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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS
(ODIHR)

UKRAINE

URGENT JOINT OPINION

**ON THE DRAFT LAW
ON LOCAL REFERENDUM**

**Issued pursuant to Article 14a
of the Venice Commission's Rules of Procedure**

on the basis of comments by

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I. Introduction

1. On 22 October 2021, the Speaker of the Verkhovna Rada requested the European Commission for Democracy through Law of the Council of Europe (hereinafter “Venice Commission”) to provide a legal opinion on the draft law on “Local referendum” registered on 19 May 2021 by the Verkhovna Rada of Ukraine (CDL-REF(2022)002, hereinafter “the Draft law”). According to the established practice, the opinion has been prepared jointly by the OSCE Office for Democratic Institutions and Human Rights (hereinafter “ODIHR”) and the Venice Commission.
2. Messrs Nicos Alivizatos, Josep Maria Castellà Andreu and Francesco Maiani acted as rapporteurs for the Venice Commission. Ms Eirini Maria Gounari was appointed as legal expert for ODIHR.
3. On 13 and 14 January 2022, online meetings took place, replacing the usual expert visit to the country due to COVID-19, between the rapporteurs, experts and members of the Venice Commission and ODIHR secretariats on the one side, and members of the Central Electoral Commission, the Ministry of Justice, the Institute of legislation of the Verkhovna Rada, deputies of the Verkhovna Rada, the Association of Ukrainian Cities, a representative of the Mayor of Kiev, representatives of national NGOs and experts on the other side. The Venice Commission and ODIHR are grateful to the Office of the Council of Europe in Ukraine for the excellent organisation of these virtual meetings.
4. This joint opinion deals with the conformity of the Draft law with international standards, in particular with the Revised Guidelines on the Holding of Referendums ([CDL-AD\(2020\)031](#)) as well as the 1990 OSCE Copenhagen Document.¹ The opinion does not seek to assess the conformity of the Draft law with the Constitution of Ukraine, related national legislation or decisions of the Constitutional Court of Ukraine on legislation on referendums; however, it refers to these materials when useful.
5. The opinion was drafted on the basis of comments by the rapporteurs and the results of the virtual meetings, including the written comments submitted by the authorities following these meetings. The application of the urgent procedure to this joint opinion was authorised by the Commission at its 129th Plenary Session (10-11 December 2021); the joint opinion was subsequently issued pursuant to the Venice Commission’s Protocol on the preparation of urgent opinions ([CDL-AD\(2018\)019](#)) on 10 February 2022.

II. Scope of the Joint opinion

6. The scope of the Opinion covers only the Draft law officially submitted for review. It covers only the most important aspects of the Draft law examined. The Opinion therefore does not constitute a full and comprehensive review of the Draft law, nor of the entire legal and institutional framework governing referendums in Ukraine, notably the relevant provisions of the Election Code of Ukraine, the laws on the Central Electoral Commission and the Constitutional Court, as well as other relevant acts.
7. The Opinion highlights positive developments while also focusing on areas that would benefit from further review or improvement. The ensuing recommendations are based on

¹ See in particular, regarding the international standards, the Venice Commission’s Revised Guidelines on the Holding of Referendums ([CDL-AD\(2020\)031](#)) and Updating guidelines to ensure fair referendums in Council of Europe member States: see also Parliamentary Assembly of the Council of Europe, Resolution 2251 (2019): <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=25325> and Congress of Local and Regional Authorities of the Council of Europe, Recommendation 459 (2021) of the on Holding Referendums at local level. <https://rm.coe.int/rec-459-2021-en-local-referendums-monitoring-committee-rapporteur-vlad/1680a2dfe4>.

relevant OSCE commitments, Council of Europe and other international human rights norms as well as good practice. The Opinion also takes into account previous recommendations of the Venice Commission and ODIHR² on the legal framework for holding national referendums in Ukraine, notably the 2020 Urgent Opinion on the draft law on All-Ukrainian referendum,³ and ODIHR and the Parliamentary Assembly of the Council of Europe (PACE) reports on elections observed in Ukraine, where relevant.⁴

8. The Opinion is based on an unofficial English translation of the Draft law. Errors from translation may occur.

9. In view of the above, ODIHR and the Venice Commission would like to note that this Opinion does not prevent them from preparing additional written or oral recommendations or comments on the respective legal acts or related legislation in Ukraine in the future.

III. Executive Summary

10. The objective of the Draft law of Ukraine on Local Referendum is to regulate in a single act issues related to the preparation and conduct of local referendums, such as the subjects of local referendums and restrictions related to their conduct, registration of the initiative group, establishment of referendum commissions, campaign and campaign finance, voter lists, access to media, as well as voting, counting and determination of results, and complaints and appeals.

11. According to established principles, any successful changes to electoral legislation, including on referendums, should be built on at least the following three essential elements: 1) a clear and comprehensive legislation that meets international obligations and standards and addresses prior recommendations; 2) the adoption of legislation by broad consensus after extensive public consultations with all relevant stakeholders;⁵ and 3) the political commitment to fully implement such legislation in good faith. An open and transparent process of consultation and preparation of such amendments increases confidence and trust in the adopted legislation and in the state institutions in general.⁶ Paragraph 5.8 of the 1990 OSCE Copenhagen Document requires participating States to adopt legislation “at the end of a public procedure”.

12. The Draft law was initiated by 112 members of the Parliament of Ukraine, who, as different national stakeholders informed the Venice Commission and ODIHR, were only members of the ruling party. During their online meetings with the authorities, the Venice Commission and ODIHR were informed that, at the initiative of the Parliamentary Working Group (in which opposition factions were invited to participate but decided against it) discussions at the national level were organised regarding this Draft law. These exchanges were followed by 96 regional consultations with civil society organisations and other stakeholders, that took place between June and October 2021. Participants had the opportunity to review the provisions of the Draft law and provide their comments on four main areas. This inclusive public debate increased stakeholders’ understanding of the process and enhanced confidence in the adopted

² Most recommendations referred to in the present Joint Opinion, like the ones of the Revised Guidelines on holding of referendums apply to referendums at the different levels of the state structure; however, they are mainly focused on national referendums. These general rules are to be adapted to the reality of local and regional referendums, in conformity with national constitutional traditions, see Revised Guidelines, para 11.

³ Venice Commission and the OSCE/ODIHR, Urgent joint opinion on the Draft law 3612 on democracy through all-Ukraine referendum, CDL-AD (2020) 024.

⁴ All previous ODIHR election reports on Ukraine can be found [here](#). Election observation reports of the Parliamentary Assembly of the Council of Europe can be found at <http://semantic.pace.net/default.aspx?search=dHlwZV9zdHJfZW46IkVsZWNOaW9uIG9ic2VydmlF0aW9uIHJlcG9ydCI=&lang=en>.

⁵ Venice Commission, Revised Guidelines on the Holding of Referendums, CDL-AD(2020)031, II.3.c and Rule of Law Checklist, CDL-AD(2016)007-rev, II.A.5.

⁶ Venice Commission, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist, CDL-AD(2019)015, paras 66 and 67; Urgent Opinion on the revised Draft law on the Referendum and the People's Initiative in Serbia, [CDL-AD\(2021\)052-e, para 9](#).

legislation. However, some interlocutors expressed their concerns to the Venice Commission and ODIHR that the number of consultations and the depth of the discussions were not sufficient for such an important piece of legislation. It is also regrettable that a broad consensus had not been reached and several opposition parties did not join the Working Group.

13. As the Final and Transitional Provisions of the Draft law indicate, harmonisation with other pieces of electoral legislation, such as, *inter alia*, the Election Code, the Law “On the All-Ukrainian Referendum”, the Code of Administrative Proceedings, the Law “On Local Self-Government in Ukraine”, the Law of Ukraine “On Voluntary Association of Territorial Communities”, and the Law of Ukraine “On the State Register of Voters”, is needed. In addition, the provisions related to the use of electronic means will come into force after the Central Election Commission adopts a decision to put an automated information system into operation.

14. The Draft law is a major step towards the conduct of local referendums following the revocation of the first Law “On the All-Ukrainian and Local Referendums” in 2012 and the subsequent lack of any legal framework regulating local referendums in Ukraine. It is also an improvement in comparison to the draft law on “Democracy through All-Ukrainian Referendum” adopted in 2021, as the Draft law under review takes into consideration several previous recommendations made by the Venice Commission and ODIHR in the Urgent Joint Opinion on Draft Law 3612 on Democracy through All-Ukrainian Referendum.⁷

15. Some of the improvements noted in the Draft law under review include, *inter alia*: detailed provisions on the procedure to be followed after suspension of the local referendum process due to a state of emergency and after this has been lifted; the verification of all signatures of voters who supported the initiative to hold a local referendum and not of just a sample; no requirement for vetting by the CEC of the rationale of the positions of the initiative group, political parties and CSOs seeking registration, as well as for approval of the campaign materials; the possibility for the initiative group to correct technical deficiencies in its submitted documents; non-automatic registration of voters who are recorded in the voter list as having permanent physical disability to vote at home; the possibility for official observers to observe all stages of the local referendum process, including the collection of signatures and the referendum campaign.

16. However, concerns remain regarding certain provisions of the Draft Law. In this respect the key recommendations of the Venice Commission and ODIHR are as follows:

- a) It is recommended to review the provisions of the Draft law allowing the organisation of local referendums simultaneously with the early termination of powers of local elected officials, by excluding the recall of elected assemblies and clearly and restrictively specifying the grounds for an early recall of the head of executive bodies.
- b) The provisions of the Draft law concerning the “normative acts” of local authorities that can or cannot be submitted to local referendum are contradictory and should be clarified.
- c) The provisions on exclusion from the subject matter of the local referendum of “certain” powers of executive authorities granted to local self-government bodies by law (delegated powers) should be clarified.
- d) Some of the procedures provided for in the Draft law are extremely burdensome, and the Venice Commission and ODIHR recommend revising them in order to make the text clearer to voters and to the authorities involved in local referendum processes.

⁷See Doc. CDL-AD(2020)024.

e) The Venice Commission and ODIHR also recommend removing the threshold of at least 50 percent of voters from the number of voters included in the voter lists necessary for the validity of a local referendum.

f) It is recommended to revise and clarify Article 93 in order to avoid misinterpretation and arbitrary application of campaign limitations.

17. In addition, the following matters could be further improved:

a) It is recommended to revise the rules on repeated referendums by making them more flexible.

b) It would be advisable to include in the Local Referendum Territorial Commissions the representatives of supporters and opponents of the referendum issue, in order to ensure that their composition reflects a balanced representation of supporters and opponents of the referendum question.

c) It is recommended that the number of members appointed at each commission level correspond to the actual needs of the election administration, with a reasonable maximum number of members established in the law. In this respect, not every referendum participant needs to have a representative on every referendum commission, provided that a balanced representation of supporters and opponents is achieved.

d) It is recommended that the Draft law establish the obligation for the authorities to provide information on the referendum issue to voters, including an explanatory report and campaign material that will reflect the views of both the supporters and the opponents of the referendum issue.

e) Provisions on the rights of voters with disabilities should be brought in line with the UN Convention on the Rights of Persons with Disabilities (UN CRPD) ratified by Ukraine in 2010.

f) It would be advisable that provisions on the use of new technologies are regulated by law rather than by-laws, and that they are excluded from the Draft law in order to be regulated by a separate and comprehensive law at a later date that would address these issues in relation to local, parliamentary and presidential elections.

g) It is recommended that citizens be allowed, on their own initiative, to expend a minimal amount of funds to personally campaign, so as not to hinder their freedom of expression or to unintentionally suppress citizens' political speech.

h) It would be advisable for the Draft law to establish clear grounds and procedures for the invalidation of results at each level by limiting such cases only to those that may have affected the outcome of the local referendum, and by also removing the provisions with arbitrary percentages; additionally, to include explicit timelines for a repeat vote in such cases.

i) The final decision on the legality of the local referendum (including the wording of the question to be submitted to the citizens), should be entrusted to the independent judiciary.

18. Additional recommendations aimed at enhancing specific aspects related to the conduct of local referendums can be found in the text below.

IV. General remarks

19. The Constitution of Ukraine provides for a representative democracy with an important space for the referendum at national and at local level. It is referred to in Articles 69, 70 and 71 (in general terms, without specification of the tier of government). Article 92.1.20 of the Constitution establishes that *“the organisation and procedure for conducting elections and referendums”* are determined exclusively by the laws of Ukraine. The local referendum is also specifically mentioned in the list of political rights: *“Citizens have the right to participate in the administration of state affairs, in All Ukrainian and local referendums...”* (Article 38). Moreover, Article 140 of the Constitution provides for the right of a territorial community to exercise local self-government to *“independently resolve issues of local character within the limits of the Constitution and the laws of Ukraine”*. It also stipulates that local self-government is exercised *“by the procedure established by law, both directly and through bodies of local self-government: village, settlement and city councils, and their executive bodies”*. Article 143 lists within the competencies of territorial communities the obligation to *“ensure the holding of local referendums and the implementation of their results”*.

20. The first Law of Ukraine "On the All-Ukrainian and Local Referendums" was adopted on 3 July 1991, by the Verkhovna Rada of the Ukrainian Soviet Socialist Republic (No. 1286-XII). The text was subject to numerous amendments and additions before its abrogation in 2012. In November 2012, the Verkhovna Rada of Ukraine adopted the Law No. 5475-VI "On the All-Ukrainian Referendum". Its paragraph 4 Section XIII "Final Provisions" declared the 1991 Law "On the All-Ukrainian and Local Referendums" to be no longer in force. The new Law No. 5475-VI concerned only the conduct of all-Ukrainian referendums and the conduct of local referendums in Ukraine was no longer regulated in any way. This legal vacuum seriously restricted citizens' right to participate in public affairs through a referendum provided for in corresponding articles of the Constitution of Ukraine. The preparation of the Draft law addresses this problem.⁸

21. The preparation of the draft law on local referendums is a positive development since it implements the corresponding provisions of the Constitution of Ukraine and meets the expectations of Ukrainian citizens to participate in public affairs through this instrument of direct democracy. The Congress of local and regional authorities of the Council of Europe underlined the importance of local referendums in its Recommendation 459 (2021) in the following terms:

*“[...] although national referendums have nowadays attracted much attention, it is in fact the local referendums that are most widespread in the Council of Europe member States. Yet, local referendums are essential for sounding out the citizens' will on concrete issues that directly affect their everyday lives”.*⁹

22. In countries where local referendums exist, they indeed provide citizens with a possibility to decide on important local issues directly on a more frequent basis; however, the main principles applicable to referendums remain the same. The Revised Guidelines on holding of referendums provide that:

“[...] In the constitutional systems of Council of Europe Member States, decision-making ordinarily occurs through mechanisms of representative democracy, whereas recourse to referendums tends to complement such decision-making processes. This is true even in countries where legislation is generally open to referendum. In view of the foregoing, referendums and representative democracy should be harmoniously combined. In

⁸ Venice Commission, Urgent Joint Opinion on Draft law 3612 on Democracy through All-Ukraine Referendum, CDL-AD (2020)024, paras 19 and 22.

⁹ Congress of Local and Regional Authorities of the Council of Europe, Recommendation 459 (2021), 2.b. <https://rm.coe.int/rec-459-2021-en-local-referendums-monitoring-committee-rapporteur-vlad/1680a2dfe4> .

particular, recourse to direct democracy should not exclude the involvement of the representative bodies in the process. Furthermore, recourse to a referendum should not be used to upset constitutional checks and balances, e.g. be used by the president or the government in order to circumvent parliamentary amendment procedures.”¹⁰

23. However, the Venice Commission and ODIHR would like to stress that it is a matter for national constitutional law to establish whether referendums may occur, what their scope is, and what procedure must be followed to hold them. A number of guarantees are necessary to ensure that they genuinely express the wishes of the electorate and do not go against international standards in the field of human rights, democracy and the rule of law.¹¹ According to established principles any successful changes to electoral legislation, including on referendums, should be built on at least the following three essential elements: 1) a clear and comprehensive legislation that meets international obligations and standards and addresses prior recommendations; 2) the adoption of legislation by broad consensus after extensive public consultations with all relevant stakeholders; and 3) the political commitment to fully implement such legislation in good faith. An open and transparent process of consultation and preparation of such amendments increases confidence and trust in the adopted legislation and in the state institutions in general.¹²

24. The process of preparation of the Draft law on local referendums in Ukraine appeared to make appropriate efforts to meet these criteria. Indeed, a Working group prepared the draft with the participation of MPs, national and international experts and members of NGOs. Discussions at the national level were organised regarding this Draft law. These exchanges were followed by 96 regional consultations with civil society organisations and other stakeholders that took place between June and October 2021. The representatives of opposition political parties were invited to join the group; however, they decided not to participate in its work. It is regrettable that a broad consensus had not been reached and several opposition parties did not join the Working Group.

25. The draft establishes a coherent set of rules on local referendums; however, the text of the Draft law provides for a number of burdensome procedures for organising local referendums. For example, Article 29 on setting up of an initiative group for a local referendum on the initiative of voters, describes in an extremely detailed way such aspects as the calling of assembly of initiators of a local referendum, participation of representatives of territorial commissions in such assemblies, issues on their agenda, etc. The same remark can be made in respect of Article 41.5 concerning the documents that should be attached to the submission of candidates to the Referendum Precinct Commission. Such detailed regulations might create unnecessary obstacles for organising local referendums. The Venice Commission and ODIHR recommend revising these provisions.

V. Analysis and recommendations

a. Subjects and types of local referendum and its nature

26. The Draft law, in Article 3, enumerates six subjects based on which a local referendum may be conducted:

- 1) approval of the Charter of the Territorial Community or amendments thereto;
- 2) approval of the Programme for the Territorial Community Development or changes to it;
- 3) early termination of the powers of a village, settlement, or city council;
- 4) early termination of the powers of a village, settlement, or city head;

¹⁰ Venice Commission, Revised guidelines on the holding of referendums, par 9. [www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2020\)031-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)031-e)

¹¹Idem, par 8.

¹² See footnote 5.

- 5) voidness of a normative act of a local self-government body or some of its provisions;
- 6) other issues of local importance assigned by the Constitution and laws of Ukraine to the jurisdiction of the territorial community, its bodies and officials.

27. From the list above it can be concluded that there are different types of referendum: a) referendums on local charter and programme (1 and 2); b) on the termination of the mandate of members of the Councils and the heads of local executives (recall - 3 and 4); c) referendum aimed at abolishing “normative acts” of the local self-government (5); and d) item no. 6 which is a very wide general clause without specification but with some limits: “issues of local importance”, issues assigned “to the jurisdiction of the territorial community, its bodies and officials”. Further limitations are established in Article 3. 2 and discussed below.

28. The Venice Commission and ODIHR have serious concerns regarding the possibility to initiate a local referendum to decide on the early termination of the powers of a village, settlement or city council and/or head of local executive, as the Draft law does not enumerate specific and restrictive legal grounds for such recall thus allowing for political grounds to be involved which could produce an alteration of the balance of powers at local level.

29. The Venice Commission has previously considered that the practice of recall is only acceptable for executive bodies and under specific conditions. Recall is incompatible with the notion of free mandate applicable to the members of local councils, and should be accompanied by a number of key guarantees in the case of the “heads” of local executives.¹³ In its 2019 Report on the recall of mayors and local elected representatives, the Venice Commission, after affirming the prohibition of the imperative mandate as a “cornerstone principle of the European democratic constitutionalism”,¹⁴ also referred to the Ukrainian case: in Ukraine such a referendum did exist in the former law at the local level for mayors, but not at the national level nor for other locally elected representatives. The Venice Commission expressed the view that a “clear distinction needs to be made between cases involving the legal accountability of the elected official, to be established in court, and situations where the political accountability of the official is at issue, and may be settled, as an exceptional measure, by recall”.¹⁵ In the opinion of the Venice Commission, “the recall of mayors may only be seen as an acceptable, though exceptional, democratic tool, when it is provided for by the national or regional law, if it is regulated very carefully and coupled with adequate and effective procedural safeguards to prevent its misuse.”¹⁶ The Draft law does not include sufficient safeguards in this respect. The Venice Commission and ODIHR recommend reviewing the provisions of the Draft law allowing to organise local referendums on the early termination of powers of local elected officials, by excluding the recall of elected assemblies and specifying clearly and restrictively the grounds for an early recall of executive bodies.

30. Article 3.2 of the Draft law lists the issues for which a local referendum may not be held, namely those that:

- 1) are the subject of an all-Ukrainian referendum;
- 2) are contrary to the provisions of the Constitution and laws of Ukraine;
- 3) may lead to an end of Ukraine’s independence, violate the sovereignty and territorial integrity of Ukraine, pose a threat to the national security of Ukraine, incite interethnic, racial, religious hatred;
- 4) are assigned to other (than those provided for in paragraph 5, part 1 of this Article) officials and public authorities under the Constitution and laws of Ukraine;
- 5) concern the exercise of certain powers of executive authorities granted to local self-government bodies by law (delegated powers);

¹³ Venice Commission, Report on the recall of mayors and local elected representatives (CDL-AD(2019)011rev)

¹⁴ Idem, par 62.

¹⁵ Idem, par 63.

¹⁶ Idem, par 122.

- 6) concern decisions on approval or modification of local budgets, tariffs for housing and communal services, abrogation of such decisions;
- 7) concern making changes, cancelling particular acts of local self-government bodies.

31. Thus, the draft law establishes a number of clear, important limits: (a) only matters falling within the remit of the territorial community may be subject to local referendum (and (b) the referendum cannot go contrary to the Constitution and laws of Ukraine (Article 3.2.1-4); (c) a clause reserving national security and territorial integrity is included (Article 3.2.3); (b) budgetary and local tariff matters are excluded (Article 3.2.6). These clauses seem appropriate. However, the drafters might consider it useful to complete Article 3.2.2 - with a reference to international law.

32. Article 3.2.5 excludes the exercise of “certain” delegated powers. Unless this is a problem of translation, the word “certain” makes this provision unclear and the principle of legal certainty would imply its amendment. The Venice Commission and ODIHR recommend clarifying this provision.

33. Article 3.2.7, prohibiting referendums on introducing changes or cancelling particular acts of local self-government seems to contradict Article 3.1.5 establishing that local referendums can be held on “voidness of a regulatory act of a local self-government body or some of its provisions” and Article 17.1.3 establishing rules for referendums on, among other issues, “draft decisions on recognition of a regulatory act of a local self-government body and its particular provisions as invalid”. The listed provisions of the Draft law are not clear as to the nature of “normative acts” that can or cannot be submitted to a vote. The Venice Commission and ODIHR recommend clarifying these provisions.

34. Finally, Article 3.3 states that “*The adoption of new normative acts may not be the subject of a local referendum.*” This is in accordance with Article 144 of the Constitution of Ukraine, which stipulates that “*Bodies of local self-government, within the limits of authority determined by law, adopt decisions that are mandatory for execution throughout the respective territory*”; therefore entrusting these bodies with regulatory powers. The Venice Commission and ODIHR recommend clarifying the term “regulatory acts” (or to draft a clear list of acts and decisions that can be submitted to the local referendum).

b. The nature of the decisions taken in a local referendum

35. Article 4 of the Draft law provides for the legally binding nature of the decision taken at a local referendum, within the boundaries of the relevant territorial community.

36. The Draft law introduces the possibility of a second referendum on the same issue in case of approval by the voters. In Article 4.2 and 4.3 there is a distinction depending on who had the initiative of such referendum: in the case of a popular initiative, the referendum can be held three years after the vote; in the case of an institutional initiative (council, mayor...), the second referendum can be held one year after the first vote. The Venice Commission and ODIHR do not fully understand the reasons behind such a distinction. At first sight, the person of the initiator should not be relevant, and this provision should be reconsidered. The Revised Guidelines on holding referendums justify a certain rigidity in relation to decisions or norms not adopted in a referendum¹⁷. The Revised Guidelines introduce a specific rule in the case of a referendum at the request of a section of the electorate, if another section of the electorate requests again another referendum. In such case the Guidelines refer to a “reasonable period of time”. It can be concluded from the text of the Draft law that the second referendum is possible after a certain period of time without distinction among the initiators. The provision should be clarified so that

¹⁷Idem, III.4.a.

it excludes any distinction between the deadlines for the revision of decision taken by referendum whatever its initiators of the local referendum.

37. In the Urgent Opinion on the revised Draft law on the referendum and the people's initiative of Serbia, the Venice Commission recommended a new referendum on the same issue to be held only after the end of the legislature or the mandate of the current authorities: *"The deadline of one year of the previous draft seemed very short. Despite the fact that a deadline of two years is more respectful of the will of the people, it would be suitable to wait until the next legislature, with a new mandate of the citizens for the Assembly."*¹⁸ Article 18.1 of the Draft law establishes that a local referendum may be initiated by the local authorities only once on the same issue within the term of office of the relevant council. As stated in the above-mentioned urgent opinion, an intermediate way could be to submit such revision to an optional referendum at the request of voters.¹⁹ In the case of decisions concerning important local matters a more flexible approach could be more adapted to the need of local communities. The Venice Commission and ODIHR recommend clarifying the rules of Article 4 on the repeated referendum.

38. The draft does not make it clear which issues submitted to a referendum are generally worded and which are specifically worded when a normative provision or an individual act are concerned. This has to be addressed since the former need a further act to be taken after their adoption. The Venice Commission and ODIHR recommend clarifying this issue.

c. Restrictions on the conduct of local referendums

39. In Article 19.2 stipulates that it "shall not be held simultaneously with any regular, early, first (except for repeated, midterm, additional) local elections" and that "if the day of holding a local referendum coincides with the day of holding regular, early, first (except for repeated, midterm, additional) local elections, then such a referendum shall be held not later than two months before or not earlier than two months after the day of holding such elections." This provision fully meets the general principle elaborated by the Parliamentary Assembly of the Council of Europe in its Resolution 2251 (2019) in order to allow voters to make well-informed decisions while casting their votes, it should not be possible to hold referendums at the same time as other elections.²⁰

40. Article 18.1 prohibits the call for a second referendum on the same issue within the term of office of the council, at the initiative of the same council or mayor. This provision could create confusion in relation with Article 4. It would seem that Article 18 can be applied if in the first referendum citizens have not approved the decision. Then, Article 18 leaves to the people's initiative (and not of the local institutions) the call for a second referendum if the results of the first referendum were positive. Perhaps a clarification on the differences among Article 4 and 18 would be convenient.

41. Article 18.2 of the Draft law introduces safeguards related to national security by stipulating that "initiating, calling and holding of a local referendum in case of introduction of martial law or a state of emergency in the entire territory of Ukraine or in the territory where it is supposed to be held, as well as within thirty days after the lifting of martial law or a state of emergency, shall be prohibited." The next parts of that article elaborate on the process to be followed for the re-initiation of the local referendum process after the termination or the lifting of

¹⁸ Venice Commission, Urgent opinion on the revised Draft law on the referendum and the people's initiative of Serbia, CDL-AD(2021)05, para 42.

¹⁹ Idem, para 44.

²⁰ Updating guidelines to ensure fair referendums in Council of Europe member States Parliamentary Assembly of the Council of Europe Resolution 2251 (2019), see also the Revised Guidelines on holding referendums, III.9.c, which admit simultaneous elections and referendums in case the referendum is not about the institution facing elections. <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=25325>

the state of emergency, if such local referendum had been suspended. The regulation of this procedure in the Draft law contributes to legal certainty and predictability of the law and may deter administrative abuses of the process.

d. Questions submitted to the local referendum

42. Article 17 of the Draft law regulates in detail the requirements related to the questions of the local referendum, such as the content (which reiterates the subjects listed in its Article 3), the formulation of the question (that should presuppose a clear “yes” or “no” answer, as per Article 17) and the wording of the question, that should be clear and understandable, without allowing for different interpretations and should not mislead the voter or contain an indication, suggestion, incitement or other incentive to support or reject the referendum proposal. This is in line with the Code of Good Practice on Referendums which recommends that the referendum question should not be misleading or suggesting an answer but formulated in a way to enable an unambiguous answer and prevent the distortion of the will of the voters.²¹

43. The Draft law does not refer to the principle of unity of content and form. The Revised guidelines on holding of referendums provide that *“the same question must not combine a specifically-worded draft amendment with a generally-worded proposal or a question of principle”* and that *“there must be an intrinsic connection between the various parts of each question put to the vote, in order to guarantee the free suffrage of the voter, who must not be called to accept or refuse as a whole, provisions without an intrinsic link”*.²² The Venice Commission and ODIHR recommend introducing the principles of unity of content and form in the Draft law and requiring the Central Election Commission and other relevant bodies to refer to such requirements in assessing the suitability of the referendum question.

44. Article 20.1 provides that the Central Electoral Commission has to provide an opinion on the compliance of the question of a local referendum with the requirements of Articles 3 (subject of the local referendum), 17 (requirements for wording the question) and 18 (restrictions on initiating, calling and holding a local referendum) of the Law on local referendum. Paragraph 3 entrusts the Ministry of Justice to check if the charter of the territorial community (or amendments to it) submitted to a local referendum complies with the Constitution and laws of Ukraine. To the extent that these preliminary checks are of a legal-technical character, the involvement of the Ministry of Justice is not appropriate, notably if its decisions are of a binding character, and such checks should be made by an electoral commission under judicial control. At the very least, the intervention of the central government should be explicitly restricted to a public interest examination under the standpoint of Article 3.2.2. The Venice Commission and ODIHR recommend that the control of the constitutionality of referendum questions be performed by the Constitutional Court (in accordance with Article 147 of the Constitution) or at least by an ordinary court on appeal of the electoral commission.

e. Equality between the supporters and the opponents of the issues submitted to the local referendum and their balanced representation on the referendum commissions

45. Any referendum should respect the principle of equality between the supporters and the opponents of a given proposal. Its main goal is to ensure that voters make a decision concerning a certain matter based on the balanced and informed dissemination of information. The information provided to voters must be comprehensive and must reflect various, even opposing, positions regarding the referendum question.²³

²¹ Venice Commission, Revised Guidelines on holding referendums, CDL-AD(2020)031, para.I.3.1.c.

²²Idem, III.2.

²³ Venice Commission and ODIHR, Urgent Joint Opinion on Draft law 3612 on Democracy through All-Ukraine Referendum, CDL-AD (2020)024, para. 50.

46. The Explanatory Memorandum to the Code of Good Practice on Referendums points out the importance of the equality principle: *"Respect for equality of opportunity is crucial for both referendums and elections. While in elections, equality must be ensured between parties and between candidates, simply replicating this principle in the case of referendums may lead to an unsatisfactory situation. In countries with popular initiatives or optional referendums, these are often not instigated by a political party, and may even propose an option that is rejected by the largest parties – such as reducing the number of members of Parliament or public funding of parties. Accordingly, the guidelines emphasise equality between the supporters and opponents of the proposal being voted".*²⁴

47. Pursuant to Article 35 of the Draft law, the local referendum is administered by the Local Referendum Commissions, consisting of the Central Election Commission and the Local Referendum Territorial (TRC) and Precinct Commissions. According to the Election Code, TRCs are formed based on suggestions of political parties which are not obliged to be supporters or opponents of the question proposed for referendum. Article 36 establishes the status of the Local Referendum Territorial Commission, which determines the result of a local referendum; according to it, it shall be the highest-level commission for all Local Referendum Territorial and Precinct Commissions within a single district, while the Central Election Commission "shall not be the legal successor of Local Referendum Territorial Commissions."

48. The Explanatory report to the Code of Good Practice on Referendums stipulates that: *"Political parties or supporters and opponents of the proposal put to the vote must be equally represented on electoral commissions or must be able to observe the work of the impartial body. Equality between political parties may be construed strictly or on a proportional basis."*²⁵ A recommendation on including the representatives of both the supporters and the opponents of the referendum question was already subject to a specific recommendation of the opinion on the Draft law on all-Ukraine referendum in 2020 stating that "it would be suitable to amend the Draft law to provide that the District and Precinct Referendum Commissions are formed in a way so that the opponents and supporters of the referendum question are equally represented in each commission".²⁶

49. Article 37 (first and second part) of the Draft law specifies the composition of the Local Referendum Precinct Commission of an ordinary or special precinct, namely with the participation of citizens who have the right to vote in elections and referendums and specifies that a citizen may be a member of only one Local Referendum Commission. Article 37.3 introduces incompatibilities to becoming a member of the Local Referendum Precinct and Territorial Commission. However, the Draft law does not specify the composition of the Local Referendum Territorial Commission but only who cannot become its members. The Venice Commission and the ODIHR were informed by the authorities during the online meetings that the composition of the Local and Territorial Commissions is regulated only by the Election Code. Taking into consideration that Article 33.8 of the Election Code states that the Territorial Commissions are permanent bodies, there is no representation of supporters and opponents of the referendum issue in the Territorial Commissions (acting as referendum commissions), which might raise concerns regarding their impartiality when conducting their duties in preparation of a local referendum.²⁷ It would be advisable to consider the possibility of inclusion in the Local and Territorial Referendum Commissions of representatives of supporters and opponents of the

²⁴ Venice Commission, Code of Good Practice on Referendums (CDL-AD (2007) 008rev-cor-e), Explanatory report, I.2.2.2, para. 8.

²⁵ Idem, para. II.3.1.e.

²⁶ Venice Commission, Urgent Joint Opinion on Draft law 3612 on Democracy through All-Ukraine Referendum, CDL-AD (2020)024, para.56.

²⁷ See Revised guidelines on the holding of referendums, II.4.1.a.
[www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2020\)031-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)031-e)

referendum issue, thus modifying the Draft law in order to ensure that their composition reflects a balanced representation of supporters and opponents of the referendum question.

50. The Draft law empowers the Local Referendum Territorial Commission to establish the Local Referendum Precinct Commission. According to Article 41, the right to submit candidates for the positions of Chairman, Deputy Chairman and Secretary of the Local Referendum Precinct Commissions is granted to initiative groups and to the local branch of a political party, a public organisation registered as a supporter or opponent of the issue of a local referendum.

51. In line with the Guidelines on Referendums, Article 42.4 of the Draft law stipulates that *“the Local Referendum Territorial Commission shall establish the composition of the Local Referendum Precinct Commission, in compliance with the restrictions on the number of Commissions established in parts two and three of this Article and in compliance with the principle of equal representation of supporters and opponents of the issue of a local referendum.”* Additionally, Article 42.5 provides for the drawing of lots to be held separately for the inclusion of candidates from supporters and opponents of the local referendum issue(s) in the Commission, in order to *“ensure the representation of supporters and opponents of the local referendum issue in the Local Referendum Precinct Commission”*.

52. Article 47 of the Draft law clearly specifies the grounds upon which the mandate of a Local Referendum Precinct Commission may be terminated *“at its own initiative or pursuant to the court decision in case of systematic violation of the Constitution of Ukraine, this and other laws of Ukraine”*. This contributes to ensuring independence, impartiality and stability in the work of the commission. Another positive feature is that the decision of early termination of a mandate of an individual member of the Local Referendum Precinct Commission *“shall be made simultaneously with the decision to include another person in the particular territorial election commission, precinct local referendum commission from the same entity that nominated the former member”* (Article 47.2).

53. Pursuant to Article 42.2 of the Draft law, the Local Referendum Precinct Commissions consist of 10 to 18 members, depending on the size of the precincts. This large size of precinct commissions has been assessed by ODIHR election observation mission reports as being too large, which may result in hindering election day operations. As the Venice Commission and ODIHR have already highlighted, *“it is recommended that the number of members appointed at each commission level should correspond to the actual needs of the election administration, with a reasonable maximum number of members established in the law. In this respect, it is not every referendum participant that needs to have a representative on every referendum commission, provided a balanced representation of supporters and opponents is achieved.”*²⁸ This recommendation is also applicable to the Draft law under review.

f. Registration of popular initiative groups and signature collection period

54. The registration of an initiative group to hold a local referendum is conditional upon the submission of the following documents, specified in Article 29 of the Draft law: minutes of the Assembly of participants; a list of members of the local referendum initiative group; a decision to elect an authorised representative of the initiative group; and a clear wording of the question suggested to be put to a local referendum. The procedure is extremely detailed and bears the risk of dissuading the local residents from starting a referendum process.

55. The grounds for refusing the registration of an initiative group are clearly specified in the Draft law, they are related to violations of provisions of the law and seem to be reasonable and justified. Among them, is the non-compliance of the proposed question with the requirements of

²⁸ Venice Commission, CDL-AD (2020)024, Urgent Joint Opinion on Draft law 3612 on Democracy through All-Ukraine Referendum, , para.58.

Articles 3, 17 and/or 18 of the Draft law, following an opinion of the Central Election Commission; no other ground for refusing registration is foreseen.

56. The Draft law stipulates those technical typos and inaccuracies in the documents submitted by the initiative group are not considered as (initial) grounds for refusal of registration and the possibility to correct them by re-submission of the documents within three days is provided. This approach is to be welcomed.

57. Article 30.4 of the Draft law provides that the decision on the registration of the initiative group shall be adopted within 12 days after the applications to register the group were filed. The group can be denied registration if the CEC concludes that the question proposed for the referendum does not meet legal requirements. It seems that in the absence of such a conclusion, the registered Draft law allows the Territorial Electoral Commission (TEC) to register the initiative group thereby effectively initiating a referendum process on a question, the legality of which has not been confirmed. The Draft law should explicitly provide that the initiative group can only be registered if there is an official conclusion that the referendum question does not violate the law; however, the risk should be avoided that in case of the absence of a decision on the legality of the referendum question the process is stuck.

58. Article 31.6 of the Draft law stipulates that only members of the initiative group may collect signatures of voters in support of the initiative to hold a local referendum, while collecting signatures by other persons is prohibited. Considering that only voters can be members of the initiative group, this provision is not in line with the Revised Guidelines on the holding of referendums, which stipulate that everyone (regardless of whether s/he enjoys political rights) must be entitled to collect signatures.²⁹ It is recommended to amend this provision to bring it in line with the Revised Guidelines.

59. Pursuant to Article 33.3, the verification of the signatures of the voters who supported the initiative to hold a local referendum will be carried out by the State Electoral Register management body within three days, using an automated information system under the procedure established by the Central Election Commission. Although not explicitly stipulated in the Draft law, the national stakeholders who participated in the online meetings with the Venice Commission and the ODIHR confirmed that all collected signatures from voters supporting the referendum initiative should be verified, and not just a sample. This is in accordance with the Revised Guidelines on the holding of referendums.³⁰ It would be advisable for the Draft law to clearly specify this issue in order to prevent any future misinterpretation.

60. The same article of the Draft Law provides for the right of official observers to acquaint with the list (printed or in electronic form) on the premises of the State Electoral Register management body. This is in line with Interpretative Declaration of the code of good practice in electoral matters on the publication of lists of voters having participated in elections.³¹ The Draft Law also requires the completion of a protocol by the Local Referendum Territorial Commission on the results of verification and the grounds of rejection.

g. Dissemination of information to voters

61. On a positive note, Article 79 of the Draft Law stipulates that the Central Election Commission and the Local Referendum Territorial Commission shall provide access to information for voters with disabilities in accessible formats which it further specifies.

²⁹ Revised Guidelines on the holding of referendums, CDL-AD(2020)031, para.III.3.d.

³⁰ Idem, III.3.g.

³¹ Venice Commission, Interpretative Declaration of the code of good practice in electoral matters on the publication of lists of voters having participated in elections, CDL-AD(2016)028.

62. Although the Draft Law states that the territorial and precinct local referendum commissions shall transmit the information specified by this Law to be published on the official websites of the Central Election Commission and the relevant Local Referendum Territorial Commission, it does not require for the referendum question to be published in the official gazette, neither to be sent to voters in advance, which goes against international standards.³²

63. Article 84 of the Draft Law details the official information materials of the local referendum, which include the text of the document and informative posters clarifying the voting procedure and responsibility for violating the legislation on the local referendum. Although Article 85 of the Draft Law stipulates that the initiative group, political parties and public organisations registered as supporters or opponents of the local referendum issue may produce informative posters with the substantiation of their position concerning the local referendum issue, it does not establish any obligation for the authorities to provide information to voters, which is contrary to the Code of Good Practice on Referendums, according to which the authorities must provide objective information which implies that the text submitted to a referendum and an explanatory report or balanced campaign material from the supporters and opponents of the proposal should be made available to voters sufficiently in advance.³³

64. Furthermore, if the referendum issue is the early termination of powers of a village, settlement or city council or mayor, consideration should be given to which authorities should provide balanced information to voters, as the underlying interest of the local authorities in this case is unavoidable. It would be advisable that the Draft Law introduces the obligation for the authorities to provide objective information on the referendum issue to voters, including an explanatory report and campaign material that will reflect the views of both supporters and opponents of the referendum issue, notably the mayor concerned, while also putting in place detailed provisions on which authorities would be responsible for this task.

h. Right to Vote

65. Article 70 of the Constitution and Article 6.1 of the Draft law disenfranchise citizens who have been declared legally incompetent by a court. This is contrary to the UN Convention on the Rights of Persons with Disabilities (UN CRPD) ratified by Ukraine in 2010, which prohibits disenfranchisement of persons with disabilities under any circumstances.³⁴ The Venice Commission and ODIHR recommend addressing this issue, which implies a constitutional revision.

i. Automated information system

66. In a few provisions, the Draft Law refers to the use of new technologies, mainly related to entering, *inter alia*, copies of acts, resolutions, protocol on local referendum results into the automated information system, and those related to the obligation of the initiative group to

³² Explanatory Memorandum of the Code of Good Practice on Referendums (CDL-AD (2007) 008rev-cor-e), para.14. Also, Urgent Joint Opinion on Draft law 3612 on Democracy through All-Ukraine Referendum, CDL-AD (2020)024, para.68.

³³ Venice Commission, Revised guidelines on the holding of referendums (CDL-AD(2020)031), para.I.3.1.d.

³⁴ Articles 12 and 29 of the UN CRPD require that "State Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life" and ensure their "right and opportunity [...] to vote and be elected". See also CRPD Committee, Concluding observations, Spain (2011), para.48: – "The Committee recommends that all relevant legislation be reviewed to ensure that all persons with disabilities [...], have the right to vote and participate in public life on an equal basis with others. The Committee requests the State party to amend article 3 of Organic Act 5/1985, which allows the denial of the right to vote based on individualized decisions taken by a judge." Also, CRPD Committee, Communication 4/2011, *Zsold Bujdoso and others v. Hungary* (2013), para.9.4: "Article 29 does not foresee any reasonable restriction, nor does it allow any exception for any group of persons with disabilities. Therefore, an exclusion of the right to vote on the basis of a perceived or actual psychosocial or intellectual disability, including a restriction pursuant to an individualized assessment, constitutes discrimination on the basis of disability, within the meaning of article 2 of the Convention."

submit electronic signature data to the Local Referendum Territorial Commission and the verification of the validity of information submitted in an electronic format.³⁵ The Draft Law also stipulates that these actions will be organised in a format approved by the Central Election Commission or under the procedure established by it. Article 1.1 of the Final and Transitional Provisions of the Draft Law specifies that these provisions will come into force after the Central Election Commission adopts a decision to put an automated information system into operation. The extensive use of new technologies for verification of information bears a high risk in the light of data protection. As the Venice Commission and ODIHR already noted regarding similar provisions in the Draft Law on Democracy through All-Ukraine Referendum, “such a derogation appears too broad in view of the importance of the matter”: they recommended that “these important aspects be regulated by the law rather than by-laws.”³⁶ This recommendation is also pertinent in relation to this Draft Law.

j. Freedom of the media and campaigning

67. The Draft law includes provisions for the start of the campaign period and campaign silence similar to those in the Electoral Code.

68. Article 7 of the Draft law refers to the equality of rights and opportunities for the local referendum process. Regarding the media, the draft says: “*equal and unbiased attitude of the media to all the local referendum process entities, objective and balance coverage of opinions both in support and against the matter...*” (Article 7.3.4). The mandate for an “unbiased presentation” of the information by the media and news agencies is repeated in Article 14.6. It is an important principle, but the public and the private media should be distinguished. In the first Opinion on the referendum of Serbia, the Venice Commission made such distinction, referring to the Revised Guidelines I.2.2: “*In contrast with public mass media, private media are not subject to a requirement of neutrality, even if equal conditions for radio and television advertising must be ensured*”.³⁷ The Venice Commission recommends providing for less strict rules for private media.”

69. The key principles in the area of media coverage in referendum campaigns are those of equal opportunity for supporters and opponents (translating into equal access to public media), neutrality on behalf of administrative authorities, and reasonable coverage by public media (including minimum access to all parties to the private media).³⁸ While the draft strives to maintain a good balance between equality in campaigning and freedom of the press and of expression, certain provisions go too far. Article 82.1 is unclear and seems to suggest, inappropriately, that the mass media should provide information materials at the request of a (party-controlled) Territorial Commission. Art. 82.2.2 is unclear but seems to impose an obligation of disclosure of “publicly relevant information” on media outlets. Treating “equally” all opinions (Article 82.2.4) seems to be an excessive requirement on private media. The Venice Commission and ODIHR recommend that Article 82.2 be revised by limiting it to establishing the principles of “authenticity, completeness and accuracy of information and its unbiased presentation”.

70. Articles 86.2 and 87.2 of the Draft Law stipulate that citizens with the right to vote can conduct or participate in campaigning for support or against the referendum without spending their own funds, except for contribution to the local referendum initiative group fund. It is recommended that citizens be allowed, on their own initiative, to spend a small amount of funds

³⁵ Notably, Article 45.6 and 45.9, Article 108.4, Article 31.18, Article 32.2 and Article 33.3.

³⁶ Venice Commission, Urgent Joint Opinion on Draft law 3612 on Democracy through All-Ukraine Referendum, CDL-AD (2020)024, paras.80, 81 and 82.

³⁷ Venice Commission, Opinion on the Draft law on the referendum and the people's initiative of Serbia, CDL-AD(2020)033, para. 48.

³⁸ Venice Commission, Revised guidelines on the holding of referendums (CDL-AD(2020)031), I.2.2.c and I.2.2.f. [www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2020\)031-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)031-e).

to personally campaign, so as not to hinder their freedom of expression or to unintentionally suppress citizens' political speech.³⁹ Article 87.15 looks like a repetition of the earlier provisions and should be either clarified or, better, deleted.

71. Article 89.2 determines that the printed campaign materials cannot contain unreliable, incomplete, and inaccurate information. Any legally enforceable content restrictions to the freedom of referendum campaign parties should – if at all acceptable – be circumscribed in a far more precise and restrictive way (for example, “defamatory” statement or hate speech). More generally, the catalogue of Article 93.1 should be sufficient.

72. Article 93 establishes additional restrictions on campaigning, some of which, such as the prohibition of statements that are discriminatory on the grounds of political views, language or other characteristics, providing information or calling for actions that may cause violations of legislation, harm to human health or life and/or environment, and encouraging the neglect of safety measures, are vaguely worded and thus could be arbitrarily interpreted and lead to abusive practices. While limitations to campaign speech related to inciting to violence or ethnic hatred are acceptable under international standards, it is recommended that Article 93, notably Article 93.21 on sanctions, be amended to avoid misinterpretation and arbitrary application, in conformity with the principle of proportionality. Moreover, Article 93.4.1 imposes a ban on the participation of “foreigners and stateless persons”. Such blanket restriction is unjustifiable and discriminatory. Article 93.15 prohibits “*to campaign for the local referendum both in foreign media operating in Ukraine and in the media registered in Ukraine where the share of foreign ownership exceeds 50 per cent*”. This provision is too restrictive and needs to be reconsidered.

k. Funding of referendum campaign

73. Article 61.4 of the Draft law sets out limits for the amount of the local referendum fund, in accordance with the number of voters in the territorial community where the referendum will be conducted. This provision can be seen as a measure against undue external influence on the process of local referendum.

74. Article 63.4 of the Draft law imposes limits to the voluntary contributions by physical persons to the initiative group fund, which amount to 0.1 per cent of the maximum contribution to support a political party during the year, as established by the Law “On Political Parties in Ukraine”. However, the size of the initiative group’s own funds, which are an addition to voluntary contributions, is unlimited, as per part 3 of the same article. This is not in line with previous Venice Commission and ODIHR recommendations to provide a limit on own resource funds in elections, especially when a spending limit is not established.⁴⁰

75. It is also in contrast to the local referendum fund limits that Article 61.4 of the Draft law imposes on local organisations of political parties having the status of a legal entity and public organisations registered as supporters or opponents of a local referendum, in relation to the number of voters in the territorial community. This different treatment that the Draft law offers to the initiative group, on the one side, and to the local organisations of political parties and public organisations registered as supporters or opponents of a local referendum, on the other side, violates the principle of equality of opportunity that should be ensured between the proposal’s supporters and opponents, in accordance with the Code of Good Practice on Referendums.⁴¹

³⁹ Venice Commission, Urgent Joint Opinion on Draft law 3612 on Democracy through All-Ukraine Referendum, CDL-AD (2020)024, para.87.

⁴⁰ Joint Opinion on the draft amendments to some legislative acts concerning prevention of and fight against political corruption of Ukraine CDL-AD(2015)025. Also, Urgent Joint Opinion on Draft law 3612 on Democracy through All-Ukraine Referendum, CDL-AD (2020)024, para.93.

⁴¹ Revised guidelines on the holding of referendums (CDL-AD(2020)031), para.I.2.2

76. Article 64 of the Draft law provides for campaign financial oversight by the Local Referendum Territorial Commission and the National Agency on Corruption Prevention, without however providing any details on their respective powers and responsibilities. This was previously highlighted also by the 2019 ODIHR Election Observation Mission Final Report, which recommended that “the National Agency for the Prevention of Corruption (NAPC) could be designated as the sole oversight authority to monitor and investigate compliance with campaign finance regulations and should be sufficiently mandated, empowered and resourced”.

77. Article 68.3.4 provides that the application must include a “substantiation of the position on the local referendum issue (in full and abbreviated form)” which cannot “include calls to vote for or against the local referendum issue”. The objective of the registration is to be able to campaign in favour or against the referendum issue. This provision is confusing and needs to be revised. The drafters could mention in Article 68 that the provisions about the abuse of administrative resources which are to be found in the Election Code also apply to local referendums.

I. Media Oversight

78. In line with the Code of Good Practice on Referendums,⁴² Articles 82.3 82.4 and 82.5 of the Draft law requires that news agencies, mass media and broadcasters treat all opinions concerning the local referendum equally, when disseminating information, views and actions of the supporters and opponents of the local referendum, as well as cover in a balanced way the comments of all parties to the referendum.

79. The Draft law tries to provide detailed rules on media coverage of the local referendum campaign. However, certain restrictions could lead to the limitation of freedom of expression, notably a set of specific rules against the “unreliable, incomplete, and inaccurate information”. More specifically, possible problems could arise from provisions in Articles 82.4 (private media), 83.3 (publication of opinion polls), 89.2.2 and 93.

80. Article 82.9 of the Draft law establishes the National Council on Television and Radio Broadcasting of Ukraine (NTRBC) and central executive authority as the bodies responsible to monitor the compliance with the requirements of the Draft law regarding the conduct of mass media and news agencies in the information support of the local referendum campaign. According to the Draft law and the explanation provided during the meetings with the Ukrainian authorities, the NTRBC is the sole authority empowered to impose sanctions if violations of the law are established. However, the Draft law does not provide any details on the sanctions that could be imposed on media-related violations, while the authorities informed the Venice Commission and ODIHR during the online meetings that for media-related sanctions reference should be made to the Election Code and the Code of Administrative Procedures.

m. Citizen and international observers

81. Official observers who, pursuant to Article 73.2 of the Draft law, are a party to the local referendum process, are nominated by the organisations of the parties registered as supporters or opponents of the local referendum issue, as well as by public organisations registered as supporters or opponents of the local referendum issue, and by public organisations that have received permission to have official observers in a local referendum and initiative group. Furthermore, public organisations whose statutory activities are related to electoral issues as well as observance and protection of citizens’ rights, and which did not have the status of supporter or opponent of the local referendum issue are entitled, pursuant to Article 75.1, to have official observers at the local referendum, including during the collection of the signatures to support the local referendum process and their verification.

⁴² Idem, para.I.2.2 a.

82. As per the Draft law, errors or inaccuracies in the registration documents are not a ground for refusal and the possibility to rectify them is provided to interested parties. Only violations of the formal requirements of the law would be a ground for refusal of registration, while in line with the right to an effective legal remedy. Any public organisation is entitled to appeal in court against a decision refusing to grant registration as observer.

83. Article 73.4 of the Draft Law stipulates that international observers may observe the collection of signatures in support of the local referendum, their verification and the progress of the local referendum process within a single constituency.

84. In accordance with Article 74.1, the powers of citizen observers begin on the day of their registration by the Local Referendum Territorial Commission, while requests for registration of international observers are submitted to the Central Election Commission after the local referendum process has started and, in case of initiating a local referendum at the initiative of voters, following the initiative group's registration.

85. Considering that all activities pertaining to the local referendum commence after the establishment of the Local Referendum Territorial Commission, as per Article 39.1, the Draft Law allows for meaningful observation of all stages of the referendum process, including of the signature collection period. This is in line with the Code of Good Practice for Referendums, para.II.3.2, recommending that accredited observers should have the right to observe all aspects of the referendum process, including the signature collection period and referendum campaign.

86. Article 78.2 does not allow citizens of a state recognised by the Verkhovna Rada “as an aggressor state or an occupying power” to be registered as international observers, taking into consideration a 2018 Ukrainian law designating the Russian Federation as an aggressor state, thus leading to the prohibition of Russian Federation citizens or persons proposed by Russian Federation to be accredited as observers in Ukraine. As previously commented by the Venice Commission and ODIHR regarding a similar provision in the Draft law on All-Ukraine Referendum,⁴³ as well as the ODIHR 2019 election observation mission Final Report,⁴⁴ this regulatory approach is not in line with paragraph 8 of the 1990 OSCE Copenhagen Document that obliges Participating states to allow international observation.

n. Voting, counting and tabulation of results

87. Article 102.7 of the Draft law empowers the precinct commission to correct inaccuracies in the results protocol, such as a typo or a mistake in the numbers, after it has signed the protocol at the polling station but before submitting it to the territorial commission, by preparing a new protocol that will be marked with the note “Adjusted”. The Draft law does not include, however, any specifications on the corrections that are allowed and any details on corrections that might not be permitted, even if they concern a mistake in the numbers, and would necessitate a recount. Similar remarks raised in the Urgent Joint Opinion on Draft Law 3612 on Democracy through All-Ukraine Referendum⁴⁵ should be taken into consideration for this Draft Law as well. In line with the principle of transparency, Article 102.10 of the Draft law includes the possibility to provide copies of the protocol including the amended one to observers, upon request.

88. Article 103.1 of the Draft law establishes arbitrary and unjustified percentages for the invalidation of the results of a polling station by a precinct commission. In addition, it is silent on

⁴³ Urgent Joint Opinion on Draft law 3612 on Democracy through All-Ukraine Referendum, CDL-AD (2020)024, para.102.

⁴⁴ Presidential Election, 31 March and 21 April 2019, ODIHR Election Observation Mission Final Report, page 31. <https://www.osce.org/odihr/elections/ukraine/407660>

⁴⁵ CDL-AD(2020)024, para.104

any time lines for a repeat vote in case the referendum results of any level are invalidated.⁴⁶ Previous ODIHR election observation mission reports recommended that such arbitrary percentages of acceptable levels of fraud should be removed.⁴⁷ This article is not in conformity with the Revised guidelines on the holding of referendums, recommending that in order to cancel the referendum results of one polling station or constituency, irregularities should have affected the outcome, and that in such event, a new referendum must be called. Reasons of uniformity with the other legal acts such as the Election Code and the Law “On the All-Ukrainian Referendum” that include the same thresholds were raised by interlocutors for maintaining these provisions despite long-standing criticism.

89. The Venice Commission and ODIHR previously recommended establishing clear grounds and procedures for the invalidation of results at each level by limiting such cases only to those that may have affected the outcome of the referendum, and by also removing the provisions with the arbitrary percentages, as well as to include explicit timelines for a repeat vote in such cases. This recommendation is also pertinent to the Draft law under review.

o. Determination of results of the local referendum

90. Article 108.5 provides that a local referendum is considered valid if at least 50 percent of voters from the number of voters included in the voter lists at the relevant local referendum took part in local referendum voting. The Revised guidelines on the holding of referendums advises against adopting specific rules on approval by a minimum percentage of registered voters.⁴⁸ The Venice Commission and ODIHR recommend reconsidering this provision.

⁴⁶ Revised guidelines on the holding of referendums, (CDL-AD(2020)031), II.4.3.e.

⁴⁷ Ukraine: Local Elections, 25 October and 15 November 2015, ODIHR Election Observation Mission Final Report, page 28, <https://www.osce.org/files/f/documents/a/2/223641.pdf>; Ukraine: Parliamentary Elections, 28 October 2012, ODIHR Election Observation Mission Final Report page 30, <https://www.osce.org/files/f/documents/3/c/98578.pdf>

⁴⁸ Idem, III.7.ii. [www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2020\)031-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)031-e)