 147 para 1, last sentence as follows:

*Article 147 para. 1 is followed by the sentence: „The President of the Slovak Republic on the proposal of the Judicial Council of the Slovak Republic shall recall a judge who fails to meet requirements on judicial competence that guarantee the judicial office shall be performed properly, on the ground of the final resolution of the Judicial Council of the Slovak Republic under the Article 154d paragraph 1 or according to the final decision of the Constitutional Court by which the petition under the Art. 154d paragraph 2 was dismissed.*

IV. The Constitutional Act narrowed the immunity of judges (as referred to in Art. 136 of the Constitution); it is no longer – as it was before - the competence of the Constitutional Court to decide on commencing the prosecution against a judge, when the Article 136. para 1 and 3 only read as follows:

*(1) Judge of the Constitutional Court cannot be prosecuted for decision-making in the exercise of his office, not even after the termination of his office*

*(3) The Constitutional Court shall grant consent to the detention of judge and General Prosecutor. The Constitutional Court shall carry out disciplinary proceedings against the President of the Supreme Court of the Slovak Republic, the Vice President of the Supreme Court of the Slovak Republic and the General Prosecutor.*

The existing statutory framework guaranteed the independence of judges and the judiciary in such a way, that it was the Constitutional Court which was to take a decision and to rule in the particular matter on admissibility of the detention of a judge and the admissibility of prosecution prior to the decision of law enforcement bodies. Such competence remained to the Constitutional Court only in the assessment of detention of judge.

We consider the constitutional regulation referred to in Article 136 para 1 and 3 and Article 148 para 4 and 5, as a good way of protecting the independence of the judiciary. The new regulation according to which the decision of law enforcement bodies on commencing the prosecution may be challenged by the judge by means of complaint, which shall be decided by General Prosecutor, is deemed inappropriate, as the constitutional regulation of his position in the Constitution is outside the judiciary. The General Prosecutor has a special status; his election takes place at the National Council and is thus partly a result of balance

or imbalance of political forces, even if he is finally appointed by the President of the Republic.

Article 148 para 2, 4 and 5 of the Constitutional Act reads as follows:

*(2) The temporary suspension of a judge cannot interfere with the independent administration of justice. Reasons for the interruption of the performance of the judicial office, the conditions for the temporary assignment of a judge and other conditions for the temporary suspension of a judge shall be established by law. "*

*(4) Neither a judge nor a lay judge may be prosecuted for their judgements, not even after the cessation of their office."*

*(5) The judge concerned may lodge a complaint against the decision to initiate the criminal prosecution of the judge, while such complaint shall be decided by the General Prosecutor.*

#### **V. The Constitutional Act:**

- changed the way of creation of members of the Judicial Council by increasing the number of judges to be elected and removed by their peers from 8 to 9 (Article 141a para 1):

*(1) The President of the Judicial Council of the Slovak Republic shall be elected and recalled by the Judicial Council of the Slovak Republic from among its members. Members of the Judicial Council of the Slovak Republic are:*

- a) nine judges, elected and recalled by judges of the Slovak Republic,*
- b) three members elected and recalled by the National Council of the Slovak Republic,*
- c) three members appointed and recalled by the President of the Slovak Republic,*
- d) three members appointed and recalled by the Government of the Slovak Republic.*

- It tightened conditions for the performance of the office of the President of the Judicial Council (Article 141a para 3):

*(3) The office of President of the Judicial Council of the Slovak Republic shall be incompatible with an office in another public authority, civil service, employment relationship, analogical working relationship, business activity, membership in a management or supervisory body of a legal person dealing with business activity, neither with another economic or gainful activity, except for the administration of one's own assets and scientific, educational, literary or artistic activity.*

The Constitutional Act also separated the office of the President of the Supreme Court and the office of President of the Judicial Council by a regulation of temporary nature, so that the President of the Supreme Court remains a member of the Judicial Council until

the end of the term of office of members of the Judicial Council elected by their peers according to current regulations.

*Art. 154d para (4): The office of the President of the Judicial Council of the Slovak Republic appointed under the current legislation shall expire on the date the Constitutional Law enters into force. The President of the Supreme Court of the Slovak Republic shall be a member of the Judicial Council of the Slovak Republic until the termination of the term of office of those members of the Judicial Council of the Slovak Republic elected by judges of the Slovak Republic under the current legislation.*

- It extended the powers of the President of the Judicial Council when it comes to submission of proposals to the Constitutional Court to start a proceeding on the conformity of legal regulations (Article 141a para 8):

*(8) The President of the Judicial Council shall submit to the Constitutional Court a proposal to start a proceeding on the conformity of legislation under the Article 125 paragraph 1 relating to the administration of justice.*

We appreciate the extension of persons eligible to lodge a motion to start a proceeding on conformity of legal regulations under Article 125 para 1 of the Constitution, which relates to the administration of justice (Article 130 para1, letter f).

VI. The submitted constitutional regulation was preceded by a media campaign involving politicians since the beginning of 2014, who were explaining to the public that the measures are needed to enhance the credibility of judges and the judiciary by introducing the review of competence for the performance of the judicial office. We highlight that the Judicial Academy of the Slovak Republic, active in Slovakia for 10 years, is responsible for training of judges, however the given amendment of the constitutional law does not aim to review the professional skills of judges. Dangerous rhetoric about the alleged contact of some members of the judiciary with organized crime is in our opinion purposeful; moreover unveiling of its actors has so far been possible by means of criminal law and existing law enforcement agencies and prosecution. We believe that the Constitutional Act is vexatious; disparaging the judiciary and distorting the balance of power in the State by the principle of collective guilt of judges, which is a bad model for politicians in other countries.

VII. The Slovak Association of Judges is a member of the European Association of Judges (EAJ) and the International Association of Judges. The Slovak Association of Judges requested the European Association of Judges for help and also informed on the threat of adoption of the constitutional law on 16<sup>th</sup> May 2014 at the European Association of Judges meeting in Limassol (Cyprus). Before the adoption of the constitutional law, the EAJ President, Christophe Regnard, sent a letter to the leading representatives of the State

(President of the Republic, Prime Minister and Minister of Justice), in which he expressed concerns that the Constitutional Act would result in breach of international documents relating to the independence of judiciary and judges (see the attachment). Despite this fact, the Constitutional Act was approved. The European Association of Judges will also in this case assess the national legal regulation by means of the expert commission. The written request of the Slovak Association of Judges was sent to the European Association of Judges. I also know that the Slovak case of the adopted constitutional law is also dealt by the Consultative Council of the European Judges based on the motion of the Slovak judges' representative.

We believe that the application of given amendment will result in violation of international standards on judicial independence in its external and internal view, as stipulated in a number of key documents of the Committee of Ministers of Council of Europe to Member States on judges, opinions of the Consultative Council of European Judges, resolutions of European Network of Councils for the Judiciary, International Association of Judges – European Association of Judges, the European Charter on the Statute for Judges and findings of the Venice Commission.

We believe that by joint efforts of the European Network of Councils for the Judiciary, Consultative Council of European Judges and the International Association of Judges – European Association of Judges, we can successfully defend opinions of the Slovak judges who advocate the judicial independence, not in their own interest, but for the right of everyone to an independent and impartial tribunal guaranteed by Article 6 of the European Convention on Human Rights and Fundamental Freedoms.

We are ready to meet all required and usual conditions relating to the full investigation and commenting on our requirements to protect the independence associated with the request.

Yours sincerely,

A handwritten signature in blue ink, consisting of several overlapping, stylized lines that form a complex, abstract shape.

**Paul Gilligan**  
**President**  
**European Network of Councils for the Judiciary**  
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