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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 DRAFT LAW 3612  
ON DEMOCRACY THROUGH ALL-UKRAINE REFERENDUM**

**Endorsed by the Venice Commission  
at its 124<sup>th</sup> online Plenary Session  
(8-9 October 2020)**

**on the basis of comments by**

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## I. Introduction

1. On 13 May 2020, 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 “Democracy through all-Ukrainian referendum” prepared by the Working group for the development of draft laws in the field of democracy created by the Verkhovna Rada of Ukraine (CDL-REF(2020)029, 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 and Josep Maria Castellà Andreu acted as rapporteurs for the Venice Commission. Ms Marla Morry was appointed as legal expert for ODIHR.

3. On 19, 24 and 25 June 2020, online meetings took place, in lieu of the usual expert visit to the country due to COVID-19, between the rapporteurs, experts and members of the Venice Commission and ODIHR secretariat and representatives of national NGOs and experts; members of the Central Electoral Commission, the Ministry of Justice, the Institute of legislation of the Verkhovna Rada, deputies of the Verkhovna Rada, as well as members of the Working Group in charge of the preparation of the draft. This Joint Opinion takes into account the information provided during the above-mentioned virtual meetings.

4. The opinion deals with the conformity of the Draft law with international standards, in particular with the Code of Good Practice on Referendums, drafted by the Venice Commission and supported by the statutory bodies of the Council of Europe ([CDL-AD\(2007\)008rev-cor](#)), as well as the 1990 OSCE Copenhagen Document. It is not intended at assessing its conformity with the Constitution of Ukraine, related national legislation or decisions of the Constitutional Court of Ukraine on legislation on referendums; however, it refers to them when useful.

5. This urgent Opinion was authorised by the Enlarged Bureau on 17 June 2020 and was issued pursuant to the Venice Commission’s Protocol on the preparation of urgent opinions (CDL-AD(2018)019) on 21 July 2020. It was endorsed by the Venice Commission at its 124<sup>th</sup> online Plenary Session on 8-9 October 2020.

## II. Scope of the Joint Opinion

6. The scope of this Joint Opinion covers only the Draft law officially submitted for review. On account of the limited time available, only the most important aspects of the Draft law were examined. This Joint 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 new Election Code of Ukraine, the laws on Central Electoral Commission and the Constitutional Court, as well as other relevant acts.

7. The Joint Opinion takes note of positive developments but focuses on areas that require further attention or improvement. The ensuing recommendations are based on relevant OSCE commitments, Council of Europe and other international human rights norms and standards as well as good practice.<sup>1</sup> It takes into account previous recommendations of the Venice Commission on the legal framework for holding national referendums in Ukraine and ODIHR and

<sup>1</sup> See in particular regarding the international standards the Venice Commission’s Code of Good Practice on Referendums [CDL-AD \(2007\)008rev-cor](#) and Updating guidelines to ensure fair referendums in Council of Europe member States Parliamentary Assembly of the Council of Europe Resolution 2251 (2019): <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=25325>

the Parliamentary Assembly of the Council of Europe (PACE) reports on elections observed in Ukraine where relevant.<sup>2</sup>

8. This Joint Opinion is based on an unofficial English translation of the draft. Errors from translation may result.

9. In view of the above, ODIHR and the Venice Commission would like to note that this Joint 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. On June 9, 2020, President Zelenskyy registered Draft law No 3612 titled “On democracy through national referendum” in the Verkhovna Rada. This draft was based on the earlier Draft law “On National Referendum,” prepared by the Working Group for developing legislative initiatives in the area of direct democracy in March 2020. The Working Group consisted of 25 representatives of ministries, civil society organisations, Members of Parliament and independent experts. The Draft law was adopted in the first reading on 18 June 2020.

11. As a preliminary remark, it should be noted that successful electoral reform (including in the field of referendums) should be built on at least the following three 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 the electoral legislation in good faith.

12. ODIHR and the Venice Commission welcome Ukraine’s efforts to amend its legal and institutional framework relating to national referendums, to bring it into compliance with relevant Venice Commission’s and ODIHR’s recommendations, OSCE commitments, Council of Europe and other international human rights documents and standards as well as good practices. The transparent and inclusive character of the drafting process should be praised. According to the information received by the Venice Commission and ODIHR, recommendations proposed by the stakeholders during public discussions held through April and May 2020 were largely taken into account in the final draft.

13. The Draft law aims at regulating in a single act all the major issues connected with the holding of national referendums, including the types of referendums, procedures for submitting questions, the registration of initiative groups, operation of commissions in charge of the process as well as campaigning and campaign financing, electronic voting, compilation of voter lists, establishment of referendum commissions, media access and coverage, voting, counting and tabulation, determination of results, observation, and complaints and appeals.

14. The text addresses a number of problems that have been subject to critical remarks from ODIHR and the Venice Commission in the past.<sup>3</sup> Among other issues, the drafters harmonised the Draft law with other pieces of electoral legislation, notably the new Election Code adopted in 2019 and the Law on the Central Electoral Commission (hereafter the CEC), and included detailed mechanisms aimed at ensuring equal campaigning opportunities for supporters and opponents of the issues submitted to national referendum. This is to be commended.

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<sup>2</sup> 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=dHlwZV9zdHJfZW46IkVsZWN0aW9uIg9ic2VydMFOaW9uIHJlcG9ydCI=&lang=en>

<sup>3</sup> See, among others, CDL-AD (2013)017 - Opinion on the Law on national referendum in Ukraine.

15. The Draft law therefore represents a considerable step forward compared to the 2012 law; however, there are several issues that could be improved in the text or would need further clarification. The following key issues could be given further consideration:

- A. It is recommended to clarify the relation between the popular initiative referendum of abrogation of laws or part of laws and the referendum on “resolving matters of nationwide significance”;
- B. The procedure for the popular initiative referendum should provide Parliament with a role before the vote, as well as, if necessary, after the vote and in conformity with the results; the consequences of the approval of the popular initiative should be defined in the law;
- C. Additional provisions should be introduced aimed at ensuring equal opportunities for the supporters and the opponents of issues submitted to referendum on referendum commissions of different levels;
- D. It is recommended to extend the deadline for collecting the signatures for referendums on popular initiative;
- E. It is recommended to check all signatures;
- F. It is recommended that the Draft law be harmonised with the election legislation to further strengthen the mechanisms of accessibility of referendums for persons with disabilities, and to establish mechanisms that will practically facilitate the effective and meaningful exercise of suffrage rights of IDPs;
- G. Consideration should be given to synchronising the provisions of the Draft law on funding of referendum campaign with the legislation on financing of political parties;
- H. It is recommended that provisions on electronic voting are excluded from the Draft law and regulated globally at a later date by way of a separate law, which would also address local, parliamentary and presidential elections;
- I. Limitations and bans on campaign activities should be reconsidered;
- J. the Draft law should include specific articles for dissuasive and effective sanctions on media-related violations.

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

#### **IV. General remarks**

17. Article 69 of the Constitution of Ukraine provides that “the expression of the will by the people shall be exercised through elections, referendum and other forms of direct democracy”. Moreover, under Article 156 a referendum is required for the amendment of three (3) important chapters of the Constitution, i.e. “General Principles” (Articles 1-20), “Elections. Referendum” (Articles 69-74) and Amendments to the Constitution (Articles 154-159). The Constitution also includes provisions on referendum on laws altering the national territory (Article 73) and on laws regarding popular initiatives (Article 72). The Constitution leaves unresolved some important issues like the subject of the popular initiative or the period for the collection of signatures – matters that are addressed by the Draft law.

18. Draft law 3612 is the third law regulating national referendums in Ukraine since its independence. The first Law of Ukraine "On the All-Ukrainian and Local Referendums" was adopted back on July 3, 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 revocation in 2012.

19. In November 2012, the Verkhovna Rada of Ukraine adopted the Law of Ukraine No. 5475-VI "On the All-Ukrainian Referendum". Its paragraph 4 Section XIII "Final Provisions" declared the 1991 Law of Ukraine No. 1286-XII "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 made it impossible to organise local referendums.

20. On April 26, 2018, the Constitutional Court of Ukraine declared the Law of Ukraine No. 5475-VI unconstitutional. The Court concluded that the Law was not in line with the constitutional principle of national sovereignty since it created mechanisms for the people to exercise power directly and bypass the Parliament, thus ignoring the constitutional principle of "division of state power". The Court also established that the law had been adopted in violation of the constitutional requirement for personal voting by People's Deputies. The Constitutional Court noted that the draft law on the all-Ukrainian referendum had not been considered at a session of the relevant Committee of the Verkhovna Rada and had not been discussed at the plenary session of the Verkhovna Rada before it was adopted.<sup>4</sup>

21. Since 2018 there was no national legislation on referendums. This legal vacuum seriously restricted the citizens' right to participate in public affairs through a referendum provided for in Article 38 of the Constitution of Ukraine. The new Verkhovna Rada elected in 2019 decided to address this problem as a matter of priority and created a specific Working group for the development of draft laws in the field of democracy. The first draft was prepared in March 2020 and submitted for public consultations from April to May 2020. Several important proposals and recommendations from different national stakeholders were introduced into the final draft (N° 3612), which was introduced by President Zelenskyy to the Rada on 9 June. On 18 June the Verkhovna Rada adopted the text in first reading.

22. The 2020 draft law No 3612 aims at filling the legal gap concerning the organisation and holding of national referendums. The draft does not address the issue of local referendums and in this respect is similar to the 2012 law and more limited than 1991 one.

## V. Analysis and recommendations

23. The Draft law "On Democracy through All-Ukraine Referendum" generally achieves a good balance between direct democracy (national referendum) and representative democracy embodied in the Verkhovna Rada. This can be observed with respect to the provisions on the referendum on Constitutional amendment (which takes place after the approval by 2/3 of the Parliament) and to the referendum on the law that ratifies an international treaty on changes to the territory of Ukraine (the Parliament and the President intervene in a balanced way: after the Parliament passes the law, the President can sign this law or return it with his/her proposals to the Parliament for revision and re-adoption by at least 2/3 of its constitutional composition as provided in Article 27 of the Draft law). However, some provisions of the Draft law on the legislative abrogative referendum upon popular initiative could be more precise on the issue of intervention by the Rada in the process. This will be addressed in more detail below.

24. The Draft law is a detailed text of 131 Articles. The Working Group in charge of the drafting made a considerable effort to harmonise the new law on national referendum with the Election Code of Ukraine adopted in December 2019, which allows to integrate among other guarantees such important requirements as a high level of transparency and openness of the different procedures for the organisation of national referendums. The draft successfully takes from the new Code, among others, provisions on compiling, adjusting, and using voter lists; campaign financing; voting procedures; vote count; and determining election results. This attempt to

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<sup>4</sup> See the decision of the Constitutional Court of Ukraine n°4-r/2018 of 26 April 2018. <http://www.ccu.gov.ua/en/docs/2058>. For the summary of the decision in English, see CODICES: <http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>.

harmonise different pieces of legislation meets a long-standing recommendation of the Venice Commission and ODIHR<sup>5</sup> and deserves to be commended.

#### A. Types of national referendum and their effects

25. Article 72 of the Constitution of Ukraine dealing with All-Ukraine referendums provides that:

“An All-Ukrainian referendum is designated by the Verkhovna Rada of Ukraine or by the President of Ukraine, in accordance with their authority established by this Constitution.

An All-Ukrainian referendum is called on popular initiative on the request of no less than three million citizens of Ukraine who have the right to vote, on the condition that the signatures in favour of designating the referendum have been collected in no less than two-thirds of the oblasts, with no less than 100 000 signatures in each oblast.”<sup>6</sup>

26. Article 3 of the Draft law lists four subjects for the national referendum in Ukraine:

- 1) amendments to Chapters I (General principles), III (Elections. Referendums) and XIII (Introducing amendments to the Constitution of Ukraine) of the Constitution of Ukraine;
- 2) resolving matters of nationwide significance;
- 3) the law of Ukraine ratifying international treaties concerning changes of the territory of Ukraine; and
- 4) abrogation of a law or particular provisions of a valid law.

27. This provision also lists the subjects which cannot be submitted to referendum. It concerns issues which:

- 1) are contrary to the provisions of the Constitution of Ukraine, the universally recognised principles and norms of international law enshrined primarily by the Universal Declaration of Human Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms, the Protocols thereto;
- 2) are designed to eliminate Ukraine’s independence, violate sovereignty and territorial integrity of Ukraine, pose a threat to national security of Ukraine, incite interethnic, racial, religious hatred;
- 3) concern taxes, budget, amnesty;
- 4) are referred by the Constitution of Ukraine and laws of Ukraine to the competence of law enforcement authorities, prosecutor’s offices or judicial authorities.

28. Article 15, on the other hand, distinguishes three types of referendum depending on the entity which is empowered to call it:

1. An all-Ukrainian referendum to approve amendments to Chapter I “General Principles”, Chapter III “Elections. Referendum” and Chapter XIII “Introducing Amendments to the Constitution of Ukraine” of the Constitution of Ukraine shall be called by the President of Ukraine according to the Constitution of Ukraine.
2. An all-Ukrainian referendum on changing the territory shall be called by the Verkhovna Rada of Ukraine according to the Constitution of Ukraine.

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<sup>5</sup> See among others, Joint Opinion on Draft Amendments to Legislation on the Election of People’s Deputies of Ukraine, CDL-AD(2013)026, pages 5 and 17.

<sup>6</sup> The Constitution of Ukraine. <http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>

3. An all-Ukrainian referendum at popular initiative shall be announced by the President of Ukraine according to the Constitution of Ukraine.

29. In the light of Article 15, it seems that there are three types of national referendum in the Draft law, covering the four subjects listed in Article 3. The coordination between Article 3 and Article 15 is however not entirely clear.

30. The first two referendums (on constitutional amendment – Article 15.1 and Article 3.1.1 - and on the laws of ratification of international treaties that change the national territory – Article 15.2 and Article 3.1.3) are mandatory pursuant to Articles 158 and 73 of the Constitution respectively. They are binding if a 50% turnout threshold is met (Article 116.5) and if the decision is supported by more than half of participating voters (Article 116.6).

31. The last one, the popular initiative, is optional (subject to the requisites of Article 72 of the Constitution) and also binding under the same conditions (Article 116.6 of the Draft law). A question not supported by voters in a referendum on abrogating a law or parts of law may only be put to another popular initiative not earlier than in a year after the former referendum (Article 120.2 of the Draft law).

32. Whatever the type of referendum, there should be a period of wait time for a rejected text/provision to be revised by another method. However, the draft law does not provide any period during which the rejected text cannot be adopted by other means.<sup>7</sup>

33. Under the Draft law (Article 3.2 as explained by Article 19.4), all issues “that affect the entire Ukrainian nation and constitute public interest” can be submitted to referendum. It seems that a question is deemed a “matter of nationwide significance” if it has received the necessary signatures (3 million nationwide, 100,000 in at least 2/3 oblasts as provided in Article 72.2 of the Constitution of Ukraine), with no other criteria imposed. **The Venice Commission and ODIHR recommend that the law make clear that no additional criteria must be met on matters of nationwide significance, provided the stipulated number of signatures are gathered. Otherwise, if the collection of a significant number of signatures is not considered a proof of national significance, there should be other clear objective criteria for a proposed question to be deemed one of nationwide significance; in this case, the Draft law should provide which body is authorised to determine in the first instance whether or not the question meets those criteria.**

34. The popular initiative referendum, according to the Draft law - the Constitution does not specify its subject -, has legislative abrogative character (it concerns repealing a law or certain provisions thereof (Article 3.1.4)). Article 30.7 on popular initiative refers to “approval or refusal to approve relevant draft law (law, issue) set to the referendum”, and in the same Article, paragraph 8 states: “the draft law abrogating the law in full or in part”. The same can be found in Article 91.1.1) referring to the information materials for the popular initiative (“a draft law on the partial or full loss of effect of the law”).

35. The question has to be raised whether another type of referendum on popular initiative is possible on “issues of nationwide importance”. According to the positions expressed by the members of the working group on the referendum during the exchanges with the rapporteurs, the draft is intended to allow for popular initiatives on an issue of principle or a generally-worded proposal on “matters of national significance”. However, the possibility of such a fourth type of referendum is currently not supported by the text of the draft. If it is intended that popular initiatives on general questions are permissible, the draft law should be amended consistently – including Articles 30.7, 85 and 100.5. Moreover, the consequences of the approval of the popular initiative

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<sup>7</sup> Cf. Code of good practice on referendums, III.5.c.

should be defined in the law. It is therefore recommended that, should the legislator intend to provide for a referendum upon popular initiative on an issue of principle or a generally-worded proposal, this should be explicitly regulated and the consequences of the approval of the popular initiative should be defined in the law.

36. The Code of Good Practice on Referendums considers minimal thresholds (in particular turnout thresholds) as not advisable.<sup>8</sup> An approval quorum or a specific majority requirement may however be acceptable for referendums on matters of fundamental constitutional significance.

37. The Draft law introduces referendums on repealing laws or certain provisions of a law. The Code of Good Practice on Referendums of the Venice Commission provides:

*"...The use of referendums must comply with the legal system as a whole, and especially the procedural rules. In particular, referendums cannot be held if the Constitution or a statute in conformity with the Constitution does not provide for them, for example where the text submitted to a referendum is a matter for Parliament's exclusive jurisdiction."*

38. Article 75 of the Constitution of Ukraine provides that the sole body of legislative power in Ukraine is the Parliament — the Verkhovna Rada of Ukraine. It does not entrust any other entity with legislative powers. Accordingly, the provisions of the Draft law on the possibility to hold the all-Ukrainian referendum on repealing the Law of Ukraine or separate provisions of a given law (sub-paragraph 1.4 of Article 3 and others related provisions) might be problematic and could lead to abuse, since the Verkhovna Rada seems to be excluded from the process proposed in the Draft law. The Code of Good Practice on Referendums provides that:

*"When a text is put to the vote at the request of a section of the electorate or an authority other than Parliament, Parliament must be able to give a non-binding opinion on the text put to the vote. In the case of the popular initiatives, it may be entitled to put forward a counterproposal to the proposed text, which will be put to the popular vote at the same time. A deadline must be set for Parliament to give its opinion: if this deadline is not met, the text will be put to the popular vote without Parliament's opinion."<sup>9</sup>*

39. In addition, parliament could be given the explicit task, where necessary, of initiating legislative proceedings in conformity with the results of the vote on the abrogation of a law.

40. In 2019 the Parliamentary Assembly of the Council of Europe adopted Resolution No. 2251 (2019) on ensuring free referendums in Council of Europe Member States, which includes a set of recommendations on the matter.<sup>10</sup> In this Resolution and the Explanatory Memorandum thereto, considerable attention is dedicated to risks that may arise out of improper regulation of referendums and manipulation of voters' opinions, especially in countries where democratic traditions are only developing (and where the executive power could use this tool to bypass the legislator). In point 4.3, special emphasis is placed on the importance of maintaining a balance between representative and direct democracy:

*"where possible, referendums should be post-legislative; where this is not possible, a process should be set out requiring two referendums if the first referendum does not allow voters to choose between the options that are ultimately available;"*

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<sup>8</sup> Para. III.7; see also, for example, Opinion on the Citizens' bill on the regulation of public participation, citizens' bills, referendums and popular initiatives and amendments to the Provincial Electoral Law of the Autonomous Province of Trento (Italy), CDL-AD(2015)009, paragraph 48.

<sup>9</sup> Idem, para. III.6.

<sup>10</sup> Updating guidelines to ensure fair referendums in Council of Europe member States Parliamentary Assembly of the Council of Europe Resolution 2251 (2019)

<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=25325>

41. The Resolution also warns against the risk of the interference of the executive through referendums:

*"referendums should be embedded in the process of representative democracy and should not be used by the executive to override the wishes of parliament or be intended to bypass normal checks and balances."<sup>11</sup>*

42. Since the proposed procedure for initiating and organising a referendum on repealing the Law of Ukraine or its separate provisions do not provide the required legal standards, and notably seem to encroach on the constitutional powers of the parliament, **the Venice Commission and ODIHR recommend reconsidering the procedure for the popular Initiative referendum with a view to providing parliament with a role before and after the vote.**

### B. Restrictions on the conduct of national referendums.

43. Article 5.2 establishes that the all-Ukraine referendum may not be held simultaneously with either regular or snap national elections. This provision fully meets the recommendations of different international bodies, notably those of the Parliamentary Assembly of the Council of Europe, which states in its Resolution 2251 (2019) that 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.<sup>12</sup> However, the Draft Law only forbids holding a referendum simultaneously with national elections, and de facto allows its conduct alongside local elections. Concurrent conduct of the referendum with regular local elections may significantly hinder the free expression of the will of the people both during the referendum and local elections. Local agendas and political issues could have a negative impact on voter's capacity to make well-informed decisions while casting their votes. Since procedures for organising referendums and elections differ this could put an additional pressure on electoral administration. In 2006 the international organisations have already pointed out the problems concerning electoral rights of citizens when national and local elections are combined in Ukraine.<sup>13</sup> Therefore, **the Venice Commission and ODIHR recommend to consider making the prohibition of organising simultaneously the all-Ukrainian referendum and local elections an additional restriction in the Draft law.**

44. Article 20 of the Draft law provides that the all-Ukrainian referendum may not be called (announced) in a situation of martial law or state of emergency throughout the territory of Ukraine or in any part thereof. Such restrictions are appropriate. However, the Draft law does not stipulate how the subject of referendum appointment (declaration) and/or the body in charge of organising the referendum (the Central Election Commission (the CEC) and other entities must act in case of such circumstances. The proposed version of Article 20.2 of the Draft law only provides for the suspension of the referendum process. However, neither the procedure of such suspension, nor the possible steps following such suspension are determined in the law. This might disrupt the certainty and predictability of the legislation and can lead to administrative abuse of the referendum procedures. **The Venice Commission and ODIHR are of opinion that the procedures in case of postponement of a referendum in case of martial law or state of emergency should be further developed in the Draft law.**

### C. Questions submitted to the national referendum

45. The Draft law attempts to provide a detailed regulation on the formal requirements to the referendum question. The proposed text includes requirements related to the form of the

<sup>11</sup> Idem para. 3.1.

<sup>12</sup> Idem, para. 4.2.

<sup>13</sup> See among other documents, Elections to the Verkhovna Rada of Ukraine, 26 March 2006, OSCE/ODIHR Mission Report on elections observation, page 25 <https://www.osce.org/uk/odihr/elections/ukraine/19595>

questions (Article 19 of Draft Law), the content of the questions (Article 3 – concerning general restrictions including constitutionality; Article 21 regarding control of the constitutionality of the question; paragraphs one and two of Article 21 of the Draft law, concerning the procedure for registering the question). In fact, only limited control over the quality of the very referendum question, its clarity and unambiguity is provided. Article 19.2 just provides that “*the question of the all-Ukrainian referendum must be worded in a clear and understandable manner that precludes different interpretations*”. The Venice Commission’s Code of Good Practice on Referendums, recommends that the questions submitted to a referendum must respect the unity of form (the same question must not combine a specifically worded draft amendment with a generally-worded proposal or a question of principle); unity of content (there must be an intrinsic connection between the various parts of each question put to the vote, to guarantee the free suffrage of the voter, who must not be called to accept or refuse as full provisions without an intrinsic link), and unity of hierarchical level (the same question should not simultaneously apply to the legislation of different hierarchical levels, such as issues falling within the scope of regulation by the Constitution and law).<sup>14</sup> The question should not be misleading or suggest an answer.<sup>15</sup> The Code also provides that texts that contradict the requirements of procedural and substantive validity must not be put to the popular vote.<sup>16</sup>

46. The Code of good practice on referendums recommends that:

- “In order to avoid having to declare a vote totally invalid, an authority must have the power, prior to the vote, to correct faulty drafting, for example:*
- i. when the question is obscure, misleading or suggestive;*
  - ii. when rules on procedural or substantive validity have been violated; in this event, partial invalidity may be declared if the remaining text is coherent; subdivision may be envisaged to correct a lack of substantive unity.”<sup>17</sup>*

47. For popular initiatives, Article 31 provides that the CEC is to review the proposed question/text for compliance with the law and can deny registration of the initiative team for “...non-conformity with the provisions of this Law of the question ...” However, the provision does not specifically refer back to the relevant articles of the law on form/substance of questions. The CEC can reject the registration of an initiative team on grounds of its own decision on unconstitutionality of the proposed text/question; this seems to be the case since Article 31 of the draft includes a requirement for constitutionality but should be made explicit. Similarly, Article 31.1 provides that if the President fails to submit on CEC’s request a question/text to Constitutional Court or the court does not initiate proceedings within 40 days, the CEC is to either register or not register the initiative, therefore apparently enabling the CEC to register an initiative despite possible concern about its constitutionality. Putting a potentially unconstitutional question/text to referendum would not be in line with international good practice on respect for both procedural and substantive validity<sup>18</sup> (though the CEC’s decision could be challenged in court and potentially make its way to the Constitutional Court via Supreme Court referral, which is discussed in more depth later on). Moreover, according to Article 21.1 of the draft, which reproduces the substance to Article 151.2 of the Constitution, not only the President, but also forty-five people’s deputies may submit the issue of constitutionality of questions that are proposed to be put for the all-Ukrainian referendum on people’s initiative to the Constitutional Court. Article 21.1 and 31.1 should be coordinated.

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<sup>14</sup> Code of Good Practice on Referendums (Doc. CDL-AD(2007)008rev-cor-e, para.III.2.

<sup>15</sup> Idem, para. I.3.1.c.

<sup>16</sup> Idem, para III.3.

<sup>17</sup> Idem, para. III.4.g.

<sup>18</sup> Idem, para III.3.

48. On a separate point, the 40-day deadline in Article 31.1 for the President to decide to submit the question to court on CEC's request or the court to institute proceedings can unduly delay the referendum process and should be shortened.<sup>19</sup>

49. Articles 22, 26 and 27 of Draft law provide that the process of the all-Ukrainian referendums on changes to the Constitution of Ukraine and changes to the territory of Ukraine starts immediately after their announcement. The constitutionality of such referendums may only be verified in conformity with Article 150 of the Constitution of Ukraine and Article 7 of the Law of Ukraine "On the Constitutional Court of Ukraine" (paragraph two of Article 21 of the Draft law), e.g. when the President of Ukraine or forty five MPs appeal to the Constitutional Court of Ukraine. Here again, it is not clear from the content of the law whether the control of constitutionality addresses procedural or substantive issues, and which of them.

**D. Equality between the supporters and the opponents of issues submitted to the referendum and their balanced representation at the level of referendum commissions.**

50. 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.

51. The Explanatory Memorandum to the Code of good practice on referendums underlines the need for respect 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"<sup>20</sup>.*

52. The Draft law stipulates that the referendum process shall be administered by the CEC, district and precinct referendum commissions (Article 39 of Draft Law). The Central Election Commission is a permanent body, while district and precinct commissions shall be set up for a certain term, separately for each referendum process. Balanced representation of both supporters and opponents of the referendum at different levels of referendum commissions is necessary in a democratic process. The Code of Good Practice on Referendums establishes 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."<sup>21</sup>*

53. According to Article 39.1 of the Draft law, the CEC is the "principal commission in the all-Ukrainian referendum". According to the national interlocutors of the rapporteurs of the Venice Commission and ODIHR participating in the videoconferences conducted in June, the current

<sup>19</sup> Idem, para II.3.3.g.

<sup>20</sup> Code of good practice on referendums (CDL-AD (2007) 008rev-cor-e), explanatory report, I.2.2.2, para. 8.

<sup>21</sup> Idem, p. II.3.1.e.

composition of the CEC maintains the required plurality, due to the appointment of its members by all the parliamentary groups in Parliament.

54. The CEC of Ukraine is a permanent body, made up of representatives of political parties represented in the Rada.<sup>22</sup> Since there is no separate national referendum commission, **the Draft law should be amended to provide that for each referendum, there is a balanced representation of supporters and opponents participating in the meetings of the CEC.**

55. The Draft law should provide for a registration system of supporters and opponents prior to the call of the referendum, so that these representatives would have a vote during the stage of registration of the initiative group/question. At present, the draft law provides for official registration of supporters and opponents only after the referendum is called (during the pre-call stage, the entities only have to open fund accounts if they want to campaign during the signature collection stage but are not registered as opponent/supporter). In any case, even if the representatives to the CEC only have consultative status, as is currently provided for in the Draft law, they should be able to take up their position at the start of the stage of registering the initiative group/question to ensure transparency and overall public trust in the early stages of the referendum process.

56. The Draft law regulates the composition of the all-Ukrainian referendum constituency commission with the participation of the initiative group and the political parties registered as supporter or opponent of the question (Article 45.1). The same applies to the precinct commissions (Article 47.1). However, there is a difference between parties represented in the parliament and other parties and entities. The referendum initiative groups and parties with factions in the Rada are guaranteed representation in any commission to which they suggested nominees. In contrast, representation of other political parties, i.e., those registered as supporters or opponents of the referendum question, depends on whether their nominees have been selected to the respective commission through the lottery. Therefore, depending on the attitude of the parliamentary parties to the referendum proposal(s), some commissions can be dominated by the referendum proposals supporters or by referendum question opponents. **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.**

57. To better ensure independence, impartiality, professionalism and stability in the work of district and precinct commissions, **it is recommended a) to prohibit nominating entities from arbitrary replacement of their commission members**, in line with the Code of Good Practice on Referendums, para. II.2.1.f (i.e. to establish clear and restrictive grounds for recall, while Article 53.2 of the Draft law allows for unrestricted recall of commission members by nominators); **b) to prohibit payments from political parties and other stakeholders to commission members; c) to provide for mandatory, standardised training of commission members** (Code of Good Practice para. II.3.1.g).

58. The large size of the precinct commissions (between 10 – 24 members, depending on the physical size of the polling station), as established in Art. 48 of the Draft law, has in the past been critically assessed by ODIHR in its election observation reports as being too high, hindering election day operations. It is therefore 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. Those without

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<sup>22</sup> Article 6.2 of the Law on Central Electoral Commission of Ukraine.  
<https://www.legislationline.org/documents/action/popup/id/714>

representation, otherwise have the right under the Draft law to appoint persons to observe the process (and with consultative status at district commission level).

#### **E. Registration of popular initiative group and signature collection period**

59. Articles 30.7 and 75.3 of the Draft law require the initiative group, political parties and CSOs seeking registration to adopt a rationale for their (proponent or opponent) position concerning the referendum issue. These provisions establish a detailed definition of “rationale”. The rationale, along with other documents, is to be submitted to the CEC (Articles 30.14 and 75.4). The CEC has apparent authority to vet the contents of the rationale for compliance with the legal definition and has power to reject the rationale (or compel the initiative team or other entity to amend it as a precondition to registration). Article 31.1. states: “...the CEC shall review...the documents [of the initiative team] referred to in Article 30.14 of this Law for their conformity to the provisions of this Law and the Constitution of Ukraine”; Article 75.7 provides that the CEC is to review the documents of political parties and CSOs for compliance with the law and the entity’s Charter. The CEC can refuse registration of the initiative group or entity on the basis of this review. These provisions should be amended to prohibit vetting of rationales as it is contrary to freedom of expression.

60. Another general issue can be raised in respect of referendums on popular initiative. Article 29.3 of Draft law 3612 provides for a 60 days’ period for collecting 3 million signatures (as provided in Article 72.2 of the Constitution of Ukraine) in support of the initiative (from the date of a registration certificate issued to the initiative team that proposes putting the question to the referendum), which seems to be quite short. For example, in Italy the period for collecting the signatures for an abrogative referendum is 90 days for 500 000 signatures. **The Venice Commission and ODIHR recommend extending this deadline.**

61. The Draft law does not provide any opportunity for the initiative group to correct technical deficiencies in its submitted documents (for instance, missing documents or missing information in a document), with a reasonable amount of time to do so prior to official rejection to register the initiative. **It is recommended that the Draft law be amended to provide sufficient guarantees for the initiative group to correct technical shortcomings within reasonable deadlines.**

62. While the Draft law mandates the CEC to check the proposed referendum question/text’s compliance with the legislation (procedural and substantive legality), it does not regulate the situation where the CEC decides that the proposed question/text does not fully conform to the law’s procedural and substantive requirements. Only in case of possible non-constitutionality the CEC is bound to submit the matter to the President to possibly seek constitutional court review. **It is recommended to review the draft law with a view to provide the initiative group with the opportunity to amend a proposed question/text that does not comply with the legal requirements.**

63. Article 32(6) of the Draft law provides that only initiative team members are allowed to collect voters’ signatures in support of a popular initiative referendum, while Article Art. 30 provides that initiative team members must be selected from amongst Ukrainian citizen voters. This is contrary to the Code of Good Practice on Referendums, para. III.4.c, which provides that everyone (regardless of whether he or she has the right to vote) must be entitled to collect signatures. As noted in the Explanatory Memorandum of the Code of Good Practice, this includes foreigners and minors, particularly in respect of proposed referendum texts concerning their status.

64. The process established in the Draft law for verification of the signatures by the CEC could be clearer and provide better guarantees. Firstly, in line with the Code of Good Practice on Referendums, para. III.4.f, **the law should make clear that all signatures collected should be verified.** The use of random sampling should be prohibited, as the sample may contain an

unusually high number of invalid signatures or, on the contrary, might not contain any while other sheets of signatures might be full of them. According to the Explanatory Memorandum on the Code of Good Practice on Referendums, **the law should ensure that once the minimum number of signatures are verified, the initiative group is registered, regardless of any invalid or unverified signatures.**

65. The provisions in the Draft law on the method of signature verification should be as clear and objective as possible, to prevent abuses or discrimination against or in favour of a referendum initiative group. In this respect, the Draft law should specify how signatures are to be verified and the degree of detail to be used. Article 35(1) provides that the CEC will determine the procedure for signature verification but this level of elaboration of the verification process should not be left to by-laws. At a minimum, the law should establish who will verify the signatures, how they will be verified, and the key principles and criteria for verification, with basic guarantees of a fair and objective process.

66. The Draft law should also require the completion of appropriate forms or protocols reflecting the steps taken in the process of signature verification should there be a legal challenge over a particular registration or denial of registration.

#### **F. Dissemination of objective information for voters to freely form an opinion**

67. The Draft Law does not fully conform to international good practice with regard to providing voters with balanced or objective information to freely form an opinion. The Code of Good Practice on Referendums, paragraph I.3.1.d states as follows:

*"The authorities must provide objective information. This implies that the text submitted to a referendum and an explanatory report or balanced campaign material from the proposal's supporters and opponents should be made available to electors sufficiently in advance, as follows:*

- i. *They must be published in the official gazette sufficiently far in advance of the vote;*
- ii. *They must be sent directly to citizens and be received sufficiently far in advance of the vote;*
- iii. *The explanatory report must give a balanced presentation not only of the viewpoint of the executive and legislative authorities or persons sharing their viewpoint but also the opposing one.*

68. The Draft law requires the CEC to distribute the text to the district and precinct commissions to remain available ahead of polling day for voters' review. Thus, contrary to the Code of Good Practice on Referendums, the text to be put to the referendum is not required to be published in the official gazette, nor to be sent directly to the voters far in advance of the vote (this is at least two weeks),<sup>23</sup> nor are voters officially informed of the impact of the vote (binding or consultative nature, whether a positive result leads to the adoption or repeal of a measure or if it is just one stage in a larger process, etc). **For voters to make an informed choice, it is recommended to publish in the official gazette the text to be put to the referendum and the potential legislative consequences.**

69. The Explanatory Memorandum of the Code of Good Practice notes that the best solution is for the authorities to provide voters with an explanatory report setting out not only their viewpoint or that of persons sharing it, but also the opposing viewpoint, in a balanced way, rather than sending the voters balanced campaign materials, while the Draft law incorporates to a

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<sup>23</sup> Explanatory report of the Code of Good Practice on Referendums (CDL-AD (2007) 008rev-cor-e), par. 14.

limited extent the latter option of distributing balanced campaign material (Article 92.) **It is recommended to review the draft in order to mandate the authorities to publish and disseminate balanced and objective information to the voters, well in advance of the polling day.**

70. An additional concern is the CEC's authority under Article 92 of the Draft law to vet the content of campaign materials that are to be disseminated to voters. The article provides that "...the [referendum entities] may produce informative posters with the substantiation (at most 2500 printed characters) of their stand concerning... the referendum issue...The CEC shall approve the informative poster text in consultation with the authorized person of the entity." These approved campaign materials are to constitute the balanced materials for informing the voters, to be distributed by the entities to the polling stations for display. However, it is unclear in the Draft law on what grounds the CEC can refuse to approve a campaign poster (for instance Article 99(1) includes a range of substantive issues that cannot be included in campaign materials). Any grounds other than technical grounds (such as number of characters and size) would be problematic as substantive vetting of campaign materials is not in line with freedom of expression. In past election observation reports, ODIHR has recommended to repeal similar provisions in election legislation on the vetting of campaign materials by the CEC. **This recommendation is reiterated.**

71. The 2019 Law on the Functioning of the Ukrainian Language as the State Language provides that the Ukrainian language is the sole language to be used in elections and referendums. This includes a ban on the use of minority languages in campaigning activities and campaign materials, as well as in official referendum materials, such as explanatory reports, voter education communications, and ballot questions and text. For campaign materials, the above-noted law provides an exception in territories that have been legally designated as minority settlements but as yet no such areas have been designated and there are no established criteria for their determination. The law is currently under review by the Constitutional Court. The ban on the use of minority languages in referendums is contrary to the right of voters to freely form an opinion as noted in paragraph I.3.1.e of the Code of Good Practice for Referendums. Past ODIHR election observation reports have recommended that the law of Ukraine provide for positive measures, in line with international obligations, to overcome obstacles to voting such as language barriers. **It is therefore recommended that the Draft law repeal such language bans in referendums to ensure the suffrage rights of minorities are fully guaranteed.**

## G. Right to Vote

72. Article 70 of the Constitution and Article 6 of the Draft law disenfranchise persons who have been declared by a court to be legally incompetent. This is contrary to the Convention on the Rights of Persons with Disabilities ratified by Ukraine in 2010, as interpreted by its official commentary which strictly prohibits disenfranchisement of persons with disabilities, including those with intellectual or psycho-social disabilities.

73. Articles 56.2 of the Draft law provides that voters who are recorded in the voter list as having permanent physical disability are by default registered to vote at their home by way of mobile voting. This is contrary to the principle of equality as persons with disabilities should be given the same opportunity as other voters to vote in person at a polling station without having to submit a special request to do so. A good practice is to assist voters with disabilities to reach polling stations and cast their ballots in the same way as other voters and in a dignified manner that preserves the secrecy of the ballot and prevents undue influence, with the use of mobile voting as an available option for the voter to choose. Accessibility for persons with disabilities is addressed in greater detail in the Electoral Code than in the draft. In this respect, **it is recommended that the Draft law be harmonised with the Electoral Code to further strengthen the mechanisms of accessibility of referendums for persons with disabilities, including the possibility for voters with disabilities to choose their voting methods.**

74. In addition, in conformity with previous ODIHR election observation reports, it is recommended to establish mechanisms that will practically facilitate the effective and meaningful exercise of suffrage rights of IDPs and persons living in conflict areas.

#### H. Electronic voting

75. Use of IT tools is a new and constantly developing trend in election administration. The Draft law attempts to introduce the use of the new technologies at the stage of initiating the all-Ukrainian referendum by the population and during voting. In order to respect the democratic principles during electoral processes, there are three key issues that have to be addressed: legality, trust and security.

76. The use of modern technologies helps simplify procedures considerably but also provides possibilities to distort the expression of the will of voters or even falsify voting results.

77. The Code of Good Practice on Referendums provides that:

*"...electronic voting should be in conformity with Committee of Ministers' Recommendation Rec (2004)11 on Legal, operational and technical standards for e-voting. In particular, it should be used only if it is safe, reliable, efficient, technically robust, open to independent verification and easily accessible to voters; the system must be transparent; unless channels of remote electronic voting are universally accessible, they shall be only an additional and optional means of voting."<sup>24</sup>*

78. The relevant reference text is now Recommendation CM/Rec(2017)51 of the Committee of Ministers to member States on standards for e-voting.<sup>25</sup>

79. Articles 3, 8, 19, 21, 85, 92 of the Constitution of Ukraine give grounds to assert that electronic voting or other forms of vote recording must be regulated at the level of the Law of Ukraine. By-laws can only determine mechanisms and procedures for detailing and developing norms of the Constitution of Ukraine and relevant legislation. These requirements stem from the guaranteed rule of law principle and its components such as legality and legal certainty.

80. The Draft Law hardly regulates the issue of electronic voting organisation and conduct. Paragraph one of Article 23 of the Draft law only provides the possibility of supporting the initiative of the all-Ukrainian referendum in the electronic format using "automated information and analytical system means". However, the procedure for creating and functioning of such a system shall be approved by the Central Election Commission (Article 23.2 of the Draft law). The electronic voting provisions in the law will take effect when the CEC adopts a decision that the automated information and analytical system is operational. In addition, the Draft law determines that electronic collection of signatures to support the all-Ukrainian referendum initiative will be carried out "in the manner established by the Central Election Commission" (Article 29.2 and Article 32.2 of the Draft law). This concerns not only electronic voting regulation, but also in operating procedures of the authorities administrating the referendum, voters, and other referendum process participants. Such a delegation appears too broad in view of the importance of the matter; it is recommended that these important aspects be regulated by the law rather than by-laws.

81. It should be noted that procedures for e-voting or other forms of electronic interaction between voters and administrative authorities in Ukraine have never been used before. The Electoral Code adopted on 19 December 2019 does not provide for electronic procedures, either.

<sup>24</sup> Code of good practice on referendums (CDL-AD (2007) 008rev-cor-e), para. I.3.2.a.iv.

<sup>25</sup> <https://rm.coe.int/0900001680726f6f>.

82. Recommendation CM(2017)5 on standards for e-voting and documents thereto provide for a series of criteria and requirements to proper regulation of e-voting: guaranteeing its technical reliability; ensuring the secrecy and privacy of personal data; creating appropriate administrative environment; transparency and clarity of electronic tools, etc. Adherence to these standards is crucial for ensuring the free expression of the voters' wishes during elections or referendum through e-voting. The Draft law does not seem to provide these conditions. Moreover, Member States that introduce e-voting shall do so in a gradual and progressive manner<sup>26</sup>. **The Venice Commission and ODIHR recommend excluding this issue from the Draft law and regulating it globally at a later date by way of a separate law, which would also address local, parliamentary and presidential elections. In case electronic voting is introduced, it should be regulated by a specific comprehensive law adopted in an inclusive manner which provides for a reliable, secure, and transparent electronic voting system, to be tested and verified by the CEC under transparent conditions.**

## I. Campaigning

83. Most provisions of the Draft Law were taken from the Electoral Code and seem to introduce adequate mechanisms to ensure equality and competition between supporters and opponents of the referendum question. The Draft law thus provides a clear set of rules aimed at establishing forms and methods of campaigning for the all-Ukrainian referendum (Article 93), general procedures for using mass media (Article 96-98) and other relevant issues.

84. Article 99 of the Draft law introduces substantive restrictions on campaigning; some of the restrictions are vaguely worded and, therefore, could lead to abusive practices. Article 99.1 and 99.17 prohibit dissemination of campaign materials and campaign broadcasts with certain types of speech. Limitations on campaign speech that are acceptable under international standards include inflammatory speech aimed at inciting another person to violence or ethnic hatred or that can undermine the physical safety and security of the public. **It is therefore recommended that this provision be amended in line with international standards for freedom of expression.**

85. Articles 32.1, 33.2 and 94.1 of the Draft law strictly prohibit campaigning by the initiative group, political parties and civil society organisations (CSOs) prior to their registration, setting up a campaign fund, and/or calling of the referendum. While campaigning entities can be required by law to set up and utilize campaign accounts as part of the framework for campaign finance reporting, broad bans on campaigning are not justifiable. Paragraph 24 of 1990 OSCE Copenhagen Document provides that: "The participating States will ensure that the exercise of all the human rights and fundamental freedoms set out above will not be subject to any restrictions except those which are provided by law and are consistent with their obligations under international law, in particular the International Covenant on Civil and Political Rights, and with their international commitments, in particular the Universal Declaration of Human Rights. These restrictions have the character of exceptions. The participating States will ensure that these restrictions are not abused and are not applied in an arbitrary manner, but in such a way that the effective exercise of these rights is ensured. Any restriction on rights and freedoms must, in a democratic society, relate to one of the objectives of the applicable law and be strictly proportionate to the aim of that law."<sup>27</sup> **These bans on campaigning should therefore be removed from the Draft law.**

86. The above-noted provisions also serve to prohibit any entity not registered as a referendum participant to campaign during the referendum even if no or little money is spent.

<sup>26</sup> Recommendation CM/Rec(2017)5, Appendix I, 27.

<sup>27</sup> <https://www.osce.org/fr/odihr/elections/14304> .

Such a ban unduly interferes with CSO's important role to inform the public on matters of public interest. This often includes providing positive or negative commentary on public policies or legislative initiatives. Even if one can argue that activities such as publishing reports and holding conferences do not constitute campaigning, CSOs may be hesitant to engage the public on referendum issues for fear of being held liable for violating the law, particularly if a communication puts a positive or negative light on the issue. This is especially so in light of Art. 86.4 of the Draft law that obliges CSOs "when disseminating information on referendum issues that is not part of referendum campaign materials, to follow principles of objectivity, impartiality, balance, reliability, completeness, and accuracy of information." **It is therefore recommended that the law allow CSOs to carry out their usual activities without registering;** a certain minimal amount to be spent on referendum-related activities could also be imposed for non-registered organisations. Alternatively, the law could prohibit non-registered entities from buying broadcast and outdoor media advertising for referendum-related advertising. The legal definition of campaigning can exclude publishing reports and conferences, though this approach has less legal certainty.

87. Articles 33.2 and 93.2 of the Draft law allows private citizens to campaign provided they do not expend any money in the process. 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 unduly hinder the personal freedom of expression or to unintentionally suppress citizens' political speech.

88. Articles 93.1 and 99.2 and 99.5 of the Draft law establish that the official stands of the President and Parliament on referendums to amend the constitution or to make changes to the national territory are not considered campaigning (provided such activity "does not include campaign comments and calls to vote one way or the other"). **It is recommended that the President and Parliament and their representatives should also be authorised under these provisions to make public their official stand on popular initiative referendums.** In fact, as noted earlier, the Parliament should be able to give a non-binding opinion on the text put to vote by popular initiative (or the president). On the other hand, **it is also recommended**, in line with paragraph I.3.1.b of the Code of Good Practice on Referendums, **that the law explicitly prohibit the public authorities (national, regional and local) to attempt to influence the outcome of the vote by excessive, one-sided campaigning and require the authorities to maintain objectivity in their statements by providing a certain amount of necessary information in order to enable voters to arrive at an informed opinion** (as per Explanatory Memorandum in Code of Good Practice on Referendums).

89. While not a consistently established international practice, consideration could be given to provide for a certain amount of publicly funded media time and space for registered participants to communicate, on an equal basis, the rationale for their proponent or opponent side of the referendum issue. This could facilitate provision of balanced information to the public, particularly in circumstances where well-resourced large political parties, which can afford to purchase expensive media time and space, are skewed in favour of one side of the referendum issue. In addition, consideration could be given to require the public broadcaster (TV and radio) to provide an opportunity for televised debates between the proponents and opponents of the referendum issue, with equal allocation of time to each side. Such debates in referendums would provide an opportunity for voters to become well-informed on the differing sides of the referendum issue and the effects of the referendum outcome, facilitating them to make an informed choice at the ballot box.

### **J. Funding of referendum campaign**

90. Article 64 of the Draft law provides that all-Ukrainian referendums shall be prepared and conducted at the expense of the funds from the State Budget of Ukraine allocated to the preparation and conduct of the all-Ukrainian referendum, as well as money from the funds of parties to the all-Ukrainian referendum.

91. The provisions of the Draft law governing referendum campaign financing through the election funds of the parties and NGOs registered as supporters or opponents of the referendum proposal(s) are very much the same as provisions governing campaign finance in the national elections. One of the Draft law's welcome developments is that its Article 68 paragraph 7 sets up a referendum campaign spending limit. Each registered party or NGO would not be allowed to spend on referendum campaigning more than 20,000 minimum monthly salaries. This goes in line with the ODIHR Election Observation Mission Final Report on early parliamentary elections of 2019.<sup>28</sup>

92. For popular initiative referendums, there are two campaign periods during which different campaign finance provisions apply: the first is an initial period of campaigning during the signature collection phase (prior to the referendum being called) and the second is the referendum campaign period. Both campaign periods have financial reporting requirements. The initiative group and other entities which will campaign during the initial period are required to set up an initiative campaign fund (distinct from the referendum campaign fund.) During this initial campaign period, the initiative team is not subject to any spending limit as per Article 70.3 of the Draft law, while the other entities (political parties and CSOs) are subject to the general campaign spending limit during the referendum campaigning as referenced in the above paragraph. This unequal treatment of supporters and opponents during the initial campaign period with regard to campaign finance is contrary to paragraph 1.2.2.a of the Code of Good Practice on Referendums for guaranteeing equality of opportunity for supporters and opponents in the campaign. **It is therefore recommended to address this disparity in the Draft law.**

93. Combined with the no spending limit in the initiative campaign period, the initiative group is also allowed limitless own source contributions to its campaign fund, which is contrary to previous Venice Commission and ODIHR recommendations to provide a limit on own source funds in elections, especially where a spending limit is not established.<sup>29</sup> It is also noted that all referendum participants are allowed limitless own source contributions to their campaign funds though a spending limit applies to all participants during the general campaign period. While all referendum participants are subject to the same restrictions on campaign donations, unlike political parties, the initiative team and civil society organizations are not subject to general political party financing rules, including restrictions on sources of party donations, effectively resulting in more favourable treatment for non-political party participants whose own source funds can essentially come from any source. **In light of the above-noted shortcomings, the framework for campaign finance in the Draft law could be further improved.**

94. Moreover, there are provisions on campaign financing oversight that could be revised in line with Venice Commission, ODIHR and GRECO recommendations. The 2019 ODIHR Election Observation Mission Final Report highlighted the overlapping and unclear jurisdictions of the CEC and National Agency for the Prevention of Corruption in campaign finance oversight and their limited oversight powers and recommended that "the National

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<sup>28</sup> Ukraine: 19 Early Parliamentary Elections, 21 July 2019, ODIHR Election Observation Mission Final Report, page 19.

<sup>29</sup> Joint Opinion on the draft amendments to some legislative acts concerning prevention of and fight against political corruption of Ukraine CDL-AD(2015)025.

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.<sup>30</sup> It also recommended that the oversight framework be strengthened to ensure that third-party financing and in-kind contributions do not circumvent regulations and reporting requirements and that the law prescribe effective, proportionate and dissuasive sanctions for campaign finance violations. **These recommendations are also applicable to the Draft law on democracy through All-Ukraine referendum.**

## K. Media Oversight

95. Article 89.6 of the Draft law establishes the National Council of Television and Radio Broadcasting of Ukraine (NTRBC) as one of the authorities (in addition to the executive authority implementing the state policy in the information and publishing spheres) responsible for exercising control over the mass media and news agencies with respect to observance of the referendum law. This may create an overlapping jurisdiction which can lead to ineffective enforcement and should therefore be avoided. Past ODIHR election observation reports have recommended that the NTRBC's status as an independent regulatory body be reinforced and that it be granted an exclusive remit and effective sanctioning powers, enabling it to effectively oversee the broadcast media's compliance with the legislation and take timely and effective measures to enforce compliance and address media-related complaints, making such decisions public.<sup>31</sup> In addition, the Draft law does not sufficiently establish effective, proportionate and dissuasive sanctions for media-related violations, with either too strict or too lenient penalties (Article 99(17-19), which has been the subject of previous ODIHR recommendations. **It is recommended that the Draft law provide for dissuasive and effective sanctions on media-related violations.**

## L. Complaints and appeals

96. In general, the Draft law provides a sensible set of guarantees for complaints and appeals procedures both at the administrative and at the judicial level. However, there are certain important issues which can be further strengthened and clarified.

97. The Code of good practice on referendums provides the following recommendations on appeals process:

"22. The appeal body's minimum powers are specified, insofar as respect for free suffrage, and the results of the ballot are expressly mentioned. Other aspects specific to referendums and popular initiatives should be subject to judicial review, at least in the last instance: the completion of popular initiatives and requests for referendums from a section of the electorate, along with the procedural and, where applicable, substantive validity of texts submitted to a referendum."<sup>32</sup>

98. The matter of appealing the referendum question foreseen in the Draft law is only possible through limited constitutional control that depends on the referendum type. These aspects were addressed in paragraphs 47 – 49 of this opinion.

99. The right to challenge CEC decisions is regulated by the Code on Administrative Procedure, with the first instance complaint to be lodged with the Administrative Court of Appeal and with further appeal to the Supreme Court. The Draft law in Art. 31(4) provides that the

<sup>30</sup> Idem.

<sup>31</sup> Ukraine: 19 Early Parliamentary Elections, 21 July 2019, ODIHR Election Observation Mission Final Report. Page 21.

<sup>32</sup> Code of good practice on referendums (CDL-AD(2007)008rev-cor), II.3.2, para. 22.

initiative team can appeal to court against the CEC's decision to deny its registration and the Code of Administrative Procedure provides that any voter whose rights are directly violated by a CEC decision can bring the matter to court. Arguably, a CEC decision to register or deny registration of a referendum question/text directly affects every voters' rights; this could be made more explicit. The Draft law could also provide that the filing of any such challenge should result in the temporary suspension of the referendum process until the final court decision on the matter has been issued, after exhaustion of all appeals. This suspension period should include any review by the Constitutional Court as referred by the Supreme Court under its constitutional powers.

100. Since the issue of national referendum is of crucial importance **consideration should be given to a possibility to provide for a special procedure for reviewing such important issues as the constitutional validity of the question, as already mentioned in paragraph 49.**

#### **M. Citizen and international observers**

101. Article 83(2) of the Draft law provides that official observers are to be accredited at the district commission level, thereby preventing observation of stages of the referendum process prior to the establishment of the district commissions. In light of this, Article 84, which sets out the rights of observers, establishes a limited scope of observation. The Code of Good Practice for Referendums, paragraph II.3.2, provides that accredited observers should have the right to observe all aspects of the referendum process, including the signature collection period and referendum campaign. In past ODIHR election observation reports, it recommended to simplify the process of accreditation of observers from CSOs in order to provide them with the possibility to observe all stages of the election process, including formation of the district commissions and the work of the CEC from the beginning of the election process. **The above recommendations from ODIHR election observation reports also stand in relation to the Draft law.**

102. The Draft law's provisions on international observation are not fully in line with OSCE Commitments, in particular paragraph 8 of the 1990 OSCE Copenhagen Document that obliges Participating states to allow international observation. While the Draft law generally provides for international observation, Article 85 bans as international observers, citizens of, or persons proposed by, an "aggressor state or an occupying power". In light of a 2018 Ukraine law designating the Russian Federation as an aggressor state, this provision in the Draft law *de facto* prohibits Russian Federation citizens or persons proposed by the Russian Federation to observe referendum (and elections) in Ukraine. Based on a similar provision in the election legislation, ODIHR in its 2019 final report on observing the presidential election noted that this deviates from OSCE Commitments.<sup>33</sup> **This recommendation stands also in relation to this Draft law.**

#### **N. Voting, counting, tabulation and results determination**

103. Article 109 of the Draft law addresses the invalidation of voting to be determined at the polling station level. It establishes arbitrary percentages of acceptable levels of irregularities, illegal voting and fraud. In past election observation missions, ODIHR has noted that such arbitrary percentages of acceptable levels of fraud should be removed.<sup>34</sup> The Code of Good Practice on Referendums, para. II.3.3.e, recommends that the referendum be annulled at precinct, district, or national level, only where irregularities may have affected the outcome, and that, in the event of annulment of the global result, a new referendum should be called, while the draft law does not address when a repeat vote at any level is required to take place in case of invalidation. **It is therefore recommended to establish grounds and procedures for**

<sup>33</sup> Ukraine: Presidential Election, 31 March and 21 April 2019, ODIHR Election Observation Mission Final Report page 31. <https://www.osce.org/odihr/elections/ukraine/407660>.

<sup>34</sup> 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>

**invalidation of results, at precinct, district or national level, as well as its consequences, based on objective criteria and limited to cases where elections results may have been affected.**

104. The Draft law allows precinct commissions decide whether changes to the results protocol are to be made with or without a recount, once the district commission identifies mistakes or inaccuracies in the protocol (Article 111.7). To ensure transparency and legal certainty in the counting process, **it is recommended that the provision be amended to establish clear and objective criteria for the types of changes that can be made in a results protocol without a recount and when a recount is required to make other types of changes.**