



Strasbourg, 14 March 2023

CDL-AD(2023)004

Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

UKRAINE

AMICUS CURIAE BRIEF

ON

**CERTAIN QUESTIONS RELATED TO THE PROCEDURE
FOR APPOINTING TO OFFICE AND DISMISSING
THE DIRECTOR OF THE NATIONAL ANTI-CORRUPTION BUREAU
AND THE DIRECTOR OF THE STATE BUREAU
OF INVESTIGATION**

**Adopted by the Venice Commission
at its 134th Plenary Session
(Venice 10-11 March 2023)**

On the basis of comments by

**Mr Martin KUIJER (Substitute Member, the Netherlands)
Ms Angelika NUSSBERGER (Member, Germany)
Mr Tuomas OJANEN (Member, Finland)
Mr José Luis VARGAS VALDEZ (Member, Mexico)**

Table of Contents

I.	Introduction	3
II.	Background.....	4
A.	Rules on the appointment of the Director of the National Anti-Corruption Bureau of Ukraine (the NABU) and the Director of the State Bureau of Investigation (the SBI)	4
B.	Previous case-law of the Constitutional Court of Ukraine	4
C.	Draft constitutional amendments under consideration	5
D.	Constitutional framework	6
III.	Scope of the Opinion.....	6
IV.	Analysis.....	7
A.	Question 4.....	7
B.	Question 5.....	10
C.	Questions 1, 2 and 3	11
1.	Preliminary remark: the limits of the substantive constitutional review of the constitutional amendments.....	11
2.	Impact of the amendments on the separation of powers/checks and balances and democracy.....	12
3.	Impact of the amendments on the rule of law	14
4.	Impact of the amendments on human rights and freedoms	15
V.	Conclusion	16

I. Introduction

1. The Constitutional Court of Ukraine (the CCU) is currently preparing, at the request of the Verkhovna Rada, an opinion on draft Law on introducing amendments to Articles 85 and 106 of the Constitution of Ukraine regarding the procedure for appointing to office and dismissing the Director of the National Anti-Corruption Bureau of Ukraine (the NABU) and the Director of the State Bureau of Investigation (the SBI), hereinafter referred to as the draft constitutional amendments.

2. By letter of 12 December 2022, the acting President of the Constitutional Court of Ukraine requested an *amicus curiae* brief from the Venice Commission on certain questions related to the procedure for appointing to office and dismissing the Director of the NABU and the Director of the SBI, related to the pending case on the draft constitutional amendments. In particular, the Venice Commission has been asked to address the following questions:

1. Does the procedure for appointing to office and dismissing Directors of the NABU and the SBI by the President of Ukraine upon the consent of the Verkhovna Rada of Ukraine, as proposed by the draft constitutional amendments, comply with the principle of separation of powers within the existing form of government under the Constitution of Ukraine in force?
2. Does the procedure for appointing to office and dismissing the two Directors by the President of Ukraine upon the consent of the Verkhovna Rada of Ukraine, as proposed by the draft constitutional amendments, comply with the requirements of checks and balances within the distribution of powers between the relevant branches?
3. Could the procedure for appointing to office and dismissing the two Directors by the President of Ukraine upon the consent of the Verkhovna Rada of Ukraine, as proposed by the draft constitutional amendments, impact in a negative way the democracy, protection of human rights and freedoms, and respect of the rule of law?
4. Is it possible for the Constitutional Court of Ukraine, in the understanding of the provisions of Article 157.2 of the Constitution of Ukraine,¹ to produce an opinion on the conformity of a draft Law on amending the Constitution of Ukraine with the requirements of Articles 157 and 158 of the Constitution of Ukraine during martial law in Ukraine? If so, what shall be the legal consequences of such an opinion in the light of the requirement of Article 157.2 of the Constitution of Ukraine?
5. Do the provisions of Article 159 of the Constitution of Ukraine² allow the Verkhovna Rada of Ukraine to consider the draft constitutional amendments in respect of which the Constitutional Court of Ukraine had produced an opinion during martial law? If so, does the opinion produced by the Constitutional Court of Ukraine retain its legal effect in case the Verkhovna Rada of Ukraine considers the draft constitutional amendments after martial law is lifted?

3. Mr Martin Kuijjer, Ms Angelika Nussberger, Mr Tuomas Ojanen and Mr José Luis Vargas Valdez acted as rapporteurs for this *amicus curiae* brief.

¹ Which provides that “the Constitution of Ukraine shall not be amended in conditions of martial law or a state of emergency”.

² Which reads as follows: “a draft law on introducing amendments to the Constitution of Ukraine shall be considered by the Verkhovna Rada of Ukraine upon the availability of an opinion of the Constitutional Court of Ukraine on the conformity of the draft Law with the requirements of Articles 157 and 158 of this Constitution.

4. This *amicus curiae* brief was drafted on the basis of comments by the rapporteurs. It was adopted by the Venice Commission at its 134th Plenary Session (Venice, 10-11 March 2023).

II. Background

A. Rules on the appointment of the Director of the National Anti-Corruption Bureau of Ukraine (the NABU) and the Director of the State Bureau of Investigation (the SBI)

5. The procedure for the appointment of the Director of the NABU and the Director of the SBI is regulated by the Law on the National Anti-Corruption Bureau of Ukraine³ and the Law on the State Bureau of Investigation.⁴

6. The Director of the NABU is appointed and dismissed by the Cabinet of Ministers of Ukraine,⁵ while the Director of the SBI is appointed and dismissed by the President of Ukraine.⁶

B. Previous case-law of the Constitutional Court of Ukraine

7. On 28 August 2020, the CCU delivered a Decision concerning a constitutional petition of 51 MPs on the constitutionality of the Presidential Decree No. 218/2015 "On Appointment of A. Sytnyk as Director of the National Anti-Corruption Bureau of Ukraine".⁷ In essence, the authors of the petition argued that the Decree contradicted the provisions of the Constitution as the President of Ukraine acted beyond his constitutional powers while appointing the Director of the NABU.⁸

8. In its Decision, the CCU stressed that the list of powers of the President, as enumerated in Article 106 of the Constitution, was exhaustive. Given the fact that the appointment of the Director of NABU was not listed in Article 106 of the Constitution, the CCU found that the President had exceeded his constitutional powers by issuing the Decree.⁹ The CCU went on to say that the National Anti-Corruption Bureau is "in fact an executive body" and that "the supreme body in the system of executive authorities is the Cabinet of Ministers of Ukraine". It therefore concluded that *"the appointment by the President of Ukraine of the head of a body functionally belonging to the executive branch will lead to an imbalance in the system of checks and balances, violation of the functional separation of powers and actual change of the form of state government provided for by the Constitution of Ukraine"*.

9. This position was reiterated by the CCU in a Decision of 16 September 2020¹⁰ which concerned a petition of 50 MPs regarding the constitutionality of certain provisions of the Law on the National Anti-Corruption Bureau of Ukraine, including the provision empowering the President to appoint and dismiss the Director of the NABU. The authors of the petition argued that the challenged provisions contradicted the Constitution as they vested the President with additional

³ See Law of Ukraine on the National Anti-Corruption Bureau of Ukraine, available at: [Legal framework | National Anti-Corruption Bureau of Ukraine \(nabu.gov.ua\)](https://zakon.gov.ua/Laws/show/218/2015)

⁴ See Law of Ukraine on the State Bureau of Investigation, available in Ukrainian language at: [Про Державне бюро розслідувань | від 12.11.2015 № 794-VIII \(rada.gov.ua\)](https://zakon.gov.ua/Laws/show/794/VIII)

⁵ See Article 6.2 of the Law on the NABU.

⁶ See Article 11.1 of the Law on the SBI.

⁷ See Decision of the Constitutional Court of Ukraine, No. 9-p/2020, 28 August 20, available at: [Рішення Конституційного Суд... | від 28.08.2020 № 9-p/2020 \(rada.gov.ua\)](https://pau.gov.ua/uk/rozhudannya/9-p-2020)

⁸ As noted in the Decision, the subject of constitutional review was the issue of ensuring the separation of powers and their functioning within the existing form of government and in Ukraine, only the CCU had the relevant powers to resolve such issues.

⁹ This conclusion also follows from the legal positions of the Constitutional Court of Ukraine, which has repeatedly stated that the powers of the President of Ukraine are determined exclusively by the Constitution of Ukraine and cannot be extended by law or other legal act.

¹⁰ See Decision of the Constitutional Court of Ukraine, No. 11-p/2020, 16 September 2020, available at: [Рішення Конституційного Су... | від 16.09.2020 № 11-p/2020 \(rada.gov.ua\)](https://pau.gov.ua/uk/rozhudannya/11-p-2020)

powers which were not envisaged by the Constitution. In addition, the petitioners argued that *"indirect subordination of the National Anti-Corruption Bureau of Ukraine to the President of Ukraine threatens the independence of the law enforcement agency"* and leads to *"the creation of a parallel executive body"*, as well as *"the establishment of uncertain limits of the powers of the head of state, contrary to the constitutional principle of separation of state power, causes an imbalance in the existing constitutional system of checks and balances in the mechanism of state power in Ukraine"*.

10. In its Decision, the CCU once again stressed that the power of the President of Ukraine to appoint and dismiss the Director of the NABU did not belong to the exhaustive list of powers of the President enumerated by the Constitution. Thus, it concluded that the Verkhovna Rada by introducing the provision concerning the appointment of the NABU Director by the President, expanded the powers of the head of state and thus went beyond the powers defined by the Constitution. In addition, the CCU held that the provisions of the Law as regards the power of the President to appoint and dismiss the Director of NABU *"cause an imbalance in the system of functioning of the state power (system of checks and balances) and, as a result, lead to a weakening of constitutional guarantees of human and civil rights and freedoms, as well as to a negative impact on the stability of the constitutional order."*

C. Draft constitutional amendments under consideration

11. Following the decisions of the CCU of 28 August 2020 and of 16 September 2020 declaring the Presidential Decree No. 218/2015 and the relevant provisions of the Law on the National Anti-Corruption Bureau of Ukraine unconstitutional, a group of MPs introduced the draft constitutional amendments (registered on 22.02.21, Reg. No. 5133) which introduce in the Constitution a new power for the President of Ukraine to appoint and dismiss the Directors of the NABU and of the SBI, following the results of a competitive selection and upon the consent of the Verkhovna Rada.¹¹

12. By Resolution of 16 March 2021, the Verkhovna Rada put the draft constitutional amendments on the agenda of the 5th session of the 9th convocation of the Verkhovna Rada and in compliance with Article 159 of the Constitution,¹² submitted it to the Constitutional Court for its opinion.

13. Currently, due to Russia's aggression against Ukraine, martial law is applied on the entire territory of Ukraine.¹³ However, at the time when the Verkhovna Rada tabled the constitutional

¹¹ In particular the draft Law proposes:

1. To introduce the following amendments to the Constitution of Ukraine (Bulletin of the Verkhovna Rada of Ukraine, 1996, No. 30, Article 141):

1) Article 85.1 shall be supplemented with paragraphs 25¹ and 25² as follows:

"25¹) granting consent for appointment to office following the results of the competitive selection and dismissal by the President of Ukraine of the Director of the National Anti-Corruption Bureau of Ukraine;

"25²) granting consent for appointment to office following the results of the competitive selection and dismissal by the President of Ukraine of the Director of the State Bureau of Investigation";

2) Article 106¹ shall be supplemented with paragraphs 11¹ and 11² as follows:

"11¹) in accordance with the procedure established by the law appoints to office and dismisses, upon the consent of the Verkhovna Rada of Ukraine, the Director of the National Anti-Corruption Bureau of Ukraine, by means of selection of candidates on a competitive basis;

"11²) in accordance with the procedure established by the law appoints to office and dismisses, upon the consent of the Verkhovna Rada of Ukraine, the Director of the State Bureau of Investigation, by means of selection of candidates on competitive basis".

2. This Law shall enter into force on the day following the day of its publication.

¹² Article 159: "A draft law on introducing amendments to the Constitution of Ukraine is considered by the Verkhovna Rada of Ukraine upon the availability of an opinion of the Constitutional Court of Ukraine on the conformity of the draft law with the requirements of Articles 157 and 158 of this Constitution".

¹³ President Volodymyr Zelensky declared martial law on 24 February 2022. On 14 March 2022, martial law was extended by the President (endorsed by the Verkhovna Rada on 15 March 2022) for 30 days, taking effect as of 26 March 2022; On 18 April 2022, martial law was extended by the President (endorsed by the Verkhovna Rada on 21

amendment for consideration and when it submitted its constitutional appeal to the CCU, martial law was not in place. According to Article 157.2 of the Constitution: *“the Constitution of Ukraine shall not be amended in conditions of martial law or a state of emergency.”*

D. Constitutional framework

14. The Constitution of Ukraine envisages a mandatory *a priori* review of a draft law on constitutional amendments.¹⁴ Article 159 of the Constitution provides: *“A draft law on introducing amendments to the Constitution of Ukraine is considered by the Verkhovna Rada of Ukraine upon the availability of an Opinion of the Constitutional Court of Ukraine on the conformity of the draft law with the requirements of Articles 157 and 158 of this Constitution.”*

15. Article 157 of the Constitution provides that:

“the Constitution of Ukraine shall not be amended, if the amendments foresee the abolition or restriction of human and citizen’s rights and freedoms, or if they are oriented toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine.

The Constitution of Ukraine shall not be amended in conditions of martial law or a state of emergency.”

16. According to Article 158 of the Constitution:

“the draft law on introducing amendments to the Constitution of Ukraine, considered by the Verkhovna Rada of Ukraine and not adopted, may be submitted to the Verkhovna Rada of Ukraine no sooner than one year from the day of the adoption of the decision on this draft law.

Within the term of its authority, the Verkhovna Rada of Ukraine shall not amend twice the same provisions of the Constitution.”

17. The Constitution seems to remain silent on some aspects of the involvement in the amendment process such as the timeframe for the revision and the consequences in case the Constitutional Court’s opinion is negative or lacking.¹⁵

III. Scope of the Opinion

18. It is not the task of the Venice Commission to review decisions by national Constitutional Courts¹⁶ or to provide an official interpretation of the fundamental laws of its Member States.¹⁷ The Commission therefore refrains from a substantive examination of the case-law of the CCU

April 2022) again for 30 days, taking effect as of 25 April 2022; On 17 May 2022, martial law was extended by the President further (endorsed by the Verkhovna Rada on 22 May 2022) for 90 days, taking effect as of 25 May 2022; On 12 August 2022, martial law was extended by the President one more time (endorsed by Verkhovna Rada on 15 August 2022) for 90 days, taking effect as of 23 August 2022; On 07 November 2022, martial law was extended by the President further (endorsed by the Verkhovna Rada on 16 November 2022) for 90 days, taking effect as of 21 November 2022; Finally, on 07.02.2023, martial law was extended by the President again (endorsed by the Verkhovna Rada on 07 February 2023) for 90 days, taking effect as of 19 February 2023. Detailed information is available at : [Про введення воєнного стану ... | Від 24.02.2022 № 64/2022 \(rada.gov.ua\)](#)

¹⁴ See Decision of the Constitutional Court of Ukraine, No. 8-rp/98, 09 June 1998, para. 6 of part 2 of the motivation part.

¹⁵ Some conclusions concerning the binding nature of the CCU opinion on compliance of the constitutional amendments with Articles 157 and 158 of the Constitution can be inferred from Article 151² of the Constitution and the CCU Judgment No. 8-rp/98 of 09 June 1998. However, there are no provisions in the Constitution describing the consequences in case the CCU opinion is negative or lacking.

¹⁶ See Venice Commission, [CDL-AD\(2007\)045](#), Opinion on the constitutional situation in the Kyrgyz Republic, para. 9; See also [CDL-AD\(2010\)044](#), Opinion on the constitutional situation in Ukraine, para. 29.

¹⁷ See Venice Commission, [CDL-AD\(2021\)037](#), Amicus Curiae Brief on the competence of the Constitutional Court regarding the validity of the local elections held on 30 June 2019, para.5.

as well as from the formal interpretation of the Constitution of Ukraine or its relevant provisions. It will be ultimately up to the Constitutional Court of Ukraine, an institution with the authority to provide a final interpretation of the Constitution, to decide whether the proposed constitutional amendments concerning the appointment procedure of the Directors of the NABU and the SBI, comply with the principle of separation of powers, the requirements of checks and balances, or if they can have a negative impact on democracy, protection of human rights and freedoms and respect of the rule of law. Likewise, it will be also up to the Constitutional Court of Ukraine to decide if Articles 157.2 and 159 of the Constitution allow the CCU to produce its opinion in the period of application of martial law and if the Verkhovna Rada can consider the relevant draft law upon the availability of such an opinion.

19. Nevertheless, the Venice Commission will make some observations on the possible ways of interpreting the Constitution in the light of applicable international standards, with the understanding that this may assist the CCU in reaching its final conclusion.

20. The five questions put by the CCU can be divided into two groups: on the one hand, the questions regarding the substance (questions 1-3 which deal with the compatibility of the proposed draft constitutional amendments with certain principles provided by the Constitution); and, on the other, the questions concerning the procedure (questions 4-5, which deal with the (im)possibility for the Parliament and the Constitutional Court to proceed with the examination and adoption of those amendments during the martial law). The Venice Commission will address the procedural questions first.

IV. Analysis

A. Question 4

21. In Question 4 the CCU asks whether it can continue with the examination of this request by the Verkhovna Rada during martial law. The Venice Commission considers that two opposite interpretations of the Constitution seem to be possible. As explained in the following paragraphs, the Venice Commission has a slight preference to a second, less strict, interpretation of the relevant provisions of the Constitution.

22. First, one may argue that the Constitution of Ukraine excludes a possibility for the CCU to produce an opinion as it is an integral part of the process of constitutional amendment, which is not possible during the martial law.

23. It is clear that Article 157.2 of the Constitution of Ukraine prohibits *the adoption* of the proposed constitutional amendments during a state of emergency or when martial law applies. More ambiguous is whether some *preparatory steps* in the amendment procedure leading towards the adoption of a constitutional amendment may be taken at a time when martial law is in force – such as the adoption of a substantive position of the CCU in response of the Verkhovna Rada's request as formulated in the Resolution of 16 March 2021.

24. In order to assist the CCU in answering the question, it may be helpful to examine the underlying reason(s) for having a constitutional provision prohibiting constitutional amendments during a state of emergency / when martial law applies.¹⁸

25. The first *raison d'être* of a constitutional provision prohibiting constitutional amendments during martial law, relates to the possibilities of guaranteeing a proper process of constitutional

¹⁸ The existence of such a provision is quite common in constitutional jurisdictions. In 2010, the Venice Commission listed the following countries having such a constitutional provision: Albania, Belgium, Estonia, France, Georgia, Lithuania, Luxembourg, Republic of Moldova, Montenegro, Portugal, Romania, Serbia, Spain and Ukraine (see Venice Commission, [CDL-AD\(2010\)001](#), Report on Constitutional Amendment, para. 54).

reform.¹⁹ A good amendment procedure will normally contain a certain time period in order to ensure “a period of debate and reflection”. Constitutional reform is a process which requires free and open public debate, and sufficient time for public opinion to consider the issues and influence the outcome.²⁰ This important element²¹ of a good amendment procedure cannot be guaranteed during martial law, if only because the free press and media platforms as well as the diversity of the political landscape can be affected by the measures taken under martial law.²²

26. The second *raison d'être* may be summarised as follows: the *ad hoc* needs during a situation in which martial law applies (which are often characterised by increased powers of the executive²³ and a consequential weakening of a constitutional system of checks and balances) should not impact the long-term constitutional design of a country. The most important characteristic of any emergency regime is its *temporary character*. This is stressed in the Paris Minimum Standards of Human Rights Norms in a State of Emergency²⁴ adopted by the International Law Association in 1984. The Venice Commission affirmed this in its Opinion on the Draft Constitutional Law on “Protection of the Nation” of France.²⁵ As a result, measures taken under the emergency regime should avoid as much as possible to have permanent effect. Such a permanent effect occurs by definition in case of introduction of structural (institutional) provisions.²⁶ Such permanent changes must be introduced in the framework of the normal democratic political process.²⁷ This is of particular importance for measures which (further) strengthen the constitutional powers of the executive.²⁸

27. Temporal limitations for constitutional amendments are meant to protect the Constitution against amendments in a situation of turmoil when the participatory democratic process is reduced or absent and the debate is lacking transparency. Furthermore, such a restriction can be understood as a measure to uphold the stability of the constitutional framework when it is needed even more than in “normal” times. Such an interpretation of the restrictive rules for constitutional amendments during times of crisis is also in line with the view of the Venice Commission that “fundamental rules for the effective exercise of state power and the protection of the individual human rights should be stable and predictable, and not subject to easy change.”²⁹

¹⁹ See Venice Commission, [CDL-AD\(2017\)005](#), Turkey - Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to the national referendum on 16 April 2017, para. 30.

²⁰ See Venice Commission, [CDL-AD\(2010\)001](#), Report on Constitutional Amendment, paras. 241 and 245.

²¹ See Venice Commission [CDL-AD\(2013\)010](#), Opinion on the draft new Constitution of Iceland, para. 14, See a *contrario*, Venice Commission, [CDL-AD\(2013\)012](#), Opinion on the fourth amendment to the Fundamental law of Hungary, para. 135.

²² On 19 March 2022, President Zelensky signed two Decrees : Decree (No. 152/2022) on the implementation of a unified information policy under martial law according to which all national television channels were merged into one platform due to martial law, available at: [Щодо реалізації єдиної інформаційної п... | від 18.03.2022 \(rada.gov.ua\)](#); and Decree (No. 153/2022) on suspension of activities of certain political parties (11 parties in total) for the period of martial law, available at: [Щодо призупинення діяльності окремих п... | від 18.03.2022 \(rada.gov.ua\)](#).

²³ See Venice Commission, [CDL-AD\(2011\)049](#), Opinion on the draft Law on the Legal Regime of the State of Emergency of Armenia, para. 44 and [CDL-STD\(1995\)012](#), Emergency Powers, p. 17.

²⁴ See section A, p. 3 (a)45.

²⁵ See Venice Commission, [CDL-AD\(2016\)006](#), para. 65 : “A state of emergency is by definition a state which must be exceptional and temporary. So it must also be provisional. [...]”.

²⁶ In an opinion on Turkey ([CDL-AD\(2016\)037](#)), Opinion on Emergency Decree Laws N°s 667-676 adopted following the failed coup of 15 July 2016) the Venice Commission stressed that “the emergency decree laws should not introduce permanent structural changes to the legal institutions, procedures and mechanisms”. See also Venice Commission, [CDL-AD\(2019\)014](#), Romania – Opinion on emergency ordinances GEO No. 7 and GEO No. 12 amending the laws on justice, para. 20: “the emergency ordinances issued by the Romanian Government contain provisions establishing rules of indefinite duration, and not only temporary or transitional solutions”.

²⁷ See Venice Commission, [CDL-AD\(2017\)021](#), Opinion on the provisions of the emergency decree law No. 674 of 1 September 2016 which concern the exercise of local democracy in Turkey, para. 58.

²⁸ Cf. Venice Commission, CDL, para. 249. See also Venice Commission : [CDL-AD\(2019\)015](#), Parameters on the relationship between the parliamentary majority and the opposition in a democracy: a checklist, para. 121.

²⁹ See Venice Commission, [CDL-AD\(2010\)001](#), para. 5.

28. Taking into consideration the reasons for having a constitutional provision prohibiting constitutional amendments during martial law, one may argue that the prohibition should be applicable to the entire process of the amendment procedure, including any preparatory steps in advance of the actual adoption of the constitutional amendment. This would imply that a constitutional court competent to do so does not adopt a substantive position on the compatibility of the proposed amendments while martial law is in force. Such an approach would not prevent the CCU from expressing itself on the scope of application of Article 157.2 of the Constitution of Ukraine.

29. Second, an alternative line of reasoning may also be possible: one may draw a distinction between different stages of the process of the constitutional amendment. Thus, political decision-making, which may be affected by the state of emergency or martial law and takes place in Parliament and also in wider society, must be differentiated from the legal assessment of the draft amendments, which is the function of the constitutional court, which is not affected in the same way. From this point of view, it is possible to conclude that the Constitution of Ukraine does not exclude a possibility for the CCU to produce an opinion, since the Constitutional Court is providing a *legal* analysis of the situation and is therefore not affected by the same considerations which are related to the impossibility of having a proper *political* discussion during the martial law.

30. It could be useful to pay attention to the wording of Article 157.2 of the Constitution of Ukraine which is phrased quite differently than some other similar provisions in other constitutions. For example, Article 169 of the Constitution of Spain provides that “[t]he *process of Constitutional amendment* may not be initiated in time of war or [alarm, emergency and siege (martial law)].” Similarly, Article 289 of the Portuguese Constitution provides that “[n]o act involving the revision of this Constitution shall be undertaken during a state of siege or a state of emergency.” Due to the wording, it could be inferred from these provision that they would also prohibit all preparatory steps in the amendment procedure leading towards the adoption of the constitutional amendment. However, Article 157.2 of the Ukrainian Constitution is phrased quite differently and rather speaks of the termination of the process (which culminates with the amendment of the constitution) and not of any preliminary steps. The question to be asked is whether issuing the opinion (under Article 159 of the Constitution) constitutes an “amendment” to the Constitution which is prohibited by Article 157.2 during martial law.

31. From a strictly grammatical point of view, the answer seems to be negative for the following reasons:

- Article 159 of the Constitution foresees the opinion of the CCU as a pre-requisite for the Verkhovna Rada to “consider” a draft law on amending the Constitution. It therefore appears that the opinion of the CCU is only a necessary condition for the Verkhovna Rada to analyse – not necessarily approve – a project of constitutional amendments.
- Furthermore, according to Articles 155 and 156 of the Constitution, “*a draft law on amending the constitution [...] is deemed to be adopted, if at the next regular session of the Verkhovna Rada of Ukraine, no less than two-thirds of the constitutional composition of the Verkhovna Rada of Ukraine have voted in favour thereof*” (Article 155) or “*on the condition that it is adopted by no less than two-thirds of the constitutional composition of the Verkhovna Rada of Ukraine, and is approved by an All-Ukrainian referendum designated by the President of Ukraine*” (Article 156). In other words, only specific acts of the Verkhovna Rada and/or a referendum have the effect of adopting or bringing into force a constitutional amendment.

32. Consequently, given that the opinion issued by the CCU pursuant to Article 159 of the Constitution as such cannot have the effect of amending the Constitution, not only due to its

intermediate nature, but also because its interpretive non-amending nature, it could be considered not to violate the prohibition established by Article 157.2 of the Constitution.

33. Another argument supporting (albeit indirectly) this interpretation may be found in Article 12.2 of the Law of Ukraine on the legal regime of martial law which provides that “[t]he powers of the courts, bodies and institutions of the justice system provided for by the Constitution of Ukraine may not be restricted under the legal regime of martial law”. This provision complies with the standards set by the Venice Commission that “[t]he functioning of the judiciary should not be restricted [during states of emergency] *except when absolutely necessary or when the functioning is factually impossible*”.³⁰ It is reasonable to limit the power of the executive (which plays a key role during the martial law) to propose structural changes in the constitutional design which may further increase its power in the system of checks and balance; by contrast, it may be dangerous to allow the executive, by referring to the martial law situation, to curtail the powers of the judiciary, and, by implication, of the Constitutional Court.

34. In conclusion, given that Article 157.2 would seem not to explicitly and unequivocally prohibit all measures, including preparatory steps, pertaining to constitutional amendment, the Venice Commission is inclined to conclude that the elaboration of an opinion by the CCU during martial law is not necessarily excluded.

35. As for the second part of question no. 4 concerning the *possible legal consequences* of an opinion of the CCU issued during martial law (in light of the requirement of Article 157.2 of the Constitution of Ukraine) which is also linked to the first part of question No. 5 concerning the possibility of the Verkhovna Rada, in line with Article 159 of the Constitution, *to consider* (emphasis added) the draft constitutional amendment, in respect of which the CCU had produced an opinion during martial law, Article 159 has to be read together with Article 157 of the Constitution.

36. Article 157 prohibits amendments which “*foresee the abolition or restriction of human and citizens' rights and freedoms, or if they are oriented toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine.*” Article 159 of the Constitution entrusts the Constitutional Court with examining the conformity of the draft amendments with this prohibition. The review by the Constitutional Court would not make sense if the Verkhovna Rada were free to ignore the negative opinion of the Constitutional Court.

37. Article 151.2 of the Constitution provides that the opinions adopted by the CCU “shall be binding, final and may not be challenged”, so, in case the CCU considers that the draft constitutional amendments breach the unamendable provisions of the Constitution, that precludes the Verkhovna Rada from adopting them or would require a reformulation of the amendments and their re-submission to the CCU.

B. Question 5

38. In relation to the question of whether the opinion produced by the CCU *retains its legal effect* in case the Verkhovna Rada of Ukraine considers a draft law on introducing amendments to the Constitution of Ukraine *after martial law is lifted*, the Venice Commission notes as follows.

39. Article 151.2 of the Constitution provides that “*decisions and opinions adopted by the Constitutional Court of Ukraine shall be binding, final and may not be challenged*”. This could mean that, once the opinion has been issued, there is no possible way of challenging or changing it and it retains its validity and binding nature until a further act of the same nature and hierarchy changes the criteria (e.g., a new draft constitutional amendment on the same matter could open

³⁰ See Venice Commission, [CDL-PI\(2020\)005rev](#), Respect for Democracy, Human Rights and the Rule of Law during States of Emergency – Reflections, para. 89.

the possibility of a further or new interpretation). Moreover, assuming that the opinion issued by the CCU, does not go against the constitutional prohibition of amending the Constitution during the martial law, its validity is independent of the martial law itself. This is even more so as the answer to the question of compatibility does not change with time.

C. Questions 1, 2 and 3

1. Preliminary remark: the limits of the substantive constitutional review of the constitutional amendments

40. In questions 1, 2 and 3 the CCU is asking whether the draft constitutional amendments comply with the principle of *separation of powers*, with the requirements of *checks and balances* between the relevant branches, and impact in a negative way the *democracy*, the respect of the *rule of law* and the protection of *human rights and freedoms*.

41. Before addressing these questions, the Venice Commission deems it necessary to make a preliminary remark about the limits of the review of constitutionality of the constitutional amendments in the present case and in general.

42 A literal reading of Article 159 of the Constitution of Ukraine implies that the remit of the constitutional review exercised by the Constitutional Court when dealing with a request submitted by the Verkhovna Rada, is limited to checking the conformity of the draft constitutional amendments with Articles 157 and 158 of the Constitution. The *substantial* limitations on constitutional amendment provided by these Articles are as follows:

- the amendments shall not foresee the abolition or restriction of human and citizen's rights and freedoms;
- the amendments shall not be oriented toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine.

43. However, the CCU is asking whether the draft constitutional amendments comply with principles which are *not explicitly provided* by Articles 157 and 158, if these provisions are construed strictly. Hence, questions 1, 2 and 3 put by the CCU cannot be answered the way they are posed by the CCU. That is also because the proposed amendments intend to precisely modify such a balance of power by granting new powers to both, the President and the Verkhovna Rada of Ukraine. It is impossible to evaluate the constitutionality of a draft constitutional provision based on the same provisions that it intends to modify.

44. A broader interpretation of the remit of the constitutional review exercised by the CCU in such cases is also possible. Thus, one may argue that a radical change in the system of checks and balances or evident departure from some basic precepts of the rule of law may eventually lead to the "*abolition or restriction of human and citizen's rights and freedoms*", and, therefore, the CCU is constitutionally entitled to entertain such analysis. Even if the Commission itself does not necessarily subscribe to such a broad interpretation of Articles 157 and 158, the CCU may conclude that Articles 157 and 158 give it an *implicit power* to evaluate the conformity of the draft constitutional amendments with the principles it referred to in its questions to the Venice Commission.³¹

45. The wording chosen by the CCU in its September 2020 decision (namely that giving such powers to the President may lead to the "weakening of constitutional guarantees of human and

³¹ The Venice Commission accepts that a constitution may contain some implicitly unamendable provisions. The most evident example of an implicitly unamendable provision in the Constitution of Ukraine would be Article 157 of the Constitution itself.

civil rights and freedoms”) could be considered relevant in this context. One may argue that already in 2020, the CCU saw the change in the balance of powers introduced by the law on the NABU as endangering human rights, thus creating a nexus with Article 157.1 of the Constitution (which prohibits constitutional amendments which lead to the “restriction of human and citizen’s rights and freedoms”).

46. That being said, the Venice Commission notes that in September 2020 the CCU examined the compatibility of an ordinary law with the Constitution as a whole, including provisions defining the system of checks and balances.

47. Thus, even though the CCU has issued two decisions on the constitutionality of the ordinary laws on the appointment and dismissal of the Director of the NABU, these decisions cannot be considered as a source for the current analysis because these decisions address the constitutionality of the ordinary legislation, which have a completely different force and hierarchy, because the unconstitutionality of contested legal acts was based on the argument that ordinary laws cannot grant more powers to the President than those explicitly provided by the Constitution while, in the present case, the Verkhovna Rada is attempting to modify the Constitution to grant such constitutional powers. Furthermore, according to the relevant provisions of the law, which was found incompatible with the Constitution, the shift in power was different as the President was not bound to act upon the approval of the Parliament.

48. The Venice Commission refers the CCU to its earlier *amicus curiae* brief³² which concerns the role of the constitutional court in reviewing constitutional amendments, and the interrelation between the power of a constituent authority and the power of the Constitutional Court. In examining the compatibility of the draft constitutional amendments with the unamendable principles of the Constitution, the CCU has to respect the role of the constituent power which may change the balance of powers, redefine features of the democratic system, or adjust the definition of certain human rights, provided that these changes do not result in the “*abolition or restriction of human and citizen’s rights and freedoms*” or the “*liquidation of the independence or violation of the territorial indivisibility of Ukraine*”.

49. In sum, it belongs to the CCU to decide whether the Constitution empowers it to evaluate the draft constitutional amendments in the light of the principles of the separation of powers, checks and balances, democracy, and the rule of law. Nothing in this analysis by the Venice Commission should be interpreted as confirming that the CCU has or has not such a power.

50. Question 3, insofar as it concerns possible effect of the draft constitutional amendment on the level of protection of human rights and freedoms will be addressed separately.

2. Impact of the amendments on the separation of powers/checks and balances and democracy

51. In general terms, the Venice Commission has recognised that the principles of “separation of powers” and “checks and balances” demand that the three functions of a democratic state – executive, legislative and judicial – should not be concentrated in one branch but should be distributed amongst different institutions.³³ The Commission explained that the extent of separation depends on the political system as determined by the Constitution and that in general, there are three models: “*In presidential systems there is a clear separation, where directly elected presidents do not depend on the confidence of the legislature. In semi-presidential systems, government has to answer both to a directly elected president and to the legislature. In*

³² See Venice Commission, [CDL-AD\(2022\)012](#), *Amicus Curiae* brief on the limits of subsequent (a posteriori) review of constitutional amendments by the Constitutional Court.

³³ See Venice Commission, [CDL-AD\(2013\)018](#), Opinion on the balance of powers in the Constitution and the Legislation of the Principality of Monaco, paras. 14-16.

parliamentary systems, the separation is usually less marked because the executive (government) is appointed from a parliamentary majority. This implies that the executive is dependent on parliamentary approval".³⁴

52. The Commission observed that each state can make a free political choice between a presidential and parliamentary system. However, "*the system chosen should be as clear as possible, and the provisions should not create room for unnecessary complications and political conflicts*".³⁵ If a presidential system is chosen, certain minimum requirements of parliamentary influence and control should be fulfilled.³⁶

53. In the past, the Venice Commission observed that "*past attempts (reforms in 2009, 2014) to change the semi-presidential system with large powers of the Head of State into a more parliamentary system have not succeeded*" and "*one can observe a contrary tendency towards the strengthening of a semi presidential system.*"³⁷

54. The proposed amendments to Articles 85 and 106 of the Ukrainian Constitution stipulate that the President shall have a power to appoint to office and dismiss, upon the consent of the Verkhovna Rada of Ukraine, the Director of the NABU and the Director of the SBI in accordance with the procedure established by the law and by means of selection of candidates on a competitive basis.

55. The Venice Commission has observed that "*the most important proposals for amending constitutional rules on the state machinery are often those that seek to alter the balance of power between the legislative and executive branches of government, one way or the other. These should also be subject to particular care and consideration. In general, amendments strengthening parliament are normally meant to make the system more democratic, while amendments strengthening the executive are meant to make it more efficient and effective*".³⁸

56. The draft constitutional amendment expressly requires that the Verkhovna Rada shall grant its consent for the appointment and dismissal of the Directors of the NABU and the SBI, following the results of the competitive selection. The Verkhovna Rada's consent fulfils a requirement of parliamentary influence and control over the executive/presidential power in this context. Compared to a model where the two Directors are appointed by the Government without any parliamentary approval, the proposed model increases the level of involvement of the Parliament and thus furthers the democratic principle.

57. This does not mean that the process of appointment of the two Directors cannot be improved further. The Venice Commission has previously noted that one of the key requirements for a proper and effective exercise of the anti-corruption agencies' functions is that they have independence, meaning "*an adequate level of structural and operational autonomy, involving legal and institutional arrangements to prevent political or other influence*".³⁹ More specifically, the Commission has pointed out that "*the need to ensure the independence and political neutrality of anti-corruption bodies is emphasised in many international documents*".⁴⁰ Political neutrality of heads of such bodies may be increased by requiring a cross-party support to their appointment and dismissal. As previously noted in a broadly similar context, the consent by the

³⁴ Ibid.

³⁵ See Venice Commission, [CDL-AD\(2003\)019](#), Opinion on three draft Laws proposing amendments to the Constitution of Ukraine, para.14.

³⁶ See Venice Commission, [CDL-AD\(2017\)026](#), para. 18.

³⁷ See Venice Commission, [CDL-AD\(2017\)026](#), Opinion on the amendments to the Rules of Procedure of the Verkhovna Rada of Ukraine, para. 19.

³⁸ See Venice Commission, [CDL-AD\(2010\)001](#), Report on Constitutional Amendment, para.142.

³⁹ *Op. Cit.* Venice Commission, [CDL-AD\(2014\)041](#), para.18.

⁴⁰ See Venice Commission, [CDL-AD\(2021\)024](#), Opinion on the draft law on the prevention of conflict of interest in the institutions of Bosnia and Herzegovina, para 64.

Parliament for the appointments of certain key officeholders may require a support of a qualified majority of its members,⁴¹ plus a suitable anti-deadlock mechanism, to prevent a possible institutional disfunction.⁴²

58. Furthermore, certain measures to improve political neutrality of the two Directors may be taken at the level of the implementing legislation, in particular, as regards an appointment process guaranteeing the selection of individuals on the basis of an objective non-arbitrary criteria. The Venice Commission does not have the mandate to examine the competitive selection and appointment process of the two Directors under the current legislation. However, the Venice Commission would encourage the Ukrainian legislator to ensure that the implementing legislation guarantees that merit, knowledge, skills and level of specialization of candidates are assessed and that it is a fair, transparent and open competition, free from political partisanship. This recommendation should not be interpreted as suggesting that the current regulations are not in line with those principles.

59. That being said, the choice of the form of the parliamentary approval belongs not to the Constitutional Court but to the Verkhovna Rada of Ukraine. Even if alternative models of appointment/dismissal of the two Directors may be considered, and even if the implementing legislation would eventually need to be further improved in order to guarantee fair and merit-based selection procedure, the mechanism proposed by the draft constitutional amendments does not appear to perturb the balance between different branches of power, and even increases the influence of the legislative branch in this process.

3. Impact of the amendments on the rule of law

60. The Venice Commission has considered *“that the notion of the Rule of Law requires a system of certain and foreseeable law, where everyone has the right to be treated by all decision-makers with dignity, equality and rationality and in accordance with the laws, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures”*.⁴³ In order to determine if the draft constitutional amendments have an impact on the rule of law, it is necessary to identify under which elements of that multi-faceted concept (see the questions formulated in the Rule of Law Checklist of the Venice Commission through which the Commission defines the notion of the “rule of law”) the draft constitutional amendments can be evaluated.

61. The requirement of the clarity and foreseeability of the draft constitutional amendments is the most relevant in the present context. For the Venice Commission, the draft constitutional amendment determines the respective roles of the President and of the Verkhovna Rada in the appointment procedure with sufficient clarity. The Venice Commission understands that the proposed mechanism would only require the vote of a simple majority of the MPs. As stressed above, an alternative model (requiring a qualified majority with an appropriate anti-deadlock mechanism) would also be conceivable⁴⁴, but the choice in this respect belongs to the constituent power and not to the CCU. Therefore, nothing in the proposed text, as it is formulated, seems to be open to misinterpretation. Furthermore, the draft Law seems to clearly point out that the amendments that are being proposed would affect the content of Articles 85 and 106 of the Constitution of Ukraine. Therefore, the proposed amendments seem to be consistent with the concept of foreseeability, which *“means (...) that the law must (...) be formulated with sufficient precision and clarity to enable legal subjects to regulate their conduct in conformity with it”*.⁴⁵

⁴¹ See Venice Commission, [CDL-AD\(2003\)019](#), paras. 34-35 and 67.

⁴² See [CDL-AD\(2018\)015](#), Opinion on the draft law on amendments to the Law on the Judicial Council and Judges of Montenegro, para. 19.

⁴³ See Venice Commission, [CDL-AD\(2016\)0007](#), Rule of Law Checklist, para. 15.

⁴⁴ See Venice Commission, [CDL-AD\(2021\)024](#), para 67.

⁴⁵ See Venice Commission, [CDL-AD\(2021\)004](#), Spain - Opinion on the Citizens' Security Law, para. 22.

62. That being said, the Venice Commission acknowledges that the constitutional norms are often formulated in a broader manner, so as to allow the legislator, within the boundaries set by the Constitution, and under the control of a constitutional court, to develop more specific rules in the implementing legislation. The Venice Commission understands that the adoption of the constitutional amendment will be followed by respective amendments to the laws on the NABU and the SBI, which might address some of the issues raised by the Venice Commission in the present *amicus curiae* brief.

4. Impact of the amendments on human rights and freedoms

63. The Constitutional Court of Ukraine has to determine if the draft Law foresees *the abolition or restriction of human and citizen's rights and freedoms*. It is first necessary to identify the rights foreseen by the Constitution which could be potentially affected and analyse the potential implications caused by the appointment and dismissal process of the Directors of the NABU and the SBI in the light of existing international standards.

64. Human and citizen's rights and freedoms are enshrined in Chapter II of the Constitution of Ukraine (Articles 21-68). Some of the rights which might be relevant in the context of the proposed amendments are the right to equality/non-discrimination (Article 24), the right of citizens to participate in the administration of state affairs (Article 38) and the right to due process (some features of which are recognized in Article 29).

65. As to the risk of discrimination in the process of appointment of two Directors, the right of citizens to participate in the administration of state affairs, and the due process guarantee, the Venice Commission observes that the competitive basis to select those two officeholders (prior to the appointment by the President and the consent of the Verkhovna Rada) serves as a safeguard against possible discrimination and provides sufficient opportunities to qualified candidates to compete for the posts. A lot would depend on how the process of competition is further improved in the law. However, this element does not need to be regulated at the constitutional level. To the extent that the constitutional provisions allow for a selection process which is based on the objective criteria that prove merit, knowledge, and specialization of the candidates the Venice Commission does not consider that the proposed constitutional model or their appointment would result in discrimination or in an unjustified limitation of the right to participate in the administration of state affairs. The fact that the final appointment decision will be taken by the political actors and at least partly on the basis of political consideration is not unusual for that kind of appointments and is not incompatible with the individual rights of the candidates.

66. Finally, the Venice Commission draws attention to Article 24.3 of the Ukrainian Constitution which establishes that equality of the rights of women and men has to be ensured by providing women with opportunities equal to those of men, in public, political, and cultural activities. This duty is in line with international standards on the subject, which have been extensively analysed by the Venice Commission. Specifically, regarding the participation of women in public affairs, the Venice Commission has quoted international instruments which point out that "participation by both men and women is a key cornerstone of good governance".⁴⁶ While this imperative does not necessarily need to be addressed at the constitutional level, the legislator might consider introducing necessary legal mechanisms in the implementing legislation, in order to ensure that qualified women and men have the same opportunity to be appointed as Directors of the NABU and the SBI.

⁴⁶ See Venice Commission, [CDL-AD\(2011\)009](#), Stocktaking on the notions of "Good governance" and "Good administration", para. 36.

V. Conclusion

67. The Constitutional Court of Ukraine (the CCU), at the request of the Verkhovna Rada, is currently considering draft constitutional amendments regarding the procedure for appointing to office and dismissing the Director of the National Anti-Corruption Bureau of Ukraine (the NABU) and the Director of the State Bureau of Investigation (the SBI). On 12 December 2022, the acting President of the Constitutional Court of Ukraine requested an *amicus curiae* brief from the Venice in relation to this pending case.

68. The five questions put by the CCU before the Venice Commission can be divided into two groups. Questions 1, 2 and 3 deal with the compatibility of the draft constitutional amendments with certain principles enshrined in the Constitution, namely the principle of the separation of powers, checks and balances, democracy, and the respect for the rule of law. The CCU is also asking whether those amendments might impact in a negative way the protection of human rights and freedoms.

69. The second group of questions (questions 4 and 5) concerns the procedure of constitutional amendment, namely the (im)possibility for the Parliament and the Constitutional Court to proceed with the examination and adoption of those amendments during the regime of martial law declared in Ukraine in connection with the Russian aggression. The Venice Commission will address the procedural questions first.

70. The Venice Commission examined two alternative interpretations of the constitutional provision prohibiting constitutional amendments while the martial law is applied (Article 157 of the Constitution). One possible line of argument is based on the understanding that the Constitution excludes *any possibility* for the CCU to produce an opinion on constitutional amendments during martial law, since such an opinion is an integral part of the process of constitutional amendment which cannot take place during the martial law.

71. An alternative reading is based on the understanding that the Constitution only prohibits the final adoption of the constitutional amendments, not the preparatory or intermediary steps in this process (such as obtaining an opinion of the CCU). Having regard to similar provisions in some other Constitutions, as well as to the purpose of introducing such a limitation (which is to exclude rushed adoption of permanent changes under the pressure of the moment and without a proper and open political discussion), the Venice Commission has a slight preference for the second line of reasoning but reiterates that it belongs to the CCU to give a final answer to this question, in the light of the constitutional tradition of the country. The Commission further observes that the CCU opinion issued in accordance with Article 159 of the Constitution is binding but imposes no further obligation to proceed with amending the Constitution.

72. As concerns questions 1-3, the Venice Commission observes, at the outset, that, if construed strictly, Articles 157 and 158 of the Constitution do not give the CCU a power to issue an opinion on the conformity of the draft constitutional amendments with such principles as the separation of powers, checks and balances, democracy, and the respect of the rule of law. Even if the CCU finds itself in a position to conclude that the Constitution does give it such a power, which can be derived from the substantive remit of the review as indicated in Articles 157 and 158, the CCU should use this power with caution and with respect for the role of the constituent power which may change the balance of powers, redefine the features of the democratic system, or adjust the definition of certain human rights, provided that these changes do not result in the “abolition or restriction of human and citizen’s rights and freedoms” or the “liquidation of the independence or violation of the territorial indivisibility of Ukraine”.

73. Leaving aside the question of the possible remit of the constitutional review which may be exercised by the CCU in this case, the Venice Commission considers that the proposed amendments fulfil a minimum requirement of parliamentary influence and control over the

executive and do not overstep the boundaries of areas reserved for legislative, executive or presidential powers. The Commission notes that other models of appointment of the two Directors could also be possible (for example, the approval by the Verkhovna Rada with a qualified majority and with an appropriate anti-deadlock mechanism), but this is a matter of political choice which belongs to the Verkhovna Rada, and it is not for the CCU nor for the Venice Commission to propose such alternative models.

74. From the rule of law perspective, the draft constitutional amendments appear to be formulated in an intelligible manner, and it is understood that the constitutional amendments, if adopted, will be developed further in the implementing legislation on the two institutions concerned. In such an implementing legislation the Verkhovna Rada may consider further ways of improving the process of appointment of both Directors on a competitive basis, in order to ensure merit-based and fair process of appointment and guarantee that it is compatible with the constitutional human rights provisions related to the right to participate in the administration of public affairs, non-discrimination, equality, and due process. The final decision whether the proposed amendments create a conflict with the human rights provisions of the Constitution remains with the Constitutional Court.

75. The Venice Commission remains at the disposal of the Constitutional Court and the Ukrainian authorities for any further assistance they may need.