

Reservations expressed in the Expert Review

- Exceptionally, a “guest judge” could also be appointed to a higher level court, but only as a temporary assignment (an hypothesis for transferring a judge, already existing in the Slovak legislation for the purpose of securing the proper running of the justice system, hereby amended in Article I §12, category which seems to somehow overlap with the category of “guest judges” – see hereunder Section B).

Opinion of the Legislation Section: Compared with the original Draft Law which went to the Interdepartmental Comments Procedure Commission and was the subject of an expert review, the wording of the current draft as submitted to the National Council of the Slovak Republic no longer envisages the possibility that a guest judge might serve also at a higher level court, because there remains the option of using a temporary assignment to secure proper running of the justice system at higher level courts. A temporary assignment may be used at District Courts if a guest judge cannot be used. Temporary assignment and the office of a guest judge are two different institutions. The institution of a guest judge is aimed at resolving personnel problems at District Courts. The institution of a temporary assignment of a judge is to be used to resolve temporary changes in the filling posts at courts of a higher level (Regional Courts, a Specialised Criminal Court and the Supreme Court of the Slovak Republic). The objective of the proposed change in the framework of temporary assignment is to achieve a situation whereby temporary assignment will be used at District Courts only if personnel shortages at these courts cannot be resolved by the assignment, transfer or use of a guest judge.

- Tasks and limitations

“guest judge” shall generally fulfil his/her judicial tasks in the same manner as a traditional judge, examining cases from the agendas in all areas of law for which the respective district court is competent. However, Article III §51 of the Draft Law foresees two exceptions

- in the criminal law agenda, a “guest judge” can only be assigned cases of preparatory proceedings;

Opinion of the Legislation Section: This is the wording of the Draft Law as sent to the Interdepartmental Comments Procedure – restricting use of a guest judge in the criminal law agenda only to cases of preparatory proceedings. The Draft Law in the National Council of the Slovak Republic restricting the allocation of criminal cases to guest judges is currently worded as follows: In §51(1) a new sentence is inserted after the first sentence: “A guest judge shall not be allocated a case in the criminal law agenda.” The criminal law agenda is outside the jurisdiction of a guest judge.

- in cases to be decided by a sole judge, at the end of the term for which the “guest judge” substitutes the traditional judge, the case shall return to the latter (this limitation shall also apply to temporarily assigned judges, as envisaged under Article I §12, category which might overlap with the category of “guest judges”).

Opinion of the Legislation Section: Substitution of a traditional judge by a guest judge ends on the day the traditional judge resumes office. Since there is no longer a need for the guest judge, it is

logical that he/she should be assigned to another court and that all cases should revert to the substituted traditional judge.

Except for this last provision, the Draft Law does not contain any details on a fade-in/fade-out phase, in order to secure a continuous examination of certain cases.

- Career developments/promotions, time limits

With regards to the duration of an appointment as “guest judge” the Draft Law (Article I §11a (4)) refers only to the moment when the substituted judge resumes office as the moment when the appointment shall end. The Draft Law does not establish any minimal or maximal duration of appointments. However, the Draft Law (Article I §11a (5)) envisages a time limit to the role of “guest judge”, aimed at offering “guest judges” a facilitated path for the appointment to a vacant position as a traditional judge: after five years as a “guest judge”, the concerned person may be transferred at his/her own request to a vacant judge’s post at a district court or, following a selection procedure, at a regional court.

Opinion of the Legislation Section: *A time limit of five years was proposed for consideration by the Interdepartmental Comments Procedure. The wording of the draft in the National Council of the Slovak Republic permits a guest judge to be transferred at his/her own request to a vacant judge’s post at a District Court or, following a selection procedure, at a Regional Court after four years of service as a guest judge.*

- 2.2. Relevant national terms of comparison and evaluation of the Slovak Draft Law

The Slovak regulation, similar to the French one, sets a maximum threshold of “guest judges” in the judiciary: “The number of vacant posts of guest judges shall not exceed 4% of the total number of judges” (see Article III §71(3) of the Draft law). In this respect, given that the resort to “guest judges” might differ considerably from one region to another, it could be suggested that the maximal percentage relate to the number of judges on a regional basis, rather than on a national basis.

Opinion of the Legislation Section: *We are aware of the importance of this suggested amendment, but we regard it as a moot point whether this requirement should be incorporated in the legislation or whether it should be left to the Minister of Justice to apply the determination of a percentage share at regional level in practice without a statutory direction to do so.*

Article II 27fa of the Draft Law seems to describe the procedure and the formal steps for the appointment of a “guest judge”, indicating some of the information that the written invitation should include. Thus, the formal act of the mobility (to which the candidate “guest judge” shall give his/her consent) does not seem to be required to include information regarding the duration of the mobility.

Opinion of the Legislation Section: *The Law sets a period of 4 years for the duration of mobility. Since this regulation has been enacted in law, we proceed from the assumption that future judges know the law and can read, so it is not necessary to include this information in a call for mobility.*

It also transpires from the Draft Law that the Slovak legislator did not envisage establishing certain limits: neither of the duration of an appointment (minimal and maximal), nor of the number of appointments (maximal) as a “guest judge”. If in certain situations (for instance maternity leave), these can be predicted or estimated, in others (such as in case of sickness or even secondment to a body of the European Union) such an estimation is not so obvious and it could be the case that the “guest judge” would be needed for substitution just for a few months.

Opinion of the Legislation Section: *As mentioned above, the law set a period of 4 years, because it is assumed that the majority of judges will make use of the opportunity for career advancement that the law provides. As concerns number of repetitions, we proceed from the assumption that a guest judge must “guest” for at least 4 years if there is still a reason for the substitution. We are aware that this could be the short-term absence of a traditional judge, or even their long-term absence; nevertheless the mobility of a guest judge is set by the very fact that the transfer of a guest judge to another District Court within the relevant Regional Court area for reasons as set down in §11a(2) is not regarded as a “repetition” of a guest judge’s appointment of office. Meanwhile his/her further consent is no longer required, because they have already consented to their assignment by the Judicial Council of the Slovak Republic to such a vacant judge’s post with which this very judge’s mobility is associated.*

This aspect, together with the absence of minimal provisions for a fading-out phase at the end of the appointment of the “guest judge”, might not fully comply with the principle of irremovability of judges (exposing them to multiple transfers for very short periods of time), as it might not serve the purpose of efficiency of justice, in the absence of a certain continuity in the examination of cases.

Opinion of the Legislation Section: *A judge substituting for a traditional judge for a short period may replace multiple judges, but always for temporary reasons as under §11a(2), depending on the nature of the case whilst ensuring continuity in the examination of cases.*

Moreover, the principle of irremovability of judges might not be fully respected in the absence of legal provisions for the situation in which a “guest judge” who has completed an appointment is not immediately appointed to another mission as “guest judge”, to substitute another traditional judge in one of the situations described in Article I §11a (2) letters a) to g). If the interpretation of the draft text under examination shall be that “guest judges” are to continue serving as judges also when they are not called to substitute a traditional judge absent for one of the reasons listed in Article I §11a (2) letters a) to g) (thus, not as a sort of “interim staff” hired only when needed), it is highly recommended that the Draft Law includes an explicit clarification of this situation.

Opinion of the Legislation Section: *The wording of the draft that underwent expert review is different from the wording submitted to the National Council of the Slovak Republic. The new draft provision of §11a(2)(b) resolves an exceptional situation wherein use of the institution of a guest judge to substitute for a traditional judge is not possible due to the fact that all traditional judges’ posts are occupied in the relevant Regional Court area, i.e. no need exists for any judge to be substituted for reasons as under §11a(2)(a). In such an event consideration must be given to a guest judge’s performance of the office of judge at that District Court within a Regional Court area which shows signs of temporary casework overload.*

One might argue that the intention of the Slovak authors of the Draft Law is that in such a case the “guest judge” would be temporarily assigned to one of the courts of his/her district which need support in dealing with incoming cases or its backlog, for the purpose of securing the proper running of the justice system (see Article I § 12). In this regard, the Draft Law should regulate in more clear terms the relation between this kind of temporary assignment (regulated by Article I §12) and the other conditions for the mobility set forth in Article I §11a(2), avoiding the ambiguous reciprocal reference of one text to the other (see also Section B hereunder).

Opinion of the Legislation Section: *The institution of temporary assignment and that of guest judge are two different institutions. One is aimed at resolving personnel problems at District Courts, while the other is aimed at higher level courts.*

Lastly, from the point of view of the principle of independence of the judiciary from the executive, a few critical remarks might be made as regards such guarantees related to the decision of assignment of the “guest judge” to a given district court, under Article I § 11a(2). More precisely, it would be advisable to replace the involvement of the Minister of Justice in such a decision, with that of the Judicial Council . Above all, given that more “guest judges” could be available for the same mobility (for instance: to replace the judge of a district court who is on maternity leave), additional criteria (besides the order of results obtained in the recruitment competition) should be fixed in advance for the choice of the President of the Regional Court, which should be motivated and take also into account the opinion of the concerned judge(s).

Opinion of the Legislation Section: *We regard the determination of the post of a guest judge by the Chairperson of a Regional Court following discussion with the Minister of Justice as a more effective system, since the Minister of Justice is able to make an immediate operationally flexible intervention, whereas the National Council of the Slovak Republic, being a collective body which meets only once a month, cannot satisfy such a requirement.*

- Evaluation from the standpoint of the requirement for efficiency of justice

The Slovak Draft Law introducing the category of “guest judges” provides for an enhanced use of “guest judges”, aimed at tackling various situations affecting the proper functioning and the efficiency of courts, which are likely to have a positive impact on the efficiency of the Slovak judiciary.

For instance, the Draft Law contemplates the use of “guest judges” for all levels of courts of “general jurisdiction”, including the Supreme Court, unlike the Italian and the French systems which exclude this category of judges from the respective Supreme Courts.

Opinion of the Legislation Section: *This is the original draft as sent to the Interdepartmental Comments Procedure. The institution of guest judge will not be used at higher level courts where, as mentioned, the institution of temporary assignment will apply.*

Furthermore, similar to the French law, the Slovak Draft Law sets forth clear financial benefits for “guest judges” appointed to district courts, in order to render such a position attractive. However, it is not clear whether such financial incentive also applies to “guest judges” appointed to higher level courts. It is advisable to include a similar provision also in case of appointment to higher level courts, in compliance with the principle of equal treatment/non-discrimination of judges.

Opinion of the Legislation Section: *The comment is irrelevant, the bill no longer provides for the possibility that the visiting judge will also act in a higher court.*

- In order to be of concrete help for the receiving courts, the “guest judge” should be able to deal in a proper manner with several types of proceedings (besides the legal knowledge and skills, also appropriate time and tools should be considered). Even if, according to the Draft Law, “guest judges” are to examine only civil cases and conduct only the preparatory proceedings in criminal matter (unlike their counterparts in Italy, France and the Netherlands, who examine also criminal cases), still they should be able to treat a variety of proceedings and legal matters of different levels of complexity involved in each case. Therefore, the “guest judge” would need to have enough experience and should be able to spend a reasonable period of time in a given court in order to examine in an efficient manner the assigned cases, especially the cases that are already at different phases of advancement of the proceedings.

Opinion of the Legislation Section: *This is a much-discussed issue. If the institution of guest judge were not used to secure the proper running of the judicial system in the event of a temporary absence of a judge, a case would be resolved by assigning to such courts new judges who would themselves be new and inexperienced, and from day one would have to adjudicate like judges with 20 years of experience.*

Read from this perspective, the Slovak Draft Law doesn’t reflect this concern for efficiency, as it reserves this role to newly recruited judges, thus, to judges without previous experience who can also be appointed to higher level courts, even to the Supreme Court. On this point, the French example seems to be more efficiency-oriented, as the role of “*magistrat placé*” can also be fulfilled by an experienced judge in search of acquiring experience in another field of law, wishing to be promoted more quickly to a higher level, or even to relocate to another region. In the Italian system, a four-year judicial experience is required to apply for the position of “*magistrato distrettuale*”. It could be suggested to the Slovak counterpart to consider the appointment of “guest judges” to higher level courts only after having reached a professional experience of at least two to three years.

Opinion of the Legislation Section: *This is a much-discussed issue. The expert judgment is based on the original version of the draft as it went to the Interdepartmental Comments Procedure Commission. According to the version of the draft law submitted to the National Council of the Slovak Republic, there will be no use of the visiting judge's institute in higher-level courts. The visiting judge will perform his/her duties only in the courts of first instance and only those judges with sufficient experience on a temporary basis will go from the district courts to a higher level.*

It could be worth mentioning that, for the needs of temporary replacement, an alternative system might be adopted: each traditional judge appointed at a given district court could be considered from his/her very first appointment a possible replacing judge in another district court of the same region. In this way, in case of need for a replacement in one of the scenarios set forth by Article I §11a (2), any district court judge of the same region could be temporarily appointed (part time or full time) for the replacement of the absent judge. Such a system may be accompanied with the guarantee of a necessary previous consent from the replacing judge and a “compensatory” framework (additional holidays, coverage of travel expenses, an allowance etc.).

Opinion of the Legislation Section: *A draft worded in this way would not respect the constitutional limits of the irremovability of judges.*

- Evaluation in the light of the principles related to judicial independence

Article I § 12 (2) reads as follows: “A judge may be temporarily assigned only for the purposes of securing the proper running of the justice system for reasons as under § 11a(2).” Therefore, this article could be understood in the sense that the temporary assignment of a traditional judge can be used, instead of the assignment of a “guest judge” for the same reasons for which the category of “guest judge” is being created and for the same conditions of mobility of the “guest judge” set forth by Article I § 11a(2). At the same time, letter c) of Article I § 11a(2) mentions temporary assignment as one of the possible conditions for assignment of a guest judge.

Opinion of the Legislation Section: *The amendment of temporary assignment as proposed in the Draft Law submitted to the Interdepartmental Comments Procedure has been cancelled and the original wording remains valid.*