Opinion of the Judicial Council of the Slovak Republic on the Rule of Law Report 2024 prepared in Brussels on 24 July 2024 (hereinafter also referred to as the "Report")

Ignoring the opinion of the members of the Judicial Council of the Slovak Republic

The Judicial Council of the Slovak Republic (hereinafter referred to as the "Judicial Council") notes with concern that the Report does not reflect the opinion of nine members of the Judicial Council received as part of the consultations with the European Commission by the representative of the European Commission on 06 February 2024. This opinion implies that the possibility to recall members of the Judicial Council was adopted by amending the Constitution of the Slovak Republic (hereinafter referred to as the "Constitution") in December 2020. This possibility was also available until 2018, then the Constitutional Court of the SR (hereinafter referred to as the "Constitutional Court of the SR") cancelled it (PLz. ÚS 2/2018). The previous government responded to this decision of the Constitutional Court of the SR criticised publicly by the President of the Judicial Council, by again enshrining the possibility to dismiss members of the Judicial Council "at any time". It is therefore a kind of return to the original situation used in the past by Andrej Kiska, the President of the Slovak Republic, in 2014, by dismissing the members of the Judicial Council appointed by the previous President of the Slovak Republic. By its resolution PL. ÚS 12/2022 of 12 October 2022, the members of the Judicial Council also pointed out that the Constitutional Court of the SR "*considers unjustified the petitioners' concern based on the argument that by emphasizing the power to dismiss members of the Judicial Council at any time during their term of office, the Constitutional Lawmaker introduces unacceptable interference of the executive and legislative powers in the operation of the independent judiciary, also in view of the fact that half of the members of the Judicial Council consisting of judges can only be dismissed from office (e.g. on grounds of loss of confidence) by judges, i.e. the influence of the legislative and executive authorities on the functioning of the Judicial Council is not increased in any way by the contested provision of the second sentence of Article 141a par. 5 of the Constitution."*

In response to the European Commission's question "*What has been the experience so far with the functioning of the courts and the judiciary in the broad sense according to the new judicial map? Have you made any assessment of the impact of the new court map on a) financial resources, b) human resources, c) efficiency in the courts?"* the members of the Judicial Council responded that, according to the Presidents of the District Courts (including at the Judicial Council meetings) where the offices from the former District Courts were established, it appears that this step has not brough any positive effect. On the contrary, it is more demanding in terms of finances, complicating the administration and the judges' work, and the parties to the proceedings have not been able to feel any benefit whatsoever. The new court map was approved without prior listening to expert opinions of the judges. It has not solved the fundamental problem, which lies in the lack of human resources and inadequate financial remuneration of the administrative and professional staff. In December 2023, the Constitutional Court of the SR declared that some legislative changes to the judicial reform

are unconstitutional and interfere with the independence of the judiciary and individual judges and with the rights of judges' family members. These included the interference with the privacy of adult children as a result of the Judicial Council's review and exercise of its powers, as well as the interference with the material and social security of judges, whose income and sickness allowances were abolished after 60 days of a sick leave.

As regards Section 363 of the Code of Criminal Procedure, the members of the Judicial Council stated that the possibility of the General Prosecutor of the Slovak Republic (hereinafter referred to as the "General Prosecutor") to decide under Section 363 of the Code of Criminal Procedure must be considered as a necessary extraordinary remedy that can effectively address any substantial illegality in procedures or decisions of the law enforcement authorities in criminal proceedings. The General Prosecutor, as the chief prosecutor, must have an effective legal remedy to correct errors committed in the preparatory proceedings. By its decision PL ÚS 1/2022-270, the Constitutional Court of the SR did not grant the motion of a group of MPs challenging sections 363 to 367 of the Code of Criminal Procedure regulating the revocation of final decisions in preparatory proceedings.

In response to the European Commission's question "*To what extent do you think the proposed legislative amendments to the Criminal Code and the Code of Criminal Procedure (including penalties, limitation periods, cooperation, number of corruption cases concerned) will support Slovakia's efforts to fight corruption and corruption in high places? Do you see an urgent need for reform in this regard?"* the members of the Judicial Council responded that the number of prosecuted corruption offences has not changed significantly for 20 years and oscillates on average between about 110 and 250 cases per year, with so-called petty corruption included in these figures. The proposed changes to the Criminal Law and the Code of Criminal Procedure will in no way prevent the detection of corruption or other criminal activities, as they do not limit the police in its activities. Considering the inadequate punishments in the Slovak Republic, especially for property and drug offences, the reform of the state's criminal policy in the field of punishment is inevitable and urgent. The Judicial Council adopted the Resolution No. 364/2023 of 17 October 2023 on the State of the Rule of Law Report, according to which it acknowledged the report, but drew attention to the need to reform the State's penal policy, in particular by introducing a consistent and modern philosophy of punishment based on restorative justice and responding to the currently high number of incarcerated persons, and by ensuring the adequacy of sentences and ensuring respect for human rights in the prison system.

In response to the European Commission's question "*To what extent do you think the planned institutional changes to the anti-corruption bodies specialised in the fight against corruption will support Slovakia's effective fight against corruption? Do you consider the abolition of specialised bodies as an urgently needed reform, or do you think there are other possible solutions?"* the members of the Judicial Council replied that the government draft law abolishes the Office of the Special Prosecutor of the General Prosecutor's Office of the Slovak Republic ("Office of the Special Prosecutor's Office"), while the detection of corruption as well as other criminal activities is within the competence of the police, not the prosecution, i.e. the abolition of one part of the prosecution will have no impact on the effective fight against corruption by the police. This applies especially since there are already specialised departments in each regional prosecutor's office, to which criminal cases are to be transferred

from the Special Prosecutor's Office and also some prosecutors from the Special Prosecutor's Office, thus, the specialisation for selected offences will be maintained, including at the level of supervision of compliance with the rule of law in pre-trial proceedings.

As regards the abolition of the Special Prosecutor's Office and changes to criminal codes, the Judicial Council sent the European Commission a list of a total of 11 media outputs by members of the Judicial Council, the content of which is not reflected in the report.

The European Commission's assessment that the changes in criminal law raise concerns regarding the effective fight against corruption and the protection of financial interests was supported by a single source, namely the opinion of the NGO Transparency International, while the opinion of the members of the Judicial Council was not taken into account. In this regard, it should be noted that the NGO Transparency International Slovakia (hereinafter referred to as "TIS") has recently suffered a **reputational fiasco** as regards the evaluation of the rule of law and judges, as it compiled a ranking of judges contrary to the 2014 Opinion No. 17 of the Advisory Council of European Judges on the evaluation of judges.[1]) Also recently, the NGO TIS has misreported about the functioning of the Judicial Council in its outputs.[2]) **For these reasons, this source should be more thoroughly checked for the credibility of its conclusions, which should be cross-checked.**

As regards the process of adopting changes in criminal law, it should be pointed out that the European Commission has failed to notice that the process of adopting the judicial map in 2021 was accompanied by protests by judges and the legislative process was non-transparent. Finally, the Constitutional Court of the SR did not declare the adopted changes in the organization of the judiciary as a result of such a legislative process non-compliant.[3])

The European Commission report did not mention that some parts of the approved 2021 judicial reform were declared unconstitutional by the Constitutional Court of the SR.[4])

As regards the dismissal of the members of the Judicial Council, despite the fact that European Commission had information that the Constitutional Court of the SR rejected the constitutional complaints of the dismissed members[5]), it did not mention this essential fact in the report. The decision of the Constitutional Court of the SR shows that:

Point 25: *"Therefore, under the given circumstances, the only certainty that appears (albeit paradoxical at first sight) to be essential and important is that a member of the Judicial Council may be dismissed at any time. Considerations of the proclaimed certainty also correspond to the concept of de constitutione et de lege lata, according to which the nominee*

[1]) https://rm.coe.int/ccje-2014-opinion-no17-sk/16809ec9cd
https://www.topky.sk/cl/10/2498383/Transparency-International-Slovensko-ma-stiahnut-hodnotenie-sudcov--odporuca-vedenie-Sudnej-rady
https://www.pravnelisty.sk/clanky/a1202-netransparentne-hodnotenie-sudcov-transparency-international-slovensko
https://spravy.pravda.sk/domace/clanok/664071-minister-karas-sa-pripojil-ku-kritike-rebricku-sudov-ten-v-minulosti-poukazal-na-problemovu-sudkynu/
[2]) https://www.sudnarada.gov.sk/predsednicka-sudnej-rady-slovenskej-republiky-reaguje-na-hodnotenie-formalnej-nezavislosti-institucii/
[3]) https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2023/455/20231206
[4]) https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2024/14/20240214
[5]) https://sudnamoc.sk/ustavny-sud-sr-rozhodol-o-staznostiach-odvolanych-clenov-sudnej-rady/

of a particular (nominating) political entity represents the political body in the Judicial Council. Thus, if the Government or the National Council come to believe that there is a need for a different composition of the Judicial Council, a representative may be dismissed from his or her position as a member of the Judicial Council and a different person may be appointed in his or her place in a reasonable logical and timely sequence..."

28. *"Insofar as the plea of violation of the substantive core of the Constitution by the appellants' appeal is concerned, there is no reason not to disregard the conclusions of the resolution in PL. ÚS 12/2022 of 12 October 2022, where the Constitutional Court stated that no constitutional provision relating to the establishment, constitutional status, creation and competence of the Judicial Council can be included in the substantive core of the Slovak Constitution (paragraph 57 of the above-mentioned resolution). In this connection, the Constitutional Court emphasises that in paragraph 67 of the referred order it extended the validity of this judgment expressis verbis also to the last sentence of Art. 141a par. 5 of the Constitution, where the constitutional lawmaker provided for the possibility to dismiss the members of the Judicial Council at any time before the expiry of their term of office."*

45. "*A constitutional complaint is clearly unjustified if the contested decision of a state body (in this case, the contested resolution of the Government and the contested resolution of the National Council) could not have violated the fundamental right or freedom identified by the complainants, either due to the lack of a relevant connection between the contested decision and the fundamental right or freedom, the violation of which has been contested, or for other reasons (e.g. I. ÚS 286/2023). The Constitutional Court is of the opinion that, having regard to the conclusions set out in this resolution, there is no causal link between the impugned resolution of the Government and the argumentative lines of female complainants and the complainant 3 set out in the constitutional complaints, as well as between the impugned resolution of the National Council and the grounds of the constitutional complaint of applicant 4."*

46. *"In view of the above, in its preliminary examination of the constitutional complaints, the Constitutional Court has come to the conclusion that* ***the impugned Government resolution does not signal the possibility of a violation of the fundamental rights of the fundamental rights of female complainants and the complainant 3 guaranteed by Art. 30 par. 1 and 4 of the Constitution in conjunction with Art. 1 par. 1 and Art. 2 par. 2 of the Constitution and the contested resolution of the National Council does not constitute a violation of the fundamental rights of complainant 4 guaranteed by Art. 30 par. 1 and 4 of the Constitution in conjunction with Art. 1 par. 1 of the Constitution****. It means that it is not necessary to examine the merits of the applicants' constitutional complaints once they have been admitted for further proceedings. The Constitutional Court therefore rejected the submitted constitutional complaints pursuant to Section 56 par. 2(g) of the Constitutional Court Act as clearly unjustified."*

Based on the above**, the question of the limits of the competence of the European Commission in relation to the decision of the national Constitutional Court of the SR and the constitution of the Member State arises. The Constitutional Court of the SR ruled that the dismissal of the members of the Judicial Council was a legal act that was constitutionally compliant.**

The Judicial Council is concerned to note that there is no mention in the European Commission's report of the reasons for the dismissal of Ján Mazák, the President of the Judicial Council, from his position although the European Commission has been aware of them since 17 April 2024. These reasons, consisting of illegal arbitrary lustrations of judges (including those who have been deciding politically sensitive cases or have been critical of Ján Mazák's actions), are so serious that they should be included in the State of the Rule of Law Report and should be of interest to the European Commission.[6]) The European Commission's lack of interest in such actions by the former President of the Judicial Council is a regrettable signal for the Slovak judiciary.

In its report, the European Commission did not pay sufficient attention to the decision of the Constitutional Court of the SR rejecting the Ján Mazák's constitutional complaint[7]), which shows, among other things, the unsuccessful attempt of obstruction made by Ján Mazák during his dismissal. "*The petition for dismissing of the complainant from the position of the Judicial Council in the cases reviewed by the Constitutional Court shows facts that can be reasonably considered as a repeated violation of the complainant's duties as the chairman of the Judicial Council. Even if, subject to review of the other acts of the complainant, the Constitutional Court concluded that they were constitutionally unsustainable for the purpose of dismissing the complainant from his position, this would not change the conclusion that the contested decision of the Judicial Council as a whole was not in conflict with the complainant's fundamental rights.*" stated the Constitutional Court of the SR.

By its Resolution 212/2024 of 18 June 2024, the Judicial Council emphasises that it has committed itself (in order to enhance the credibility and authority of the Judicial Council as well as the judiciary) to the promotion and implementation of the good conduct values of members of the Judicial Councils set out in the Report on the Code of Ethics for Members of the Judicial Councils approved by the General Assembly of the European Network of Councils for the Judiciary of 9 June 2023 in Ljubljana, Slovenia, annexed to Judicial Council Resolution No. 292/2023 of 21 June 2023. These values include: – the integrity of a member of the Judicial Council, which includes honesty, dignity, as well as a commitment to the highest standards of personal and professional conduct; – the independence and impartiality of a member of the Judicial Council in the performance of his or her mandate as a member of the Judicial Council; – the professionalism, responsibility and competence of a member of the Judicial Council, professional, communication and organisational competence, the ability to cooperate and respect one another, and compliance with the principle of equal treatment; – transparency. The Judicial Council has also committed itself to promoting and implementing the recommendation of the Compendium of the European Network of Judicial Councils on Judicial Councils that non-judicial members of the Judicial Council should meet the same conditions of integrity, independence and impartiality as judges, should not be politicians and should not be involved in politics for a reasonable period before and after their mandate as a member of the Judicial Council, as well as for the duration of their mandate as a member of the Judicial Council. The purpose of accepting this recommendation is to prevent the

[6]) https://zasadnutia.sudnarada.sk/data/att/15534.pdf
[7]) https://sudnamoc.sk/rozhodnutie-ustavneho-sudu-sr-k-odvolaniu-z-postu-predsedu-sudnej-rady/

politicisation of the judiciary both from inside and outside.

As regards public statements against members of the judiciary, the European Commission Report failed to mention the fact that the biggest **blow to the independence of the judiciary and the reputation of judges was made by Ján Mazák, the former President of the Judicial Council, himself,** when he publicly, even in relation to foreign countries, unjustifiably denounced František Mozner, the judge of the Supreme Court of the Slovak Republic, following his activities in the Consultative Council of European Judges.[8]) The European Commission's report also lacks public statements and appeals by Mária Kolíková, the former Minister of Justice of the Slovak Republic, and representatives of the SaS (Freedom and Solidarity) party before the elections about the judicial representatives – members of the Judicial Council.[9]) For completeness, it should be noted that Mária Kolíková is facing a lawsuit for her public statements that the court map is being obstructed by corrupt judges.[10]) It is also surprising that the European Commission's report does not mention the illegal intervention of the National Criminal Agency in one of the courts in Bratislava, which was also commented on by the Judicial Council[11]), and as a result of which Mária Kolíková

[8]) https://spravy.pravda.sk/domace/clanok/614935-sikuta-sa-ohradil-voci-mazakovi-ziada-vyvodenie-zodpovednosti/
https://dennikn.sk/2696732/predseda-najvyssieho-sudu-konanie-jana-mazaka-nemoze-ostat-bez-povsimnutia-za-jeho-vyroky-ziada-vyvodenie-zodpovednosti/

[9]) Facebook of Mária Kolíková, 30 August 2023: The Council for the Restoration of Confidence at SaS (Freedom and Solidarity) party have analysed the statements made by the media and judges on the alleged case concerning Judge Pamela Záleská. We have come to the conclusion that this is no case from the point of view of the judiciary. We are not aware of any violation of the principles of judicial ethics or the law by Judge Záleská. However, it could be investigated in any related criminal proceedings whether there are possible grounds for a plea of bias in those proceedings. The judicial system has the legal tools to deal with such cases, but no such relevant finding has been made. All members of the Council agreed that we do not consider the manner, form, and content of the discussion on Pamela Záleská's pseudo-cause as exceptional. Similar cases were the evaluation of judges by Transparency International Slovakia, the resolution on the media attacks on Judge Harabin, or the so-called debate on insulin. the standard of the manner and conduct of the discussion of some members is reminiscent of the period when the judiciary was dominated by Štefan Harabin. First of all, it is up to the judges whether they are comfortable with this way. Our Council took particular note of the last public session of the Judicial Council, where Judge Pamela Záleská was heard. The public session of the Judicial Council resembled a trial in which the guilty party is obvious in advance. Judge Záleská was asked a number of suggestive questions that are impermissible in a fair trial. Yet it is striking that they were asked by the judges. Members of the Judicial Council representing judges are naturally expected to be the creme de la creme of the judiciary, however, the last session did not prove it, because of the behaviour of female judges Dana Jelínková Dudzíková, Eyša Eren Pružinec and Marcela Kosová. These female judges represent the judges of the largest regions when it comes to the election of judges to the Judicial Council: the courts of the Bratislava, Trnava, Nitra and Trenčín regions. It is up to the judges of these election districts to consider whether these female judges should continue to represent them and whether they are comfortable with this representation or whether they will propose to change their representatives. A petition for dismissal may be filed by the judicial councils or by a qualified group of judges from the courts in the given election districts. I believe that impugning Judge Záleská, together with creating the impression of violating criminal proceedings without relevant evidence, means, in fact, questioning not only the specialised criminal court, to which Judge Záleská belongs, but also the criminal proceedings currently being conducted and aimed at cleansing society of corruption. The female judges who verbally attacked their colleague in an unacceptable manner at the Judicial Council meeting actually entered the political arena, where the struggle for voters with this very topic is particularly topical in the election campaign right now. Ondrej Dostál complemented our discussion at the Council for Restoring Confidence in Justice by stating that the numerous and extensive public statements and interviews of these female judges are always strongly negative towards their colleague, despite there is no known decision by competent authorities on the relevant misconduct on her part. Their statements lack the appropriate restraint that judges should exercise in their public statements so as not to diminish the credibility of the judiciary and its esteem in the eyes of the public. The frequent occurrence of such statements, especially in tabloid and substandard media, highlights the inappropriateness of the conduct of these female judges and members of the Judicial Council.
Ondrej Dostál Vladimíra Marcinková Alojz Baránik Právo a Sloboda (Right and Freedom) Slavomíra Henčeková – OKS/SaS (Civic Conservative Party/Freedom and Solidarity) Tomas Gabris Tomáš Hubinák Zuzana Kumanová Róbert Mudronček

[10]) https://www.trend.sk/spravy/sudkyna-jelinkova-dudzikova-podala-zalobu-kolikovu-podla-ministerky-neobstoji

[11]) https://sudnamoc.sk/uznesenie-sudnej-rady-sr-k-akcii-naka-na-okresnom-sude-bratislava-iii/

dismissed the President of the Court. The reprehensible public statements by Mária Kolíková, the former Minister of Justice of the Slovak Republic, continue to persist.[12])

Also **the report does not mention the fact that the Judicial Council took a position**[13]) **on the actions of the President of the Specialized Criminal Court, who, while lacking the competence, actively gathered information of an operational nature from the police on the judge and his daughter**, as a basis for disciplinary proceedings that he initiated together with the President of the Judicial Council, Ján Mazák. The Judicial Council stated that "*the measures taken by the President of the Court to establish the facts of the case within the meaning of section 42 par. 3 of Act No. 757/2004 Coll. on Courts and on Amendments and Supplementation to Certain Acts do not include obtaining information from law enforcement authorities by means of operative search, since the actions of the President of the Court are covered neither by the Code of Criminal Procedure, nor by Act No. 171/1993 Coll. on the Police Force, not even as a support, since it is not a procedure within criminal or disciplinary proceedings."*

The report does not mention that some media have misinterpreted (including repeatedly) the work of the Judicial Council and the functioning of the judiciary, as a result of which they influence public opinion in a negative way and provoke hatred towards members of the Judicial Council and representatives of the judiciary.[14])

The statement in the report that the President of the Specialised Criminal Court resigned in connection with the control of the allocation of files is not true. In the media, the reason for the resignation was presented as the illegal lustration of the judge and his daughter while exercising the powers of the disciplinary petitioner, as stated above.

The "Za otvorenú justíciu" (The Open Justice) Initiative is not an association of judges, it has no legal capacity, and is not a member of any international organisation of judges. This figure in the European Commission report is incorrect.

The largest professional organisation of judges is the **Association of Judges of Slovakia**, which is a member of the EAJ and the IAJ. Therefore, insofar as the European Commission is interested in referring to the opinion of the professional judicial associations, "Za otvorenú justíciu" (The Open Justice) is not such association (about 30 judges in office – sympathizers), but the Association of Judges of Slovakia is (about 600 members).

Part concerning the so-called judicial map

The European Commission's Rule of Law Report **states in the Summary section**: "The courts under the reformed court map are generally functioning well, including the separate system of administrative courts. Changes to improve access to free legal aid are under way. The level of digitalisation of the judicial system has improved, but the development of a new digital court management system faces some challenges."

[12]) https://www.sudnarada.gov.sk/sudnictvo-nesmie-byt-zneuzivane-na-zvysovanie-klesajucich-preferencii-politickych-stran/
[13]) https://zasadnutia.sudnarada.sk/data/att/14908.pdf
[14]) https://www.sudnarada.gov.sk/vyhlasenie-predsednicky-sudnej-rady-slovenskej-republiky-marcely-kosovej/

From the European Commission's Rule of Law Report, **Part I. "Judicial system":**

Independence:

"The reformed judicial map, including the separate system of administrative courts, is generally working well and overcoming some initial challenges. This reform, which has been the subject of previous Rule of Law Reports, entered into force on 01 June 2023, after a five-month delay to allow for better preparation of the judicial system. Since then, the courts have been operating with modified district and regional jurisdiction and there is a new independent system of administrative courts. Data collected by the Ministry of Justice of the Slovak Republic (hereinafter referred to as the "Ministry of Justice") show that these changes have not caused any immediate systemic disruption in performance at the district or regional level. Stakeholders report challenges in administration and organisation of work, higher financial requirements and some negative impacts on litigants, while long-standing issues such as remuneration of administrative and support staff are not addressed. The new administrative courts have started to operate partial staffed, but the situation is improving gradually. The reform called for changes in the functioning of the prosecution service, where challenges were indicated in relation to the availability of courts, logistical issues and the efficiency of prosecutors. Notwithstanding initial problems and a temporary decline in the efficiency of the courts, the reform aims to gradually improve the efficiency and quality of the judicial system, in particular by increasing the specialisation of judges."

Quality:

"The level of digitalisation of the judicial system has improved, but the development of a new digital court management system faces some obstacles. According to the European Union 2024 Justice Scoreboard, the digitisation level of the justice system has advanced, especially in civil, commercial and administrative proceedings. Generally, the courts use digital tools, including electronic case management systems, remote communication technology and electronic case assignment. In 2023, the Ministry of Justice faced setbacks in its project aimed at developing a new digital court management system. Works on the interconnection of the police and prosecution information systems to allow the electronic exchange of documents in the first phase and of the entire investigation file in a later phase are progressing slowly. Digitisation efforts are also supported by funds from the European Union, including the Recovery and Resilience Facility."

Efficiency:

"The justice system continues to face challenges in terms of its efficiency, however the progress is visible in administrative proceedings. The estimated time needed to resolve administrative proceedings at first instance has reversed in 2022 compared to 2021 (648 days compared to 679 days in 2021 and 586 days in 2020). The resolution rate of administrative proceedings at first instance also increased (to 93% in 2022 from 80% in 2021), however remained below 100%, indicating that the number of resolved cases is lower than the number of new cases. However, the available 2023 data show a further decline in case settlement rates in response to the court map reform, particularly in relation to the decline of decided cases in months when administrative cases were transferred from county courts to the new

administrative courts. However, this decline is expected to be temporary only, as staff in administrative courts is gradually recruited, and so the functioning of the courts is improving. At the same time, as a result of criminal law reform, petty theft is no longer a criminal offence and is instead classified as an administrative offence. This is expected to create an additional burden on the administrative courts."

Opinion:

The above does not make it clear which evaluation criteria were used by the European Commission to conclude that the reformed judicial map, effective as of 01 June 2023, is generally working well, and, at the same time, it does not indicate what initial challenges need to be faced.

It is indeed striking that the European Commission makes such a judgment referring to the website of the Ministry of Justice of the Slovak Republic and the 2021 – 2023 Report on the Rule of Law, since the Judicial Map was actually implemented on 01 June 2023, and therefore there were no relevant statistics in the 2021, 2022 and 2023 Rule of Law Reports based on which the European Commission could come to the presented conclusion that "the changes did not cause any immediate systemic disruption of performance at the district or county level" **(footnote 51 – Information obtained during the visit to Slovakia from the Ministry of Justice of the Slovak Republic, without specifying the year in which the visit took place).**

It is obvious that the Slovak representatives of the European Commission did not consult their conclusions with the current Ministry of Justice of the Slovak Republic, since although they refer (footnote 56) to the fact that the Ministry of Justice collects feedback from the courts and analyses, how the reform has affected the work of the courts and the accessibility of justice to the public, they were not interested in the results of this survey, despite of the fact that it was conducted prior to the drafting of the Report among judges and court administrative staff throughout the Slovak Republic, and involved approximately 3,100 respondents, including approximately 1,400 judges. We are convinced that only the conclusions of this survey can answer the question about the effect of the change of the judicial map in Slovakia.

First of all, we would like to point again to the objectives of the reform, by which the former Minister of Justice of the Slovak Republic, Mária Kolíková, the author of the reform of the judicial map, justified the change of the judicial map:

- "**Specialization of judges** – increasing the size of judicial districts allows judges to specialize in one main agenda they want to pursue. In health care good quality is ensured by a vascular surgeon, a cardiologist, a traumatologist..., i.e. a specialist, the same applies in the judiciary. With the change in the court map, judges can specialize in civil, commercial, criminal, family and administrative agenda. A specialised judge finds it easier to understand his or her area of expertise, which implies a better quality decision.

- **Faster proceedings** – late justice is not justice. If the decision does not come in a reasonable time, we can hardly speak of justice. The courts have no problem handling a real-time influx of simpler and more routine cases. More complex case that take an

inordinate amount of time to process are the real problem. This is perceived by citizens and businesses as low enforceability of the law. And it is the specialisation of judges that will enable more complex cases to be concluded more quickly.

- **Adequate accessibility** – access to justice is not defined by kilometres one has to travel to get to court, but by the speed and quality of decision-making. It is about implementing the right to judicial protection. The right to a trial in every town does not exist. On the contrary, the right to a fair decision within a reasonable time exists. And this right can only be fulfilled by effective courts."

It must be stated that the new judicial map not only failed to achieve the expected goals, on the contrary it revealed the absolute unpreparedness of the judiciary for such a supposedly systemic judiciary reform.

Already when promoting the new judicial map, the former Minister of Justice of the Slovak Republic abandoned the open discussion and the inevitable close cooperation with all the entities involved, i.e. judges, judicial apparatus (management), legal professions, academic and business sphere, relevant authorities. It should be noted that the underlying assumptions that were defining the new court map were not properly justified and, in all their specific consequences, were not evaluated in terms of their potential costs and benefits. The new court map draft did not provide relevant reasons for the disappearance of the selected appellate courts. The material did not contain the data and reasons on the basis of which the author decided to abolish the regional courts and to establish three appellate courts. The Ministry of Justice justified the abolition of the regional courts in Bratislava and Košice as follows: *"This change is also motivated by the desire to break the corruption ties in the city of Bratislava."* The draft also did not address the effects of the reform on court staff, who would find it unsustainable to remain in employment following a change of work location and would have to seek employment in other courts or outside the judiciary system.

The Association of Slovak Judges, the largest professional organisation of Slovak judges, for example, found unacceptable the arguments about the high pressure and risk of a corrupt environment at the regional courts in Bratislava and Košice ("*The statement without any factual basis /data/ is a politically invented construction, i.e. a fabricated fact. Another fabrication (fiction) is that the fragmented courts (i.e. all such courts) have become too in tune with the regional environment, unable to cope with the growing challenges and not resilient enough to the surrounding pressures".*

As regards the Ms Kolíková's statement, the Association of Judges of Slovakia stated that "*there are other state authorities and public administration bodies in the same environment. This implies collective guilt on the part of all courts, which the association considers to be a disgrace. At the same time, the draft reform of the judicial map is not in line with the Recommendation of the European Commission for the Efficiency of the Judiciary (CEPEJ), in particular as regards the number of judges and other staff at individual courts."*

After the implementation of the new judicial map, the lack of the expert debate on such a major reform became fully apparent. When several district courts were merged into one court, the court map did not take into account the staffing of the new courts based on realistic capacity possibilities (e.g. Municipal Court Bratislava IV, as the second largest municipal court in the Slovak Republic), and this worsened the staff working conditions, in particular

the required standards for a dignified and undisturbed performance of their work; the new courts have created workplaces, which caused some judges to have to travel to the such workplaces to hear cases, even though their workplace was at the seat of the district court, which increased the workload of the judge disproportionately.

Also as a result of parliamentary lobbying and as a result of the incompetence of the former Ministry of Justice of the Slovak Republic, which ignored all the objections by the judges, several functional district courts were abolished (or workplaces of district courts were created), in particular the District Court of Dolný Kubín, the District Court of Topoľčany, the District Court of Brezno, the District Court of Svidník, the District Court of Ružomberok, which not only had their specialisation, but also sufficient space and, in particular, many court decisions of very good quality.

It is also necessary to point out that due to the merger of courts into one court (one building), it is not possible to ensure the smooth operation so that each judge has at least one hearing day per week at the seat of the respective court. The court map did not take into account the status of the buildings in which the courts reside. For example, the Municipal Court Bratislava IV. The condition of both buildings of this court is in a state of disrepair. On Saratovská ulica street in Bratislava, the staircase on the right side of the building used by the public as an access to the hearing rooms is falling apart (wall deflects in the staircase area, while other problems are visible, too – plaster falling off, mould on the walls, leakage, etc.). There is a dilapidated former post office building in the immediate vicinity of the court building on Saratovská ulica street in Bratislava, where regular extermination work needs to be done because the litigants and their lawyers are harassed by rats outside the entrance to the building (rats have also been spotted in the court building).

The roof of the building at Prokofievova 6 – 12 in Bratislava is leaking and a comprehensive repair of the roofing is required. The static load capacity of the building on Prokofievova ulica street was already almost full when the court map was being prepared for implementation. A static structural analysis was drawn up for the building on Prokofievova ulica Street in Bratislava, which showed that the court building is not designed for higher load caused by constant increase in the number of employees and the influx of archive files from other courts, which belong to the court departments of the judges of the Municipal Court Bratislava IV. The capacity of the buildings is also related to the archive capacity problem. Currently, archived files are stored in the archives of the Regional Court in Bratislava, in Pezinok, however they are already completely full, and so private companies as well as the building of the Ministry of Justice of the Slovak Republic (basement premises) are used for archiving.

During the implementation of the new court map, the courts found that the question of migration of both live and archival files was not addressed at all; the migration itself took an unreasonable amount of time, which was detrimental to the smooth transition of the judiciary. At the end of 2023, it was not possible to match the migrated archive files with their actual status, which meant that despite the electronic migration of the files, the paper files remained in the archives of the original courts. Thus, access to such files is complicated when they need to be traced, and their retrieval is handled by the staff of the courts where the paper files are located.

The implementation of the court map has also led to a tabular increase in the number of staff, although the actual number of court staff does not correspond to this figure, as the courts are currently struggling with understaffing. The main reason for this is the inadequate financial remuneration of employees in the state and public administration, with the gross starting salary of a Senate assistant being EUR 865.50 and the gross salary of a senior judicial officer (a university-educated person) is EUR 1,257.50. In the long term, there is no interest in these positions on the part of job seekers, precisely because of insufficient financial evaluation, and this problem is most acute in the Bratislava region. In addition, the implementation of the judicial map, which included the establishment of administrative courts, has worsened the already existing understaffing due to the transfer of some civil servants to the newly established administrative courts.

We refer to the preliminary results of a survey conducted by the Department of Justice in April – May 2024, which shows just the opposite of what the Report concludes.

The court map does not work well either in general or in concreto, as the accessibility of the courts has been enormously complicated (traffic situation, financial burden for citizens), the costs for the court seats and workplaces have increased (mail delivery is delayed, i.e. forwarding of files, documents, transportation of judges and assistants to hearings in other districts), i.e. the court map has put an extreme burden on the state's economy.

Court proceedings have slowed down due to with correct designation of the statutory judge, complications in guardianship cases and in the criminal agenda (criminal emergency). The judges' warnings during the drafting of the laws on the new court map about the slowdown of court proceedings and the negative impact on the timeliness and quantity of decisions due to the lack of professional staff of judicial departments have been fulfilled to the fullest.

Ironically, although the Report (paragraph 52) refer to the Declaration of the nine members of the Judicial Council of 06 February 2024, that Declaration absolutely contradicts the statement of the Slovak representatives of the European Commission (as detailed above), who drafted the Report, that the reformed judicial map is generally working well.

Nor can we agree with the statement in the Report (Efficiency) that “The justice system continues to face challenges in terms of its efficiency, however some progress is visible in administrative proceedings”. Again, it is not at all clear, based on which specific documents the authors of this Report reached the above conclusions, since the footnote reference (79, 80) refers to information obtained during the visit to Slovakia from the Ministry of Justice of the Slovak Republic, without specifying the year of these visits.

The Administrative Court in Bratislava started its operation 01 June 2023 with only 7 judges (out of the planned number of 44). In the first month of operation, the number of judges increased to 18, after more than a year there are 33 judges, but there are only 30 judges in office, which means an enormous burden in deciding a huge number of cases taken over from the regional courts (5,776 cases plus the cases that as of 01 June 2023 were at the court of cassation, which is approximately another 1,000 cases), and new cases delivered to the Administrative Court in Bratislava since 01 June 2023.

Hence, after more than a year of operation (since 01 June 2023), the Administrative Court in Bratislava is till understaffed: there are still 11 judges and 24 senior court officials missing (this court has only 10 senior court officials out of the planned 34), there are no recorders and court secretaries, and therefore it is logical that the newly established administrative courts cannot actually handle (decide) the monthly number of cases and objectively reduce the number of pending cases due to the absolute lack of staffing.

The European Commission's Report does not mention the fact that the Regional Court in Bratislava had a proper specialisation of administrative justice until 31 May 2023, and this was also the case at the time of the preparation of the "judicial map" in 2020, so this argument about specialisation for the creation of the "judicial map" was misleading from the beginning.

Similarly, when assessing the "performance" of the newly established administrative courts, the authors of the Report failed to take into account the fact that only two judges were transferred from the Administrative Collegium operating at the Regional Court in Bratislava until 01 June 2023 to the Administrative Court in Bratislava and since judges from other courts do not apply for the selection procedures, but only people who have never worked in the judiciary (lawyers and other legal professions) they need time to adapt, since they do not master judicial skills and have to understand how the Senate works, or literally learn to be judges, which really slows down the decision-making in administrative cases.

The European Commission's report also does not address the enormous understaffing, particularly at the Administrative Court in Bratislava, and we therefore point out that not enough candidates apply for the selection procedures for senior court officials because of the low financial remuneration, there is no interest in these positions in Bratislava, and after more than a year of the existence of this court, there is still a shortage of 24 senior court officials, and therefore it is necessary to increase the salaries of the administrative staff in the courts so that the courts are competitive in the labour market and attract more candidates (high-quality candidates).

The report of the European Commission does not even reflect the fact that the Bratislava administrative court was not prepared for the independence of the administrative court system because of deep understaffing; it fails to mention that originally there was not even supposed to be an administrative court in Bratislava (it was Nitra and later in Trnava), as Mária Kolíková started talking about Bratislava only in 2022, despite the fact that the "court map" was supposedly prepared from 2020.

We would like to point out that all three administrative courts (in Bratislava, Banská Bystrica and Košice), as well as the Supreme Administrative Court of the Slovak Republic, reside in buildings rented from business entities, which places a disproportionate burden on the state budget, while the leased buildings are not up to the standards of any of the three powers in the state, even after costly renovations have been carried out.

We also point to the long-standing, constantly recurring problem of inadequate material equipment of the court (computer equipment is outdated, lack of printers), which is even more significant after the implementation of the court map.

To conclude on this part, in view of the above, we have to state that the Report contains a number of biased and incorrect conclusions, apparently because it was not drawn up after a thorough analysis of the objective state of affairs which it assesses.

On the offence of bending the law under the provisions of Section 326a of the Criminal Code

European Commission evaluation

In the **Report**, the European Commission stated that: *"Changes to Code of Criminal Procedure raise further concerns about the offence of bending the law."*[15]*) "With regard to the recommendations addressed to Slovakia in the 2023 Rule of Law Report, Slovakia has generally: (...) made no progress in ensuring that sufficient safeguards are in place and properly respected in cases where judges have to be held criminally liable for the offence of 'bending the law' in relation to their judicial decisions, (...)".*[16])

The European Commission further noted that in its 2022 and 2023 Rule of Law Reports, it recommended that Slovakia ensures: *"(...) that sufficient safeguards are in place and properly respected for cases where judges have to be held criminally liable for the offence of bending the law in relation to their judicial decisions."*[17]). While a judge does have the power to ask the Judicial Council to "discontinue criminal proceedings", according to the European Commission, this can only happen after charges have been filed, which means that the judge may be in custody at the time of the Judicial Council vote.[18]) According to the European Commission, the new wording of the Code of Criminal Procedure also "may suggest" that the content of court decisions may be subject to prosecution for offences other than bending the law, which raises some uncertainty in the application of this provision.[19]) In this respect, the European Commission pointed to the wording of section 9 par. 2 of the Code of Criminal Procedure, according to which the prosecution of a judge must be discontinued or the case referred for a disciplinary hearing only if the act of which the judge is accused cannot be legally assessed as other criminal offence[20]). Further, the European Commission noted that the amendments to the Code of Criminal Procedure limited the judge's right to request the Judicial Council to "vote to discontinue criminal proceedings", as under the current legislation, unlike the previous one, a judge can only do so within 60 days of receiving the "decision on the indictment".[21]) The European Commission concluded that: *"Criminal proceedings adversely affect judges not only because the investigation itself is a burden, but also because of the lack of clarity and safeguards, making the provision in question vulnerable to potential abuse, which has an intimidating effect on the independent decision-*

[15]) Report, p. 1
[16]) Report, p. 2
[17]) Report, pp. 7 and 8
[18]) Report, p. 8
[19]) Report, p. 8
[20]) Report, footnote 41 on p. 8
[21]) Report, p. 8

making of judges. Criminal proceedings against a judge are also a relevant aspect in the eventual vetting of a judge."[22])

Based on these conclusions, the European Commission recommended that Slovakia: *"(...) ensures that sufficient safeguards are in place and properly respected for cases where judges have to be held criminally liable for the offence of bending the law in relation to their judicial decisions. (...)."*[23]*)*

Opinion:

The European Commission states in this part of the Report that a judge is entitled to request the Judicial Council to "discontinue criminal proceedings", or "to vote to discontinue criminal proceedings" being conducted for the offence of bending the law under section 326a of the Criminal Code. In this section of the Report, the European Commission confuses two different terms – criminal proceedings and prosecution – which have different meanings. A criminal proceeding is a proceeding under the Code of Criminal Procedure and a criminal prosecution is the period from the initiation of a criminal prosecution until the final judgment or other decision of a law enforcement body or court on the merits of the case.[24]) The accused (even if the accused is not a judge) is not entitled to request that a "criminal proceeding" or "prosecution" to be discontinued unless it is against him or her, however only on the merits.[25]) The accused can only seek dismissal of his or her accusation[26]), i.e. his or her own prosecution. The accused may do so by ordinary[27]) and extraordinary[28]) remedies, which are decided in the preparatory proceedings by the public prosecutor[29]) or the General Prosecutor[30]).

But what is much more important, the Judicial Council does not have the power to quash the accusation of a judge (to discontinue his or her "criminal proceedings") for the offence of bending the law under the provisions of Section 326a of the Criminal Code, as the European Commission states incorrectly. The Judicial Council may, subject to a motion of the accused judge, only oppose his or her prosecution for an act legally qualified as a criminal offence of bending the law under the provisions of Section 326a of the Criminal Code. However, such a decision of the Judicial Council is not a decision on the merits of prosecuting the judge for (any) criminal offence. Only the criminal law enforcement bodies are entitled to decide on this issue in criminal preparatory proceedings, and only the general courts of the Slovak Republic are entitled to decide on this issue in court proceedings. The purpose of the Judicial Council deciding whether to consent to the prosecution of a judge for the offence of bending

[22]) Report, p. 8
[23]) Report, p. 2
[24]) According to the provisions of section 10 par. 14 of the Code of Criminal Procedure
[25]) Under the provisions of section 199 par. 1 of the Code of Criminal Procedure
[26]) Pursuant to the provisions of section 206 par. 1 of the Code of Criminal Procedure
[27]) A complaint under the provisions of section 185 et seq. of the Code of Criminal Procedure
[28]) A motion to quash final decisions of police officer and prosecutor
[29]) Under the provisions of section 190 par. 2(a) of the Code of Criminal Procedure
[30]) Pursuant to the provisions of section 363 par. 1 of the Code of Criminal Procedure

the law under section 326a of the Criminal Code is not to protect a particular accused judge from unlawful prosecution, but to protect the judiciary as a whole from unjustified interference by the executive (law enforcement agencies) with the judiciary independence. Therefore, even if the Judicial Council disagrees to the prosecution of a judge for an act legally qualified as a criminal offence of bending the law under the provisions of Section 326a of the Criminal Code, it does not mean that this act cannot be legally qualified as other offence[31]) for which the law enforcement authorities may prosecute the judge even after the Judicial Council has expressed its disagreement. For this reason, section 9 par. 2 of the Code of Criminal Procedure provides that the prosecution of a judge for an act legally qualified as a criminal offence of bending the law pursuant to the provisions of Section 326a of the Criminal Code may be discontinued after the Judicial Council has expressed its disagreement with the prosecution only if the offence cannot be assessed as a different criminal offence.

The statement of the European Commission that a judge may submit a motion to the Judicial Council to disapprove his or her prosecution for the offence of bending the law only after the prosecutor has filed an indictment against the judge for this crime is also contrary to the valid and effective legal order of the Slovak Republic. The provisions of section 207a par. 3 of the Code of Criminal Procedure clearly state that the accused judge has the right to do so within 60 days from the delivery of the accusation order or from the delivery of the notification on the change of legal qualification. However, neither an accusation nor a change of legal qualification can be confused with an indictment. Each of these acts of criminal proceedings has a different meaning and takes place at a different time. The filing of an accusation initiates the prosecution of a particular person, the accused[32]), the notice of change of legal qualification by the police officer alerts the accused that the act for which he or she has been accused of is a different or an additional offence[33]), and the indictment is filed by the public prosecutor with the court if the results of the investigation or summary investigation sufficiently justify bringing the accused before the court[34]). It is therefore clear that a judge can ask the Judicial Council to disagree to his or her prosecution for the offence of bending the law from the moment he or she is charged with it, not only after he or she has been charged of it by the prosecutor, as the European Commission incorrectly states.

The Judicial Council does not consider it a problem that an accused judge may request the Judicial Council to oppose his or her prosecution for the offence of bending the law under the provisions of section 326a of the Criminal Code "only" in 60 days of the date on which he or she was accused of that offence, or, as the case may be, from the date on which the offence with which he or she is charged was reclassified as this offence. This is so not only because such a period is considered sufficient for the accused judge to make such an application if he or she believes that the law enforcement authorities are prosecuting him or her for a legal opinion he or she has expressed in his or her decision-making, but particularly because the

[31]), e.g. as a criminal offence of abuse of power of a public official under the provisions of Section 326 par. 1 of the Criminal Code, or the offence of accepting a bribe pursuant to the provisions of Section 329 par. 1 of the Criminal Code, etc.
[32]) see section 206 par. 1 of the Code of Criminal Procedure
[33]) see section 206 par. 6 of the Code of Criminal Procedure
[34]) see section 234 par. 1 of the Code of Criminal Procedure

real problem of the offence of perverting the law under section 326a of the Criminal Code lies elsewhere. This offence, as regulated in the provisions of section 326a par. 1 of the Criminal Code, is contrary to the Constitution and is also a tool by which the executive power can directly interfere with the independence of the judiciary. **In this respect, the Judicial Council fully agrees with the conclusion of the European Commission that the provision of Section 326a of the Criminal Code is prone to potential abuse, which has an intimidating effect on the independent decision-making of judges. However, this defect in the provision of Section 326a of the Criminal Code cannot be remedied in any other way than by repealing it,** in particular for the following reasons:

All human beings are equal in rights (Article 12 par. 1 of the Constitution). This also apply to judges, who have the same rights and obligations as everyone else; i.e., they also bear responsibility for their actions like any other person, including the criminal liability. However, exceptions may be made to the constitutional principle of equality of people before the law in justified cases if this is necessary (for example) to ensure the functioning of constitutional bodies or to fulfil another public interest. Such a legal and legitimate exception is, for example, the immunity (indemnity) of the judges of the Constitutional Court of the SR against criminal prosecution for their decision-making activities, which is intended to protect the Constitutional Court of the SR as a whole against interference by the executive power in the independent exercise of its jurisdiction (Article 136, par. 1 of the Constitution). Judges of the general courts of the Slovak Republic enjoyed a similar guarantee, as their prosecution had to be approved by the Constitutional Court of the SR pursuant to Article 136 par. 2 and 3 of the Constitution as in effect until 31 August 2014. We have to emphasise that the Constitutional Court's consent to the prosecution of a judge did not protect the judge as an individual, but the judiciary as a whole. However, this constitutional guarantee was deleted from the Constitution by Constitutional Act No. 161/2014 Coll., amending and supplementing the Constitution of the Slovak Republic No. 460/1992 Coll., as amended, in effect from 01 September 2014.

At the same time, on 01 January 2021, Act No. 312/2020 Coll. on the execution of decisions on seizure of property and administration of seized property and on amendment and supplementation of certain acts (hereinafter referred to as “Act No. 312/2020 Coll.”) entered into effect, which (among other things) introduced into the Criminal Code the provision of Section 326a, paragraph 1 of which modified the basic facts of the criminal offence of bending the law as follows: *"Whoever, who as a **judge**, associate judge or arbitrator of an arbitral tribunal**, arbitrarily applies the law in making a decision** and thereby harms or favours another, shall be punished by imprisonment for one to five years."* The drafter of the law
No. 312/2020 Coll., which was the Ministry of Justice on behalf of the Government of the Slovak Republic, stated in the explanatory memorandum to the draft of this law [Parliamentary Press No. 195[35]) delivered to the National Council of the Slovak Republic

[35]) Available online at the official website of the National Council at: https://www.nrsr.sk/web/Default.aspx?sid=zakony/cpt&ZakZborID=13&CisObdobia=8&ID=195

(hereinafter referred to as the "National Council") on 28 August 2020 (hereinafter referred to as "Parliamentary Press 195"), that the facts of this offence: *"(...) does not penalise the actions of a judge, assisting judge or arbitrator based on his or her legal opinion supported by the law even if it was assessed by a superior court, court of appeal or similar court of a higher instance deciding on the case as incorrect, insufficiently reasoned or arbitrary as to the sufficiency of the reasons given in the reasoning, but it exclusively penalises arbitrary decisions not supported by the law"* (Parliamentary Press 195, explanatory memorandum, p. 40). However, this ambition was not fulfilled by the wording of Act No. 312/2020 Coll., which entered into effect on 01 August 2021.

As of 01 August 2021, the judges of the general courts of the Slovak Republic not only do not enjoy guarantees protecting them from the executive power interfering with the independent exercise of their constitutional powers or even sanctioning them for the independent exercise of these powers, but what's more, an instrument has been introduced into the legal order of the Slovak Republic that allows the executive power (law enforcement bodies) to sanction the judges of the general courts of the Slovak Republic directly for the way they exercised their decision-making power. This instrument is the aforementioned provision of section 326a par. 1 of the Criminal Code, which allows a judge, assisting judge and arbitrator to be prosecuted if he or she "arbitrarily applies the law in making a decision and thereby harms or favours other person".

At the same time, it is not clear why the legislator established only judges, assisting judges and arbitrators as the subject of this offence and not all public officials (section 128 par. 1 of the Criminal Code), who have the power to decide on the rights and obligations of natural and legal persons, including police officers and prosecutors (the criminal liability of arbitrators who are not a public authority could be regulated simply by defining them for the purposes of the Criminal Code in the provision of Art.128 par. 1 of the Criminal Code as public officials if they decide on the rights and obligations of natural and legal persons). In the explanatory memorandum to the draft Act No. 312/2020 Coll., the Ministry of Justice justified the exclusion of other persons who, on behalf of a public authority, decide on the rights and obligations of natural and legal persons as follows: "*Compared to public authorities of an executive nature, i.e. exercising their powers within the executive branch of power (...) or the legislative branch of power, courts are independent, they are not accountable to the electorate or to other public authorities, the principle of subordination does not apply, and their actions are not reviewed by another branch of power. (...) Moreover, the decisions of public authorities, which are constitutionally empowered to decide on the rights and obligations of the addressees of the law (...) can in all circumstances be subject to judicial review (...) – whether before the general courts or the Constitutional Court. In other words, the actions of the executive branch of power (...) or the legislative branch of power (...) are subject to judicial review. The decisions of the courts are subject at most to review by another judicial instance or another judicial body. Thus, there is no other branch of power reviewing the decision-making of the courts. The separation of judges and assisting judges from the executive and legislative decision-making bodies is justified both by the nature of the activity*

they perform and by the absence of control of the decision-making activity by another branch of power. The separation and the threat of criminal sanction is thus justified (...)" (Parliamentary Press 195, explanatory memorandum, pp. 41 and 42). Thus, the Ministry of Justice not only forgot that protection against arbitrary interpretation and application of law by general courts in the Slovak Republic is ensured by the Constitutional Court of the SR, but also admitted that the aim of the proposed legislation is to subordinate the decision-making activity of general courts to the review of the executive power, thus **interfering with the independence of the judiciary**.

It is also not clear why the legislator protects only the decision-making activities of the judges of the Constitutional Court with immunity (Article 136 par. 1 of the Constitution), but not the decision-making activities of the judges of the general courts of the Slovak Republic, although there is no difference in their decision-making activities in terms of interpretation and application of the law (a general court judge also protects constitutionality by providing protection of the parties' fundamental rights at the statutory level).

Thus, the legislator introduced legislation that allows the prosecutor to prosecute a judge for his or her legal opinion if he or she assesses it as an "arbitrary application of law". This can lead to situations that are absolutely unacceptable from a constitutional point of view, where the prosecutor files an indictment against the accused, the courts acquit the accused from the indictment and the prosecutor prosecutes the judges who did so for the offence of bending the law, because he or she assesses their decision to acquit the accused from the indictment as an "arbitrary exercise of the law", which favoured the accused. The legislator introduced such legislation without providing guarantees to the judges of the general courts that the provision of Section 326a of the Criminal Code would not be abused by the law enforcement bodies to interfere with their independent position and their decision-making activities.

Act No. 40/2024 Coll., amending Act No. 300/2005 Coll. Criminal Code as amended, amending and supplementing certain acts, supplemented the Code of Criminal Procedure with effect from 20 March 2024 with the provision of Section 9 par. 2, according to which the prosecution of a judge for the offence of bending the law under section 326a of the Criminal Code cannot continued and must be stopped if the Judicial Council opposes the prosecution of the judge for this offence. Pursuant to the provisions of Section 27hi of Act No. 185/2002 Coll. on the Judicial Council of the Slovak Republic and on Amendment and Supplementation to Certain Acts (hereinafter referred to as the "Judicial Council Act"), the Judicial Council decides whether to oppose the prosecution of a judge for the offence of bending the law pursuant to the provisions of Section 326a of the Criminal Code subject to the proposal by a judge accused of this offence (par. 1), in closed session (par. 2) and within 30 days from the date on which the judge has delivered his or her proposal (par. 3).

However, even such legal safeguards against interference with the independence of the judiciary cannot be considered sufficient.

This is because the provision of Section 326a of the Criminal Code is not in conformity with Articles 49 and 141 par. 1 of the Constitution. Thus, in the proceedings on a motion for disapproval of the prosecution of a judge for the offence of bending the law under the provisions of section 326a of the Criminal Code, the Judicial Council is obliged to decide whether the prosecution of a judge for this offence in a particular case might not seem as an interference with the judiciary's independence from the side of the executive, even though it is aware that the provision of section 326a of the Criminal Code as such is contrary to Articles 49 and 141 par. 1 of the Constitution. The Judicial Council must respect the fact that a legal standard is presumed to be constitutional until the Constitutional Court of the SR, in proceedings under Article 125 par. 1 of the Constitution does not declare it incompatible with the Constitution. However, it is unacceptable for the Judicial Council to tolerate for a long period of existence of a legal standard in the legal order, which it assessed as being contrary to the Constitution and allowing the executive power to interfere with the independent position of the judiciary.

The provision of Section 326a of the Criminal Code is inconsistent with Article 49 of the Constitution for the following reasons:

According to Article 49 of the Constitution, only the law shall determine what conduct constitutes a criminal offence and what punishment or other injury to rights or property may be imposed for its commission. This article is the constitutional expression of the principle *nullum crimen sine lege, nulla poena sine lege* (no crime without law, no punishment without law). According to legal theory, this principle, which is an expression of the legality of criminal law and is a rule of constitutional law, must be understood in terms of four requirements: (1) conduct may be defined as a criminal offence by an act, not by subordinate or internal legislation *(nullum crimen sine lege scripta*); (2) **conduct which is defined as a criminal offence by an act must be expressed in the statute in a precise, clear, intelligible and sufficiently detailed manner, so that the legal standard addressee had no doubt about under what conditions his or her conduct becomes criminal** *(nullum crimen sine lege certa*), (3) analogy, which extends criminal liability to the detriment of the legal standard addressee, is prohibited *(nullum crimen sine lege stricta*), (4) retroactivity, which makes criminal conduct that was not criminal at the time when the legal standard addressee committed it, is prohibited *(nullum crimen sine lege praevia*) (Číč, M. et al. Commentary to the Constitution of the Slovak Republic, Žilina: EUROKÓDEX, s. r. o., p. 343-344).

Thus, it is not sufficient if an action is designated as criminal by law, it must also be clear from the law what specific action is criminal, or what specific action the law prohibits under threat of criminal sanction *(nullum crimen sine lege certa*). Only then does the criminal standard addressee know in what legally permissible way he or she can act. The constitutional unsustainability of a law that allows interference with fundamental rights and freedoms on the basis of vague and unclear terms it uses, has been generally addressed by the Constitutional Court of the SR in its ruling PL ÚS 29/05 of 03 September 2008, published in the Collection of Rulings and Resolutions of the Constitutional Court (hereinafter referred to as the “Coll. of

the Constitutional Court") under number 6/2008, and in relation to the constitutional unsustainability of using such terms directly in the facts of the offences, then in the ruling PL. ÚS 5/2017 of 09 January 2019, published under number 1/2019 Coll. of the Constitutional Court.

The provision of section 326a par. 1 1 of the Criminal Code does not comply with the constitutional requirement of defining the conduct which the legislator considers criminal in precise, clear and comprehensible terms since the normative feature "arbitrary application of law" mentioned therein is vague and does not allow the legal standard addressee (the judge) to recognize when his or her decision-making can already be qualified as an arbitrary application of law and when it is not. It should also be pointed out that, strictly speaking, the judge does not "exercise" the law, but applies (uses) it, since only the (subjective) right holder can apply it, i.e. a natural or legal person, or the state in private-law relations, can apply the (subjective) right.

This is particularly true in a situation where the judge is entitled, under certain circumstances, to rule even in the absence of express statutory legislation, based on the principles of general justice (Art. 4 par. 2 of Act No. 160/2015 Coll. of the Civil Procedure Code), or even contrary to the law(*contra legem*), in case of reprobation of proceedings contrary to good morals (ruling of the Constitutional Court of the Czech Republic IV. ÚS 1735/07 of 21 October 2008, paragraph 40 of the grounds). This contradicts the intention pursued by the legislator when introducing the criminal offence of bending the law under the provision of Section 326a of the Criminal Code, to punish a judge for making decisions not supported by the law (see the quoted part of the explanatory memorandum to draft act No. 312/2020 Coll., referred to in paragraph 6 of the grounds of this resolution). A judge of a general court cannot be punished for an action ordered by law or resulting from a constitutionally consistent interpretation of the law by the Constitutional Court of the SR. However, the provision of Section 326a of the Criminal Code allows that.

The provision of Section 326a of the Criminal Code is not consistent with Article 141 par. 1 of the Constitution due to the following reasons:

Pursuant to Article 141 par. 1 of the Constitution, in the Slovak Republic the judiciary is exercised by **independent** and impartial courts. The Constitutional Court of the SR characterizes the concept of judicial independence as follows: *"(...) it includes decision-making without any legal or factual influence on the exercise of their jurisdiction, as well as on their decision-making process, and* ***the independence of judges as their insubordination to anyone else in the exercise of their functions.*** *(...) Consequently, it cannot be regarded as a 'privilege' of the judiciary, but (on the contrary) as* ***a prerequisite for the fulfilment of its responsibility for impartial and fair judicial decisions****."* (ruling of the Constitutional Court of the SR PL. ÚS 52/99 of 04 June 2000, published under No. 36/2000 Coll. of the Constitutional Court).

It is clear from the cited explanatory memorandum to draft act No. 312/2020 Coll. that the reason why the legislator decided to introduce the offence of bending the law pursuant to the provisions of Section 326a par. 1 of the Criminal Code, was to make the judiciary subject to the control from the side of the executive power, as the judiciary was the only uncontrolled power in the state. The fact that the executive power, under the current state of the law, can indeed control the judiciary through law enforcement bodies, and how it can control it, has already been noted by the Judicial Council above. The provision of Section 326a of the Criminal Code thus contravenes Article 141 par. 1 of the Constitution, as it allows law enforcement bodies to interfere with the independence of the judiciary by prosecuting judges for decisions which they assess as "arbitrary application of law", while they themselves do not bear any criminal liability for such actions (arbitrary application of law), since the legislator has established only judges, assisting judges and arbitrators as a special subject of the criminal offence of bending the law pursuant to the provision of Section 326a of the Criminal Code. The law enforcement bodies have thus become de facto and de jure the controllers of the "correct" decision-making of the general courts.

The fact that the potential to arbitrarily interfere with the independence of the judiciary is inherent in the provisions of section 326a of the Criminal Code is indicated by the fact that after the Judicial Council acquired the power to decide whether or not to consent to the prosecution of a judge for the offence of bending the law under the provisions of section 326a of the Criminal Code, it did not give any such consent. On the contrary, by Resolution NZ 3/2024 of 28 May 2024 and Resolution NZ 6/2024 of 7 May 2024 the Judicial Council disagreed to the prosecution of the three judges for the offence of bending the law under the provisions of section 326a of the Criminal Code, concluding that the law enforcement bodies had not identified any such specific conduct in the acts of which the judges were accused, which would fulfil the statutory element of the offence of "arbitrary exercise of the law" (for more details, see page 9 of the resolution of the Judicial Council of 28 May 2024, No. NZ 3/2024[36]) and page 13 of the Judicial Council's resolution of 07 June 2024, No. 6/2024[37]).

The way the law enforcement bodies have interpreted these cases and applied the provision of Section 326a of the Criminal Code also shows that the safeguard which, according to the explanatory memorandum to draft act No. 312/2020 Coll., was supposed to protect judges from criminal sanctions for their decision-making activities and which was supposed to consist in the following, does not work at all in practice: *"In order to infer criminal liability, the element of arbitrariness in decision-making must be in principle established by the judicial authority deciding the case (Court of Appeal, Court of Final Appeal, other similar court, Constitutional Court of the SR, European Court of Human Rights, Court of Justice of the European Union, etc.) (...)*" (Parliamentary Press 195, Explanatory Memorandum, p. 40).

[36]) Available on the official website of the Judicial Council via the following link: https://zasadnutia.sudnarada.sk/data/att/16019.pdf
[37]) Available on the official website of the Judicial Council via the following link: https://zasadnutia.sudnarada.sk/data/att/16034.pdf

When deciding on the motions by the respective judges to oppose their prosecution for the offence of bending the law under the provisions of Section 326a of the Criminal Code, the Judicial Council found that the law enforcement bodies were prosecuting all of these judges because they had issued judicial decisions, despite the fact that such decisions had not been annulled by the superior courts on the grounds of arbitrariness (for more details, see page 10 of the resolution of the Judicial Council of 28 May 2024, No. NZ 3/2024, and page 15 of the resolution of the Judicial Council of 07 June 2024, No. 6/2024).

The Judicial Council points out that during the previous 8th term of the National Council, by its Resolution No. 63/2023 of 16 February 2023, pursuant to the provisions of section 4 par. 1 (c) of the Act on the Judicial Council, it has submitted to the Minister of Justice of the Slovak Republic an initiative to delete the Section 326a from the Criminal Code and recommended to include this legislation change in the 2023 plan of legislative tasks of the Government of the Slovak Republic. The Ministry of Justice has not informed the Judicial Council how it has dealt with this complaint. At the same time, the changes proposed to the Minister of Justice of the Slovak Republic on the basis of the Resolution of the Judicial Council No. 63/2023 of 16 February 2023 have not been reflected in the legislative activity of the Ministry of Justice. The legislative change initiated by the Judicial Council did not even become the subject of the latest amendment to the Criminal Code – the government draft amending Act No. 300/2005 Coll. of the Criminal Law, as amended, amending and supplementing certain acts, which was delivered to the National Council on 06 December 2023 as parliamentary press number 106[38]).

On the power of the General Prosecutor to annul final decisions of a police officer and a prosecutor under the provisions of section 363 et seq. of the Code of Criminal Procedure

European Commission evaluation

In its Report, the European Commission stated that: *"Rather than addressing concerns by limiting the General Prosecutor's use of discretion to quash investigations into grand corruption cases, the General Prosecutor's oversight powers over grand corruption investigations and prosecutions have been strengthened."*[39] *) "With regard to the recommendations addressed to Slovakia in the 2023 Rule of Law Report, Slovakia has generally: (...) made no progress in taking measures to improve coordination between law enforcement bodies and in ensuring the objectivity of prosecutorial decisions, nor in bringing forward legislative changes that would limit the General Prosecutor's power to overrule prosecutorial decisions, in order to promote the achievement of conclusive results in cases of grand corruption, (...)".*[40])

[38]) Available online at the official website of the National Council through the following link: https://www.nrsr.sk/web/Default.aspx?sid=zakony/cpt&ZakZborID=13&CisObdobia=9&ID=106
[39]) Report, p. 1
[40]) Report, p. 2

The European Commission further stated that: *"As an extraordinary remedy, the General Prosecutor shall have the power to annul any final decision of lower-ranking prosecutors or the police taken in the preparatory proceedings if he or she considers such decision contrary to the law, without being required to state the reasons for such decision (section 363 et seq. of the Code of Criminal Procedure). There is no possibility of judicial review of such decisions or any other remedy. European standards provide that stakeholders or victims should be able to challenge prosecutors' decisions concerning non-prosecution. In addition, European standards on autonomy and internal independence within the prosecution service require a clear mechanism for lower-ranking prosecutors to appeal against a higher-ranking prosecutor's delegation or instructions."* The European Commission also pointed out that the Constitutional Court of the SR failed to satisfy the constitutional complaint by which the President of the Slovak Republic sought a declaration that the provisions of the Code of Criminal Procedure, which regulate the power of the General Prosecutor to annul final decisions of a police officer and a prosecutor, are incompatible with the Constitution, however, the Constitutional Court of the SR did not address the issue of the safeguards required by the "European standards" in its ruling".[41]) The European Commission also added that the Constitutional Court of the SR has not yet ruled on the "second constitutional complaint", which *"(...) was filed by the former President of the Slovak Republic Čaputová and which requests a review of the constitutionality of the activities of the General Prosecutor's Office in connection with the use of Section 363 (...)".*[42])

Based on the above conclusions, the European Commission recommended Slovakia to: *"(...) ensure the effective and independent investigation and prosecution of cases of grand corruption in order to achieve conclusive results, including by preventing an undue interference in such cases and by limiting the use of the powers of the General Prosecutor to overrule the final decisions of investigators and prosecutors, (...)".*[43])

Opinion:

The provisions of section 363 et seq. of the Code of Criminal Procedure provides for an extraordinary remedy, on the basis of which the General Prosecutor may annul final decisions issued by a police officer or a prosecutor in criminal preparatory proceedings, if they or the prior proceedings violated the law. Violation of the law is understood as a violation of both the substantive provisions of the Criminal Code and the procedural provisions of the Code of Criminal Procedure. This extraordinary remedy was included in the Code of Criminal Procedure by the recodification of criminal law with effect from 01 January 2006. The legislator justified its inclusion in the Code of Criminal Procedure on the grounds that *"(...) it is necessary to allow, in cases in which the court has not yet acted and (...) which to that extent is based on a defective procedural procedure, that the illegality is corrected by the General Prosecutor." This will both make the procedure more expeditious and relieve the*

[41]) Report, p. 10
[42]) Report, p. 10
[43]) Report, p. 2

courts of the burden of other new forms of proceedings and decision-making (diversions), and the contradictory main hearing itself will be procedurally more demanding." (Parliamentary Press 720, explanatory memorandum, p. 69)[44]).

The quoted part of the Report shows that the European Commission assumes that limiting the power of the General Prosecutor to annul final decisions taken by a police officer or a prosecutor in a criminal preparatory procedure in violation of the law would result in more convincing clarification of "cases of grand corruption", better coordination between the various law enforcement bodies and ensure the objectivity of prosecutorial decisions. The European Commission does not explain how the limitation of the extraordinary remedy, which is intended to guarantee the parties to criminal proceedings – the accused, the victim and the stakeholder[45]) – that the criminal proceedings will be conducted lawfully and without violating their procedural rights, can contribute to the changes in quality, and which does not have the capacity to stop a "grand corruption investigation", as it is based essentially on the cassation principle, whereby the General Prosecutor, if he or she concludes that the contested decision of a police officer or prosecutor has violated the law, "merely" annuls such decision and orders the police officer or prosecutor to proceed with the case and make a decision.[46]) Nothing prevents the police officer or the subordinate prosecutor from continuing the "grand corruption investigation", however they must do so lawfully and with full respect for the procedural rights of the parties to the criminal proceedings.

In the quoted part of the Report, the European Commission also suggests that the General Prosecutor uses his or her power to overrule final decisions of police officers and prosecutors to "unreasonably" interfere in "investigations of cases of grand corruption". **Such a statement is, in the opinion of the Judicial Council, of an explicitly political nature, as it is not based on any concrete data and should therefore not be included at all in a professional document dealing with law and the rule of law.**

As pointed out by the European Commission, the Constitutional Court of the SR has also commented on the constitutionality of the extraordinary remedy in its plenary ruling of 21 June 2023, No. PL. ÚS 1/2022-270, by pointing out that the decision of the General Prosecutor under the provisions of section 363 et seq. of the Code of Criminal Procedure is of procedural nature and after the contested decision has been annulled, the procedure under Section 367 par. 1 of the Code of Criminal Procedure should be followed, which **does not constitute an obstacle to the continuation of criminal proceedings**[47]). The legal condition for the annulment of a final decision of a prosecutor or a police officer in a preparatory procedure by the General Prosecutor is a violation of the law by the annulled decision or by the prior proceedings. The purpose is therefore to protect the legality of the preparatory proceedings. The principle of legality expressed in section 2 par. 1 of the Code of Criminal

[44]) Available online at the official website of the National Council through the following link: https://www.nrsr.sk/web/Default.aspx?sid=zakony/cpt&ZakZborID=13&CisObdobia=3&ID=720
[45]) see section 364 par. 1 of the Code of Criminal Procedure
[46]) see section 367 par. 1(b) of the Code of Criminal Procedure
[47]) paragraph 184 of the ruling

Procedure as the principle of prosecution on lawful grounds only, which includes the legality of the initiation of prosecution as well as the legality of the conduct of prosecution, is the most important principle of criminal procedure. This is not only a criminal procedural principle, but also a **fulfilment of the constitutional principle of legality, since criminal prosecutions can only be conducted in accordance with the law, and the achievement of its objective alone cannot sanctify any unlawful means**[48]). The fundamental right to other legal protection under Art. 46 par. 1 of the Constitution also includes the right of the person concerned to apply for protection of his or her rights to the competent prosecution authorities, including in accordance with the procedure under section 363 et seq. of the Code of Criminal Procedure, and this right corresponds to the obligation of the competent prosecution authorities to deal with such a complaint in accordance with the procedure established by law and to inform the person concerned of handling thereof. However, this right does not include the right of the person concerned to have his or her complaint satisfied by the competent prosecution authorities (I. ÚS 40/01, II. ÚS 168/03, III. ÚS 133/06, I. ÚS 15/2017).[49])

The Judicial Council fully agrees with the conclusions of the Constitutional Court of the SR.

If the European Commission points out that the Constitutional Court of the SR has not yet ruled on the "second constitutional complaint of the President of the Slovak Republic, by which she seeks an assessment of the constitutionality of the use of Section 363 of the Code of Criminal Procedure by the General Prosecutor, it is necessary to draw its attention to the fact that the President of the Slovak Republic filed a complaint on 12 September 2023 to the Constitutional Court of the SR to initiate proceedings[50]) under Article 128 of the Constitution about the interpretation of those provisions of the Constitution which, in her opinion, entitle the President of the Slovak Republic the control the General Prosecutor[51]). A competence dispute arose between the President of the Slovak Republic and the General Prosecutor as to whether the General Prosecutor is obliged to provide the President of the Slovak Republic with all decisions by which he or she has decided on the petition of the persons entitled under the provisions of section 363 et seq. of the Code of Criminal Procedure or not[52]). Thus, the question of whether the power of the General Prosecutor to annul final decisions of a police officer and a prosecutor is in accordance with the Constitution is not affected by the proposal of the President of the Slovak Republic to initiate proceedings about the interpretation of the Constitution, as the European Commission incorrectly states in its Report, and therefore the decision of the Constitutional Court of the SR on this proposal cannot have any impact on the conclusion on the compatibility of the provisions of sections 363 to 367 of the Code of

[48]) paragraph 149 of the ruling
[49]) paragraph 173 of the ruling
[50]) According to the provisions of section 42 par. 2(h) and section 147 of Act No. 314/2018 Coll. on the Constitutional Court of the SR and on Amendment and Supplementation to Certain Acts, the procedure about the interpretation of the Constitution pursuant to Article 128 of the Constitution is initiated on the basis of a petition, not on the basis of a constitutional complaint, as incorrectly stated by the European Commission in the Report.
[51]) The President asks for an interpretation of the Constitution in relation to the General Prosecutor. Available online: https://www.prezident.sk/article/prezidentka-ziada-o-vyklad-ustavy-v-suvislosti-s-generalnym-prokuratorom/

[52]) Ibid.

Criminal Procedure, which the Constitutional Court of the SR adopted in its plenary ruling of 21 June 2023, No. PL. ÚS 1/2022-270.

The European Commission's finding that the General Prosecutor is not obliged to give reasons for an order annulling a final decision of a police officer or prosecutor for being contrary to law. Pursuant to the provisions of section 162 par. 2 of the Code of Criminal Procedure, the law enforcement bodies (including the General Prosecutor) decide, unless the law provides otherwise or unless the decision is of a technical-organisational or operational nature, by way of a resolution. They decide by an order where the law expressly provides so. The provisions of section 363 et seq. The Code of Criminal Procedure does not stipulate what type of decision the General Prosecutor is entitled to use to overrule a final decision of a police officer or prosecutor, and such a decision is neither technical-organizational nor operational in nature. This means that in such case the General Prosecutor makes the decision by means of a resolution. Pursuant to the provisions of section 176 par. 1(d) of the Code of Criminal Procedure, unless the law provides otherwise, the resolution must contain a statement of reasons. As the provisions of section 363 et seq. do not provide otherwise, the General Prosecutor's resolution annulling a final decision of a police officer or prosecutor must contain a statement of reasons. At the same time, the Judicial Council is not aware of any case in which the General Prosecutor has ignored these statutory provisions and failed to give reasons for his or her resolution annulling a final decision of a police officer or a prosecutor. Finally, the European Commission itself does not mention any such case in its Report.

As regards the European Commission's statement that it is not possible to review such a decision of the General Prosecutor's Office in a court of law, the Judicial Council again refers to the plenary ruling of the Constitutional Court of the SR of 21 June 2023, No. PL. ÚS 1/2022-270, in the grounds of which the Constitutional Court of the SR stated that: *"In this context, an analogy may be drawn to the situation where the prosecutor, based on the results of the preliminary proceedings, if the results of the investigation or summary investigation do not sufficiently justify the accused's standing before the court, decides not to bring charges, and thus, for the reasons set out in the law, discontinues the criminal prosecution [with an authoritative statement of an indisputable situation corresponding to factual or legal innocence pursuant to Section 215 par. 1(a) to 1(c) of the Code of Criminal Procedure and constituting an obstacle to the final determination of the case], shall refer the case to other authority if it assesses that it is not a crime but an offence or an administrative offence. Such decisions by the prosecutor can neither be appealed against at the court, nor are reviewable by a court, while in this case we could speak (...) of an interference with the judicial power by denying it the final decision in the case.*[53]) *The inadmissibility of an appeal against a decision taken in an extraordinary appeal procedure does not constitute an interference with the right to judicial or other legal protection under Art. 46 par. 1 of the Constitution, it is quite the contrary. The extraordinary legal remedy seeks to remedy a violation of legality, thereby providing a different legal protection.*[54]*) If, by legally regulating*

[53]) paragraph 179 of the ruling
[54]) paragraph 172 of the ruling

the extraordinary remedy, the legislator allowed the review of the decision of the extraordinary appeal proceedings by another remedy, it would lead to iteration or a chain of remedies, which would make it impossible ad absurdum to ever achieve stability and immutability of decisions, and thus would grossly violate legal certainty (...). Therefore, the legislation on criminal procedure does not allow for the review of a decision from an extraordinary appeal procedure, neither in section 363 par. 3 of the Code of Criminal Procedure, nor in section 392 par. 2 of the Code of Criminal Procedure, according to which no appeal is admissible against the decision on the appeal.[55])

The Judicial Council fully agrees with the conclusions of the Constitutional Court of the SR.

Insofar as the Insofar as the European Commission refers to "European standards", according to which interested parties and victims should be able to challenge the prosecutor's decision "not to initiate criminal prosecution" (according to the Slovak Code of Criminal Procedure, these are resolutions on the dismissal of a case[56]) or on the discontinuation of criminal prosecution[57])), it is necessary to draw its attention to the fact that the victim can file a complaint against such decisions under the Slovak Code of Criminal Procedure[58]) and also the aforementioned motion for annulment of final decisions of a police officer or prosecutor[59]).

Insofar as the European Commission refers to "European standards" which require a mechanism allowing lower-ranking prosecutors to appeal against the assignment or instructions of a higher-ranking prosecutor, it should be pointed out that such a mechanism is already in place in Act No. 153/2001 Coll. on the Prosecutor's Office (hereinafter referred to as the "Act on Prosecutor's Office"). Pursuant to the provisions of section 6 par. 4 of the Act on the Prosecutor's Office, a subordinate public prosecutor is obliged to refuse to comply with an order if by complying with it he or she would commit a crime, offence other administrative offence or disciplinary offence; he or she is obliged to justify in writing the refusal to comply with the order. Pursuant to the provisions of section 6 par. 7 of the Act on the Prosecutor's Office, if a subordinate prosecutor considers the order to be contrary to a legal regulation or to his or her legal opinion, he or she may request in writing the superior prosecutor to withdraw the case from him or her. He or she must justify the request. The superior prosecutor grants the request and entrusts another prosecutor with the handling of the case or handles it himself or herself. At this point, the Judicial Council also finds it necessary to point out that in this case the European Commission appears to have confused the right of a party to criminal proceedings to appeal against certain decisions of law enforcement bodies and courts with the right of a subordinate prosecutor to refuse an order by a superior prosecutor which he considers to be contrary to the law or contrary to his or her conscience. This is precisely the kind of subordinate prosecutor power recommended by the "European standards" referred to

[55]) paragraph 171 of the ruling
[56]) see the provision of section 197 par. 1(d) of the Code of Criminal Procedure
[57]) see the provision of section 215 of the Code of Criminal Procedure
[58]) see the provision of section 185 par. 2, section 197 par. 3 and section 215 par. 6 of the Code of Criminal Procedure
[59]) see section 364 par. 1(d) of the Code of Criminal Procedure

by the European Commission in the Report[60]). After all, it would be a legal nonsense for a subordinate prosecutor to be able to challenge the decisions of a superior prosecutor by way of appeal. The subordinate prosecutor supervising the legality of criminal proceedings does not have the status of a party to the criminal proceedings, but the status of a state authority which decides on the rights and obligations of the parties to criminal proceedings in an authoritative manner. Therefore, there is no reason why a subordinate prosecutor should have the right to "appeal" a decision by which a superior prosecutor has decided on an appeal against his or her own decision in a preparatory criminal proceeding. The absurdity of such a procedural solution is evident if we imagine that instead of a subordinate and a superior prosecutor, a subordinate court could appeal against a decision by which a superior court decided on an appeal against its own decision.

Bratislava, 3 September 2024

[60]) see, for example, paragraph 43 of the Opinion of the Consultative Council of European Prosecutors (CCPE) of 23 November 2018, number 13, from which I quote: *"Clear mechanisms should be established to allow lower level prosecutors to appeal against the assignments or instructions of a superior prosecutor if they find those assignments or instructions to be unlawful or unjustified."*