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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

SLOVAK REPUBLIC

DRAFT OPINION

ON TWO QUESTIONS REGARDING THE ORGANISATION OF THE LEGAL PROFESSION AND THE ROLE OF THE SUPREME ADMINISTRATIVE COURT IN THE DISCIPLINARY PROCEEDINGS AGAINST LAWYERS

On the basis of comments by

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Ms Veronika HORRER (Expert)

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I. Introduction

1. By letter of 2 June 2021, Ms Mária Kolíková, the Minister of Justice of the Slovak Republic, requested an opinion of the Venice Commission on two questions regarding the organisation of the legal profession in the Slovak Republic and the role of the Supreme Administrative Court in the disciplinary proceedings against lawyers. The two questions were as follows:

Question one: *Would it be in accordance with the principles of the rule of law and democracy if the Supreme Administrative Court serves as a second instance appellate body reviewing non-final disciplinary decisions of the disciplinary body of the Slovak Bar Association (whereas at present only final decisions of the disciplinary bodies of the Slovak Bar Association are reviewed by the administrative judiciary)?*

Question two: *Would it be in accordance with the principles of the rule of law and democracy if the law allowed for the establishment of several professional chambers of attorneys or several Bar Associations based on the decision of attorneys themselves, reflecting either the regional principle or the sectorial principle (whereas at present only a single Slovak Bar Association with compulsory membership of attorneys is established)?*

2. Mr Nicos Alivizatos, Ms Monika Hermanns, and Ms Veronika Horrer (expert) acted as rapporteurs for this opinion.

3. On 9 and 10 September 2021, a delegation of the Commission composed of Mr Alivizatos and Ms Horrer, accompanied by Mr Dikov from the Secretariat, travelled to Bratislava and had meetings with the Ministry of Justice, the Supreme Administrative Court, the National Council, the Supreme Judicial Council, the Slovak Bar Association, as well as with lawyers, academics and representatives of civil society. The Commission is grateful to the Ministry of Justice for the excellent organisation of this visit.

4. This opinion was drafted on the basis of comments by the rapporteurs and the results of the visit to Bratislava. [Following an exchange of views with representatives of the authorities], it was adopted by the Venice Commission at its … Plenary Session (…2021).

II. Background

A. The scope of the opinion

5. As explained by the Minister of Justice, the contours of the future reform of the Slovak legal profession are still being discussed within the Ministry. Before preparing a more specific legislative proposal the Minister decided to seek assistance from the Venice Commission, and formulated two questions (see para. 1 above).[1]

6. The Venice Commission is grateful to the Minister for the opportunity to contribute to the reform process at such an early stage. At the same time, this form of assistance presents certain challenges. Without seeing a specific legislative proposal, it is more difficult for the Commission to obtain appropriate feedback from national stakeholders and to put the reform in the broader context. In such circumstances, the answers given by the Venice Commission will necessarily be of a rather general character. This opinion should be seen neither as a blank endorsement, nor as a blank disapproval of any future draft law which may originate from the Ministry. Once the Minister's proposals are transformed into a bill, the Venice Commission, if requested, will be

[1] To facilitate its task, the authorities provided the Venice Commission with the legislation currently in force and, most importantly, with the English translation of Act No. 586/2003 on the legal profession (CDL-REF(2021)066), and with the English translation of the explanatory note to the Minister's request for an opinion. The translation may not accurately reflect the original version on all points.

ready to assess it and to complement this opinion by commenting on the specific provisions contained therein.

B. The background and the stated rationale of the future reform

7. On 9 December 2020, the National Council of the Slovak Republic approved a substantial amendment of the Constitution together with a legislative package providing for a comprehensive judicial reform. The 2020 reform was a response of the new government (elected in February 2020) to a series corruption affairs, which revealed alleged links of some judges and prosecutors to big businesses, possibly unethical or corrupt behaviour, etc. This reform affected, in particular, the composition of the Judicial Council and of the Constitutional Court, provided for the verification of assets of all judges, removed judges' immunity against criminal prosecution, etc.[2] Some elements of the reform – such as a restructuring of the judicial map for the courts of the general jurisdiction – are still under preparation.

8. One of the elements of the 2020 reform was the introduction of a two-tier system of administrative courts with the Supreme Administrative Court of the Slovak Republic (the SAC) at its top. The SAC became operational as from 1 August 2021 and it is now the highest judicial authority in the field of the administrative justice.[3] Most importantly for the purposes of this opinion, according to the Constitution, the SAC will act as a disciplinary court for judges, prosecutors and, in cases stipulated by law, other professionals.[4]

9. The Government's political manifesto focused on the problems within the Slovak judiciary and the prosecution service and did not mention attorneys and other legal practitioners (hereinafter referred to as "lawyers"). However, according to the Minister of Justice, the lawyers did not escape the plight of corruption and/or unethical behaviour. Some of them had been allegedly involved in the corruption schemes. The public trust in the judicial system remained very low, and this reflected on the reputation of the legal profession. According to the Ministry, the Slovak Bar Association (the SBA) was a closed structure which did not seem to ensure sufficient accountability of its members. The Ministry argued that disciplinary proceedings were long and cumbersome, and the lawyers were rarely brought to liability due to the over-protective approach of the SBA. In the opinion of the Minister, the judicial reform would be incomplete if the legislation on the legal profession was left intact.

C. The current regulations and the outline of the future reform

10. Currently, the legal profession is regulated by Act no. 586/2003. This Act establishes the SBA as a single self-governance body of lawyers, based on mandatory membership. Membership in the SBA is a pre-condition to practice law before the courts or as private consultants.[5] Act no. 586/2003 establishes rules of conduct for lawyers and disciplinary sanctions for their breaches (including disbarment). In addition, the SBA adopts the Rules of Disciplinary Procedure, which supplement the provisions of the Act.

1. Disciplinary proceedings against lawyers

11. The disciplinary proceeding shall commence upon application submitted by the Chairperson of the Supervision Committee (SC) or by the Minister of Justice, acting either on their own or

[2] https://slovakconlaw.blogspot.com/2020/07/key-policies-from-slovak-govt-manifesto.html
[3] There is no single law on the SAC; its jurisdiction and organisation are regulated by a series of amendments to various laws which were adopted as part of the December 2020 reform package (law 423/2020).
[4] See Article 142 (2) (c) of the Constitution
[5] This Act does not regulate the position of in-house legal advisors who do not provide services to the external clients.

following a complaint. Members of the SC are selected amongst the lawyers by the General Assembly of the SBA. The SC supervises due practice in pursuit of the legal profession. In the context of the disciplinary proceedings, the SC acts as a filtering body; according to the statistics provided by the SBA, a large majority of complaints that are submitted to the SC are not pursued further as manifestly ill-founded.

12. Under the Act, there are four stages in a disciplinary procedure against a lawyer. First, applications submitted by the Chairperson of SC or the Minister are considered by a panel of the Disciplinary Committee of the SBA (the DC).[6] Members of the DC, which is the first-instance disciplinary body of the SBA, are selected by the General Assembly of the SBA.

13. Second, decisions of the DC may be appealed against by the lawyer concerned or by the Minister to the Disciplinary Committee of Appeal (DCA), also a body established by the SBA.

14. Third, decisions of the DCA may be appealed by way of judicial review before a regional administrative court. Under the current system, such review is limited in the scope to matters of law. As explained to the rapporteurs, the administrative courts do not re-examine the evidence and do not re-establish the facts of the case. This review is akin to a "cassation" in other legal orders.

15. Finally, a decision of the regional administrative court can be appealed against before the SAC (before 1 August 2021 appeals against decisions of the regional administrative court were heard by the administrative division within the Supreme Court).

16. As explained by the Minister, the reform of the disciplinary proceedings will consist of the following. First, there will be only one disciplinary body within the SBA, similar to the current DC. This body will be composed of lawyers elected by the General Assembly of the SBA and will examine cases referred to it by the SC or by the Minister of Justice.

17. The DCA will be abolished. Instead, decisions of the DC will be appealable directly to a panel created within the Disciplinary Senate of the SAC which will render final decisions. The panels of the Disciplinary Senate of the SAC dealing with this category of cases will be composed of three judges and two lawyers either appointed by the Bar or selected from the list of lawyers composed by the Bar.[7] Contrary to the current system, in the future the SAC will exercise *full* review of the disciplinary decisions of the DC, i.e. it will be competent to look into questions of fact as well as questions of law. In sum, the current four-steps' system with a limited ("cassation"-type) judicial review will be replaced by a two-steps' system with full review by a mixed body.

2. Fragmentation of self-governance structures

18. The second prong of the proposed reform consists of abolishing the single SBA and replacing it with a number of smaller Bars. Currently, the SBA is established by the Act as an "independent professional organisation and a legal entity".[8] Membership in the SBA is mandatory and there is a monopoly of lawyers admitted by the SBA to consult clients and practice law before courts. [9] The General Assembly of the SBA adopts internal regulations and elects other governing bodies

[6] Disciplinary proceedings are conducted by a three-member panel appointed by the Chairperson of the Disciplinary Committee from amongst its 31 members (Section 57 (1) and 66 (4) (d)).
[7] The latter solution – with the "lay-judge" database – mirrors the proposal contained in Section 9 of the Draft Disciplinary Court Code for prosecutors, bailiffs and notaries. Section 6 of the Draft provides that it is up to the President of the SAC to appoint the judges for a three-year-term, whereas lay-judges shall be selected from the databases of lay-judges pursuant to Section 9 upon registration of disciplinary petition in the registry for each disciplinary petition separately; see footnote 30 below.
[8] Section 66 (1) - (3) of the Act
[9] Section 12 (6) of the Act

of the Bar, including the Council (dealing with the ongoing management), the SC, the DC and the DCA.[10]

19. The Minister of Justice proposes to split the single SBA into several independent Bars. Several alternative models are currently being explored by the Ministry. The first consists of having few alternative Bars based on voluntary membership. It means that while belonging to one of the Bars would remain mandatory to practice law, the lawyers would be able to choose to which Bar they wish to belong. Another model consists of having specialised Bars depending on the substantive area of legal practice (civil law, criminal law, family law, tax law, etc.).[11] The third model consists of having regional Bars, unite to which lawyers will belong depending on the geographical area of their practice. A combination of the second and third model is also being considered, where regional Bars for "generalist" lawyers co-exist with one or two nation-wide Bars for "specialist" lawyers practising in some narrow field of law.

20. Finally, it is yet to be decided whether or not some sort of nation-wide Bar will exist in the future, which could retain some of the powers of the SBA, and exercise supervision vis-à-vis regional and/or specialised Bars.

III. Analysis

A. The justification and the process of the reform

21. The Minister of Justice argued that the corporatist culture within the SBA makes disciplinary proceedings against lawyers lengthy and ineffective. Therefore, the SBA should be reformed. The leadership of the SBA, to the contrary, was satisfied with the *status quo* and insisted that even if there was room for improvement, all problems could be easily fixed within the existing structure. For the SBA, the proposed steps might weaken the legal community and endanger the independence of lawyers. The members of the parliamentary opposition were of the same opinion.

22. During the visit to Bratislava the rapporteurs saw no evidence to support the Minister's claim that the SBA was overprotective of its members. As follows from the statistics provided by the SBA, in the past years the lawyers have been brought to disciplinary liability more often than judges, and some of those disciplinary cases involved heavy monetary fines or even disbarment. There are no visible signs that the SBA is overwhelmed by its tasks or incapable of providing good services to its members.

23. On the other hand, even if evidence of the alleged malfunctioning of the current system was lacking, it is the primarily the role of the Ministry of Justice to assess the local conditions and to respond to the demands of the general public. The question of justification of this reform is a political one, and, ultimately, it should be debated in the National Council. The Venice Commission has always advocated for the inclusiveness of parliamentary debates which should involve relevant stakeholders and independent experts.[12] During the meetings in Bratislava the rapporteurs learned that the initiative to start a discussion about the future of the legal profession in Slovakia came from the Ministry of Justice, and not from the SBA or the legal community. It seems that the judiciary – and in particular the SAC – has not yet had an opportunity to contribute

[10] See Sections 69-71 of the Act

[11] Before 2004, the legal profession was divided between "commercial" and "generalist" lawyers. Commercial lawyers developed historically from the in-house legal advisors of the governmental companies during socialist times. They were, contrary to advocates, not allowed to represent clients in criminal courts. This division existed until 2004 when commercial lawyers became advocates and joined the Bar.

[12] See CDL-AD(2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist, para. 77

to this discussion either. For the Venice Commission it is essential that the Ministry obtains meaningful input from all relevant stakeholders, in particular lawyers and administrative judges. Furthermore, the adoption of the law should be preceded by an impact assessment,[13] in particular as to the additional resources which may be needed to create independent Bars and to entrust the SAC with new functions. Lastly, the cost of the proposed reform should be carefully assessed and compared to its perceived benefits.

B. Compliance with the European standards and best practices

24. The first question by the Minister concerns the proposed reform of the disciplinary mechanism. In particular, it is intended to reduce the number of stages of the disciplinary proceedings (from four to two) and to provide for a full review of disciplinary cases by the SAC.

25. However, the Commission may not assess the question of the number of stages without knowing how the legal profession will be organised, whether it will be a two-tier model where regional or specialised Bars co-exist with a national Bar, or a decentralised system with multiple Bars only. The Commission will thus start by answering the Minister's second question which concerns the possible fragmentation of the current system.

26. The Venice Commission observes at the outset that there is no commonly accepted model of governance of the legal profession. International human rights treaties implicitly require the independence and professionalism of *defence attorneys* – a guarantee which mostly serves the interests of the accused in criminal cases.[14] International soft law instruments are more specific: they recommend the creation of independent Bar associations.[15] The idea of "self-government" or "self-regulation" of the legal profession is also mentioned in the documents of authoritative international professional associations, such as the International Bar Association (the IBA) and the Council of Bars and Law Societies of Europe (the CCBE).[16] However, the possibility of having more than one such association in any given area is not ruled out.[17] In particular, Principle 17 of the IBA Standards provides that "there shall be established in each jurisdiction *one or more* [italics added] independent self-governing associations of lawyers recognised in law, whose council or other executive body shall be freely elected by all the members without interference of any kind by any other body or person. This shall be without prejudice to their right to form or join in addition other professional associations of lawyers and jurists."

27. In most of the Council of Europe member-States, having more than one independent self-governing body of lawyers is an exception rather than the rule. These independent self-governing organisations are either governing different legal professions[18] or they developed historically to govern lawyers from different cultural backgrounds.[19] The most common model in Europe is to have a unified legal profession governed by a single self-regulation organisation, that may consist of regional/local Bars under the umbrella of the national/federal Bar.

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[13] CDL-AD(2016)007, Rule of Law Checklist, Section II (5).

[14] See CDL-AD(2020)029, Turkey - Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the July 2020 amendments to the attorneyship law of 1969, para. 27.

[15] See Recommendation Rec(2000)21 of the Committee of Ministers of the Council of Europe (see principle V/1) and the UN Basic Principles on the Role of Lawyers (see p. 24).

[16] See the IBA Standards for the Independence of the Legal Profession

[17] See, for example, the UN's Basic Principles on the Role of Lawyers or the Recommendation Rec(2000)21 of the Committee of Ministers.

[18] Such as Bar Council for barristers and Law Society of England and Wales for solicitors in Great Britain, or National Council for Advocates and National Council of Legal Advisers in Poland.

[19] For example, in Belgium, *Ordre des Barreaux Francophones et Germanophone* groups together all the local Bars of the French-speaking and German-speaking communities in the country and the *Orde van Vlaamse Balies* is the umbrella organisation for the local Bars of the country's Dutch-speaking community.

28. Provided that the rationale of that reform is clearly exposed, fragmentation of the unique national Bar into smaller entities can be a legitimate solution. The main question, however, is the *criteria* for such a fragmentation, and the effect the fragmentation may have on the independence and professionalism of lawyers, and on the quality of the legal services they provide to their clients and on the public mission of the legal profession.

1. Creation of multiple Bars based on the voluntary membership

29. One of the proposals discussed within the Ministry is to let the lawyers choosing freely to which Bar they want to belong. The Ministry argues that the plurality of different Bars will boost competition amongst them and improve the quality of services which the Bars provide to their members. However, in the opinion of the Venice Commission, this argument is misconceived: the "free market" logic is not applicable to the relationships between the lawyers and the Bar(s), at least not where the Bar is a regulatory body.

30. As it is the case in most of the European countries, the SBA is a body of *self-governance* of lawyers. As such, the SBA should be independent from the State, or, at least, enjoy significant autonomy.[20] One of the main functions of the SBA is representative – it is entrusted with the task of protecting the rights and interests of its members before the State.

31. At the same time, the SBA is not a private association. The SBA is created not by the free will of its members but by law and it is based on mandatory membership. The SBA does not pursue any economic activity and it is not a business undertaking. In addition to defending the interests of the legal community before the State in virtue of its representative function, the SBA also defends the public interest on behalf of the State and may thus act contrary to the interest of its members in virtue of its regulatory and supervisory function. The SBA ensures that lawyers are duly qualified, that free legal aid is provided in situations defined in the legislation, that the rules of professional conduct are respected, etc.

32. It is clear that even if the SBA is to be reformed, the Ministry does not want to abandon the public service mission of the Bar and its regulatory/supervisory function. That implies that multiple Bars should not be allowed to compete amongst themselves: such competition could be detrimental to the quality of the public service they provide. Lawyers could be tempted to join Bars with lower admission requirements, fewer training sessions, and a more lenient approach to professional misconduct. Such forum-shopping would inevitably lead to the "race to the bottom" regarding professional standards.

33. In addition, as previously noted by the Venice Commission, the creation of multiple Bars with voluntary membership might transform Bars into political clubs and endanger the politically neutral status of these bodies.[21] The Ministry suggests that multiple Bars would "create space for associations of attorneys with similar interests, focus and values". But all lawyers must share the same basic values of independence, loyalty (absence of conflicts of interest), confidentiality, commitment to the rule of law and to the Constitution, etc. And it is the main purpose of the Bar to enforce compliance with these basic values.

34. The above said does not exclude that lawyers enjoy freedom of association and may thus establish and join private associations, groups, caucuses, political clubs etc. to pursue their particular interests. However, those associations etc. should remain private and purely

[20] See the CM Recommendation (2000)21 which mentions the "self-governing" Bar associations which should be "independent of the authorities" (p. 2 of Principle V).

[21] CDL-AD(2020)029, Turkey - Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the July 2020 amendments to the attorneyship law of 1969, para. 48

representative, and should not replace the self-governance bodies with regulatory and supervisory functions.

35. In conclusion, the Venice Commission recommends the Slovak government and the legislature not to pursue the creation of multiple Bars based on voluntary membership.

2. Creation of specialist Bars

36. An alternative proposal discussed within the Ministry consists of having different Bars for lawyers practicing in different fields of law (civil law, criminal law, family law, tax law, etc.).

37. This model is conceivable only if the lawyers belonging to each specialist Bar cannot practice outside of their field of specialisation. If this is the case, there is no risk of competition between different Bars and the ensuing "race to the bottom", at least in theory.

38. That being said, creation of multiple specialist Bars has many downsides. First and foremost, it may result in the emergence of classes of highly specialised lawyers, quite distinct from the rest of the legal community and having their own interests and priorities and developing their own approaches to self-regulation and their own ethical rules. Specialisation of Bars may thus lead to the fragmentation of professional standards. In this model specialist Bars are likely to become pure lobbyists, merely representing particular and very narrow interests of their members. The ability of the legal profession to regulate itself, and to speak in one voice will be reduced, if not lost completely. This model does not offer sufficient flexibility: what if a lawyer who has previously practiced tax law gets more inclined to change to civil law since his clients demand consultations in civil law much more often? Would he have to change the Bar, or send his clients to a colleague?

39. The Venice Commission is aware that specialist Bars do exist in few European countries, for lawyers practicing in a certain narrow field of law or before a specific court. For example, in Germany the lawyers practicing in civil matters at the Federal Court of Justice have their own Bars. In France there is a special Bar for lawyers practicing before the *Conseil d'État* and at the Court of Cassation. [22] However, these specialist Bars came into existence in the very specific historical circumstances of each country, and, in any event, these specialist Bars are very small compared to a large "generalist" Bar.

40. These examples remain quite exceptional. As stressed above, the most common model in Europe is to have a unified legal profession and do not have a mandatory specialisation of lawyers. And even in those countries where specialisation is recognised or required *de jure*, there is always a national umbrella organisation which brings together all lawyers of all sorts and which is responsible for developing and enforcing common professional standards.[23]

41. In sum, although specialised Bars do exist in certain countries, in the opinion of the Venice Commission it is useful to have a central entity which would represent the interests of all Bars and all lawyers in the country, and which would enforce the same minimal professional standards across the legal community. The Ministry and the legislator should carefully assess the possible practical implications of the creation of specialist Bars before moving further in this direction.

[22] Another system which stands apart is the distinction between solicitors and barristers in England and Wales; however, the British tradition sees them as members of two completely different legal professions, rather than "specialised lawyers" in the sense discussed in the present opinion.

[23] For example, in Georgia lawyers may be admitted to the practice of the civil law or of the criminal law, or have a general admission (to practice both civil and criminal law). But despite this specialisation all lawyers belong to the same Georgian Bar Association which have representative and self-regulatory functions.

3. Creation of regional Bars

42. The most obvious criterion for the fragmentation of the system of self-governance is geographical, where separate Bars are created for lawyers practicing in every region. This model has the benefit of creating stronger links between the Bar and its members. It may be justified particularly in large countries with a considerable number of lawyers, where having one single national Bar may be detrimental to the interests of some lawyers from remote areas who may feel disconnected from the leadership of the central Bar.

43. In Germany, for example, regional Bars have developed historically at the seat of the higher regional courts, and one Bar at the Federal Court of Justice. The regional Bars in Germany administer the legal profession in their respective regions and ensure that the regional interests of their members are represented at the national level by the German Federal Bar. The German Federal Bar is the representative of the interests of all German Bars. Regional Bars exist in other European federal states (in Austria, for example).

44. A similar model can be found in smaller countries not having a federal structure, like, for example, Slovenia. The legal community of Slovenia is smaller than that of Slovakia,[24] but the legal profession in the former is administered by eleven regional assemblies of lawyers throughout the country. The representation of regional interests is ensured by the umbrella organisation in Ljubljana. In Greece, the legal profession is also administered essentially by the regional Bars.

45. Thus, having several regional Bars[25] instead of a single national Bar could be an acceptable solution, if regional interests are not adequately represented by the national Bar or if it struggles with the administration of the profession in the regions. However, the Ministry of Justice did not put forward the argument that in its opinion the regional interests are inadequately represented by the SBA. This appears not to be the case: even though approximately a half of all Slovak lawyers are based in Bratislava and the seat of the SBA is also in Bratislava, regional lawyers actively participate in the work of the SBA. Thus, over a half of members of the bodies of the SBA are lawyers from the regions. Furthermore, according to the SBA, it maintains the network of regional representatives and organises regular meeting of the board of the SBA with regional lawyers.

46. Most importantly, the plan of splitting the SBA into several regional Bars presents several serious challenges. First and most obviously, it might incur additional financial costs, related to the creation of new administrative structures, which would have to be borne by the legal community. Dissolution of the SBA could lead to the loss of institutional memory, and it would take some time before regional Bars become fully operational. It is also important to ensure that lawyers practice and establish their office within the geographical jurisdiction of the Bar to which they belong. Otherwise, they might join a Bar in one place and practice in another, which in turn may lead to forum shopping and result in the “race to the bottom” problem described in sub-section 1 above.

47. Most importantly, it is necessary to ensure that all regional Bars have similar standards as regards admission to the legal profession, rules of professional conduct and obligations, etc., and that those standards are applied uniformly across the country. There are two ways of achieving this uniformity.

48. First, the uniformity could be achieved through more State oversight and less self-regulation. In principle, it is possible to make the law on the legal profession much more detailed and casuistical, and to remove the power to decide on admissions, discipline, etc. from the Bars and

[24] There are approximately 2400 lawyers in Slovenia, against more than 6,000 in Slovakia.
[25] Aligned with the administrative division of the country, or with the judicial map, but not necessarily

transmit this power to a statutory body external to the legal community, or directly to the courts. To a certain extent this is the model examined below – see the answer to the first question formulated by the Minister. In and of itself, this model of external regulation is not against international practices.[26] However, the Venice Commission has previously warned against an "over-regulatory" approach by the legislator and expressed a clear preference for self-regulation (apart from some basic regulations in the law required by the democratic principle, the principle of equality and the rule of law). It stated in particular that "self-regulation is both the most efficient and the most rigorous means of regulating the [legal] profession".[27] The Venice Commission reiterates this opinion in the Slovak context: there is no evidence that the self-regulation model does not work in Slovakia, and that more State oversight is needed.

49. Another way of ensuring uniform standards would be to have a central body representative of all Bars and therefore all lawyers of the country. This body would develop common rules and oversee their consistent application – for example, by serving as an appeal instance in disciplinary cases or in overseeing matters related to professional exams. Countries like Austria, Germany, Romania, Bulgaria, Croatia and the Netherlands have regional and national Bars, but all of them are part of one and the same system of self-regulation. This is also a solution recommended by the UN Special rapporteur who noted that "it is preferable to establish a single professional association regulating the legal profession".[28]

50. The functions of such a central body vary depending on the country. In some older European democracies with a long-standing tradition of self-regulation of the legal profession, the national or federal Bars are not involved into the administration of the profession and are merely representatives of interests of the legal community. In this model regional Bars are independent from the national Bar and from each other and conduct their activities (such as admission to the profession, disciplinary measures, disbarment etc.) at their own responsibility and in compliance with applicable laws. The acts of these regional Bars (such as non-admission, disciplinary measures etc.) are then subject to judicial review. This is a model where the central Bar (or another similar umbrella organisation) has essentially *representative functions*.

51. In many countries with the communist past and a relatively recent self-regulation system the national or federal Bars take over the role of coordinating and overseeing the activities of the regional Bars to ensure the equal development of the regional Bars and equal application of professional standards. In this model the central body combines *representative function* with a *strong regulatory and supervisory functions*. Given the historical context, in Slovakia it would be more natural to opt for this second model.

52. This second model, however, is not without flaws either. The existence of a central entity to which regional Bars would be subordinated risks making procedures lengthier and the management structures bulkier and more expensive. In addition, the central entity should be sufficiently representative of the legal profession.[29] Hence, the practical question remains – if a central body (akin the SBA) is to remain with all of its functions, would it be worth to additionally create regional Bars?

53. In sum, the creation of regional Bars or several specialist Bars (in addition to a "generalist" one) is not as such against international standards, provided that some criteria are met. If several Bars are to be created, they should not compete amongst themselves for the lawyers, because

[26] See, in particular, the Report of the Special UN Rapporteur on the independence of judges and lawyers (2018), page 11 et seq.
[27] CDL-AD(2011)039, Joint Opinion on the draft law on the bar and practice of law of Ukraine by the Venice Commission and the Directorate of Justice and Human Dignity within the Directorate General of Human Rights and Rule of Law of the Council of Europe, paras. 6 et seq. and in particular para 11.
[28] See the 2018 report, cited above, p. 97
[29] This issue was discussed in detail in the opinion on Turkey, CDL-AD(2020)029, referred to above.

such competition may lead to the weakening of professional standards. Furthermore, it is necessary to ensure common professional standards and their uniform application throughout the country. It can be ensured either by lowering the level of self-regulation, which the Venice Commission does not recommend, or by keeping a central body representative of all lawyers and all Bars (akin to the SBA) with representative, regulatory, and supervisory functions vis-à-vis regional (and/or specialised) Bars. In this case, the need for this system as well as the administrative and financial costs of having such a two-tier system of self-regulatory bodies should be carefully assessed.

4. Full review of the disciplinary decisions of the Bar by the SAC

54. The first question put by the Minister relates to a possible reform of the disciplinary procedure applicable to lawyers. It consists of giving to a disciplinary panel of the SAC the power to review the decisions taken by a disciplinary body of the Bar. This review will cover questions of fact and law and will be conducted by a mixed disciplinary panel composed of three judges of the SAC and two lawyers. Those two lawyers will be either appointed by the Bar or selected from a list of lawyers composed by the Bar.[30]

55. One of the arguments in favour of this solution is that it mirrors the model of review of disciplinary cases concerning judges, prosecutors, and (potentially, since the draft law in this respect is still pending), notaries and bailiffs. However, the Venice Commission does not see a need to have a perfect symmetry in such matters. Various disciplinary systems may co-exist, provided that each of them taken alone corresponds to the constitutional principles and to the needs of the profession.

56. The Venice Commission has previously, expressed a preference for disciplinary proceedings to be conducted *within* the Bar itself.[31] However, this does not exclude the possibility of judicial review of disciplinary decisions or conduct of disciplinary proceedings by an independent statutory body,[32] provided that the Bar participates in it.[33] Any disciplinary system which satisfies those two requirements (independence and sufficient participation of the Bar) would be acceptable.[34]

[30] The Ministry shared with the rapporteurs a draft Code on Disciplinary Proceedings pending before the National Council. This draft Code describes the disciplinary procedure before the SAC, which will hear disciplinary cases against judges, prosecutors, and "other persons" (see Article 142 of the Constitution, amended in 2020). The draft Code extends the competency of disciplinary panels to notaries and court bailiffs. So far lawyers are not covered by this draft Code, but as explained by the Minister, they can later be included in the scope of this Code. In this case, the disciplinary panels hearing cases against lawyers will be composed of three SAC judges and two lawyers.

[31] See CDL-AD(2016)007, Rule of Law Checklist, page 24 where one of the benchmarks for the independence of the legal profession is effective and fair disciplinary procedure "at the Bar".

[32] See the UN's Basic Principles on the Role of Lawyers of 1990, p. 28

[33] See CM Recommendation (2000)21, Principle VI (2)

[34] For example, in Germany, a three-instance lawyers' disciplinary court system is in place, which forms a specialized branch of the justice system (Lawyers Disciplinary Courts, Higher Lawyers Courts and a panel for matters pertaining to the legal profession established at the Federal Court of Justice). The first instance panel consists of three lawyers, the panel of the second instance consists of three lawyers and two judges, and the panel at the Federal Court of Justice consists of three judges and two lawyers. These lawyers are appointed by the Federal Land Administration of Justice or, for the highest instance at the Federal Court of Justice, by the Federal Ministry of Justice. They are selected from the list of proposed candidates submitted to the Land Administration of Justice/Federal Ministry of Justice by the Council of a Regional Bar/The German Federal Bar. The Land Administration of Justice/Ministry of Justice determines the required number of members and seeks the opinion of the Council of the Regional Bar/The German Federal Bar. The list of proposed candidates provided by the Council of a Bar must contain at least fifty per cent more than the required number of lawyers, etc. In Germany, lawyers working as judges in disciplinary courts do so on an honorary basis and continue practicing in their law offices. However, it is important to know that the panels of the first and the second instance

57. As to the independence, the interlocutors met by the rapporteurs in Bratislava were confident that the SAC is an independent court, both in theory and in practice. As to the participation of the Bar in the decision-making, it is ensured by the participation of the two lawyers who sit in a mixed disciplinary panel of the SAC. The Venice Commission understands that those two lawyers will be either appointed by the Bar or selected from a list of lawyers prepared by the Bar. Those two lawyers should be sufficiently experienced and be appointed in a transparent manner, which excludes any arbitrariness. There should be sufficient safeguards of their independence and impartiality. If these conditions are met, the model proposed by the Minister would be in accordance with international standards and good practices.

58. However, the current system – with the administrative courts having only a limited power of review – is also in accordance with the international standards. And even if the new system will not *destroy* the lawyers' independence and may possibly reduce the risk of corporatism, it will certainly *dilute* the influence of the legal community in deciding on disciplinary matters. In many European countries the decision on the disciplinary measures is taken by the organs of the Bar and only its legality can be reviewed by a court.[35] This raises once again the question of whether or not this reform is justified.

59. The most evident gain from this reform is a possible acceleration of disciplinary proceedings. Indeed, the current four stages' system (DC – ADC – the regional administrative court – the SAC) may seem too lengthy and expensive, and a reduction of the number of instances may be needed. Such simplification may however be achieved without giving the SAC the power of full review of the decisions of the disciplinary bodies of the Bar. The SAC may retain a limited power of review, not involving *de novo* assessment of evidence and establishment of facts, as it is currently the case (the "cassation"-type review), while the examination of evidence, the establishment of material facts and their interpretation will remain in the hands of a self-regulating body.

60. Furthermore, as stressed above, the Venice Commission recommends *not to abolish* the national Bar, even if the regional/specialised Bars are to be created. One of the main functions of this national Bar would be to ensure uniform application of disciplinary rules. In order to perform this function, the national Bar would have to review disciplinary cases, either as the *only* instance or as an *appellate* instance, before they reach the SAC. If the national Bar is involved in the disciplinary proceedings along with the regional/specialised Bars, the reduction of the number of instances would not be so dramatic. In any event, it should be possible to reduce the number of instances while remaining within the framework of the current system, where the courts only conduct a residual review of legality of the decisions of the bodies of the SBA.

61. There are other factors which may reduce the useful effect of the Minister's proposal. Most importantly, it is unclear whether the SAC is prepared to cope with an influx of disciplinary cases regarding lawyers, given that it will have to examine these *de novo* and will not be able to rely on the findings of the disciplinary bodies of the Bar. One may consider distinguishing between important cases involving heavy sanctions (like disbarment) which could be appealed directly to the SAC, and minor cases, which may end in the second-degree disciplinary panel created within the national Bar.

(where lawyers have a majority) are considered as "disciplinary courts" that can decide on disciplinary measures. An appeal to the panel established at the Federal Court of Justice can only be lodged in severe cases (temporary suspension from the practice; disbarment, general interest) and is restricted *to the review of the legality*.

[35] See also the previous footnote.

IV. Conclusions

62. On 2 June 2021, Ms Mária Kolíková, Minister of Justice of the Slovak Republic, put before the Venice Commission two questions regarding the organisation of the legal profession in the Slovak Republic. The first question concerned the possibility to create multiple Bars instead of a single Slovak Bar Associations (SBA). The second question concerned the role of the Supreme Administrative Court (SAC) in the disciplinary proceedings against lawyers.

63. As the Venice Commission is called to assess not a specific draft law but two abstract questions, while there is an advantage in being associated in the reform process at such an early stage, the answers given by Venice Commission will necessarily be of a rather general character. This opinion should be seen neither as a blank endorsement, nor as a blank disapproval of any future draft law which may be prepared by the Ministry.

64. In respect of both questions the Ministry's proposal remains within the range of acceptable solutions. It is compatible with international standards and good practice to have multiple Bars in a given country, and to entrust the examination of disciplinary cases to a mixed panel composed of judges and lawyers. However, the rationale for this reform is not entirely clear, and the proposed solutions need to provide for certain additional guarantees.

65. As regards the possible fragmentation of the SBA, the biggest risk is related to the creation of multiple Bars open to voluntary membership, which would compete for the lawyers. That would inevitably lead to politicisation of the legal profession, and involve a high risk of the lowering of professional standards and should therefore be avoided.

66. The creation of several specialist Bars or regional Bars is a more acceptable solution, but it also presents serious challenges. Most importantly, it is necessary to ensure that there be common professional standards for the whole legal profession, and that these standards be applied uniformly to all lawyers, irrespectively of where they practice and in which area of law they specialise.

67. There are two ways how to achieve such common standards/uniformity. In principle, uniformity may be achieved by more State oversight and less self-regulation of the legal profession, but the Venice Commission is not in favour of such a solution.

68. An alternative way of ensuring the uniformity would be to have a central umbrella organisation representative of all lawyers and all Bars, with regulatory and supervisory functions, which would develop common rules and oversee their implementation. This solution is more respectful of the self-governance of the legal profession.

69. The second question relates to the Minister's proposal of giving the SAC the power of full review of disciplinary cases regarding lawyers. This model is, as such, legitimate; it is positive that the disciplinary panel of the SAC would be composed of judges and lawyers. Nevertheless, this reform would reduce the extent of self-governance of the legal profession, and it is not entirely clear what advantages this would have. If the objective is to reduce the number of instances and to accelerate disciplinary proceedings, this can be achieved within the current system, where the review by the administrative courts is limited to the questions of legality. In addition, it is not clear whether the SAC is ready to assume the new functions.

70. It is very important that any further discussion about the advantages and disadvantages of this reform involves representatives of the legal community and judges. The Venice Commission remains at the disposal of the Slovak authorities for any further assistance on this matter and is ready to provide its expertise if the proposal analysed above is transformed into a draft law.