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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**DRAFT REVISED**

**CODE OF GOOD PRACTICE ON REFERENDUMS**

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## I. INTRODUCTION

1. In 2006-2007, the Council for Democratic Elections and the Venice Commission adopted the Code of Good Practice on Referendums ([CDL-AD\(2007\)008rev-cor](#)) - the Guidelines at the 18<sup>th</sup> meeting of the Council (Venice, 12 October 2006) and the 68<sup>th</sup> plenary session of the Commission (Venice, 13-14 October 2006) and the explanatory memorandum at the 19<sup>th</sup> meeting of the Council (Venice, 16 December 2006) and the 70<sup>th</sup> plenary session of the Commission (Venice, 16-17 March 2007).
2. On 23 November 2007, by Recommendation 1821(2007), the Standing Committee, acting on behalf of the Parliamentary Assembly of the Council of Europe, asked the Committee of Ministers to adopt a recommendation to member states endorsing the Code of Good Practice on Referendums. By Resolution 1592(2007), the Assembly decided to forward the Code of Good Practice to national delegations and parliaments so that it could be applied in Council of Europe member states without delay.
3. At its 14<sup>th</sup> plenary session (Strasbourg, 30 May – 1 June 2007), the Congress of Local and Regional Authorities of the Council of Europe approved the Code of Good Practice on Referendums.<sup>1</sup>
4. On 27 November 2008, at the 1042bis meeting of the Ministers' Deputies, the Committee of Ministers adopted a Declaration on the Code of Good Practice on Referendums for the purpose of inviting public authorities in the member states to be guided by the Code of Good Practice on Referendums.
5. In October 2016, the Venice Commission addressed recurring concerns with respect to a number of referendums in member states, relating both to the procedure for launching referendums and to the substance of the proposed changes. Regarding the procedure, the Commission first emphasised the need for referendums to respect the Rule of Law and, in particular, to comply with the legal system as a whole, especially with the procedural rules on constitutional revision. It also warned against the use of referendums to bypass important constitutional safeguards, such as the requirement for a qualified majority in parliament. As regards the substance of the proposed changes, the Commission was concerned that most of these referendums were aimed at concentrating powers and reducing democratic control by parliament.<sup>2</sup> On that basis, the Commission initiated the process of revision of the Code of Good Practice on Referendums.
6. In 2017, the Council for Democratic Elections and the Venice Commission adopted a questionnaire ([CDL\(2017\)022rev2](#)) asking for information on recent developments in the member states in the field of referendums. The replies to the questionnaire can be found in the Study on Referendums – Replies to the Questionnaire ([CDL\(2018\)042](#)).

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<sup>1</sup> Resolution 235 (2007).

<sup>2</sup> CDL (2017)002, p. 3.

7. In parallel, the Parliamentary Assembly of the Council of Europe drafted a report entitled “Updating guidelines to ensure fair referendums in Council of Europe member States” ([Doc. 14791](#)) which led to [Resolution 2251\(2019\)](#) entitled “Updating guidelines to ensure fair referendums in Council of Europe member States” adopted on 22 January 2019. In this Resolution, the Assembly first “welcomes the fact that a process for updating the 2007 Code has been initiated by the Venice Commission and invites the latter to take into account, in the revised Code, the following general principles:

3.1 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;

3.2. proposals put to a referendum should be as clear as possible and subject to detailed prior scrutiny, including by parliament, to ensure that they reflect voters’ concerns and express their wishes;

3.3. the campaign should ensure a balance between the different sides and allow voters access to balanced and quality information in order to be able to make an informed choice.

The Venice Commission fully endorses these principles.

8. The present report does not intend to determine whether and under which circumstances recourse to referendums is desirable as such. The answer to this question varies according to the nature of the constitutional system and tradition. It belongs to national constitutional law to establish whether referendums are at all foreseen, what their scope is, and what procedure must be followed to hold them. However, 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.

9. 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 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.<sup>3</sup>

10. Participatory democracy and, in particular citizens’ assemblies, are also complementary to representative democracy; they will not be addressed in this report. The introduction of such assemblies does not exclude nor imply referendums, and vice versa: they can be a step in a process which will lead to a referendum.

11. The present Code applies to referendums at the different levels of the state structure (national, regional, local). However, it is mainly focused on national referendums. Its general rules are to be adapted to the reality of local and regional referendums, in conformity with national constitutional traditions.

12. National law may provide for referendums:

- on specifically worded draft amendments to a legal text or a specific proposal to abrogate existing provisions of this text;
- on a question of principle;<sup>4</sup>

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<sup>3</sup> Report on Constitutional Amendment ([CDL-AD\(2010\)001](#)), para. 189; Resolution 2251(2019), paras 3.1-3.3.

<sup>4</sup> For example: “are you in favour of introducing a presidential system of government?”

- on a concrete proposal which does not have the form of specifically worded amendments, known as a “generally worded proposal”<sup>5</sup>.

13. Issues submitted to referendum may be of a constitutional, legislative or even administrative nature (especially at the local level). They may concern (the ratification of) a treaty.<sup>6</sup> They can also address territorial issues, such as the creation or merger of subnational entities as well as secession, in the rare cases where it is allowed by the national Constitution.<sup>7</sup>

14. Distinctions have also to be made between mandatory referendums (imposed by the Constitution or legislation) and optional referendums (at the request of an authority, a minority in parliament or part of the electorate) as well as, according to the effect of the referendum, between legally binding and consultative referendums. Consultative referendums binding the executive – in the sense that it has to introduce a draft in parliament – are an intermediate category.

15. The Code of Good Practice on Referendums includes the Guidelines on the Holding of Referendums as well as an Explanatory Memorandum, which will, when necessary, refer to the various items of the Guidelines in order to elaborate on their content and background.

16. The revised guidelines were approved by the Council of Democratic Elections at its 69<sup>th</sup> online meeting (7 October 2020) and adopted by the Venice Commission at its 124<sup>th</sup> online Plenary Session (8-9 October 2020).

17. *The final version of the revised Code of Good Practice on Referendums, including the explanatory memorandum, was approved by the Council for Democratic Elections at its xxx meeting (Venice, xxx) and adopted by the Venice Commission at xxx Plenary Session (Venice, xxx).*

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<sup>5</sup> For example: “are you in favour of reducing the number of seats in Parliament from 300 to 200?”

<sup>6</sup> For instance, the 2005 French, Luxembourgish, Dutch and Spanish referendums on the European Constitution.

<sup>7</sup> Cf. Referendums in Europe – An Analysis of the Legal Rules in European States, [CDL-AD\(2005\)034](#), pp. 10-11 and 32.

## GUIDELINES ON THE HOLDING OF REFERENDUMS

### I. Principles of Europe's electoral heritage

#### 1. Universal suffrage

##### 1.1. Rule and exceptions

Universal suffrage, in principle, means that all persons have the right to vote. This right may, however, and indeed should, be subject to certain conditions. Such conditions, where the right to vote in referendums is concerned, should not be more onerous than those applying to elections:

- a. Age:  
the right to vote must be subject to a minimum age, but must be acquired, at the latest, at the age of majority;
- b. Nationality:
  - i. a nationality requirement may apply;
  - ii. however, it would be advisable for foreigners to be allowed to vote in local referendums after a certain period of residence.
- c. Residence:
  - i. a residence requirement may be imposed; residence in this case means habitual residence;
  - ii. a length of residence requirement may be imposed on citizens solely for local or regional referendums;
  - iii. the requisite period of residence should be reasonable and, as a rule, should not exceed six months;
  - iv. the right to vote in referendums should be granted to citizens residing abroad under conditions not more onerous than those applying to elections-
- d. Deprivation of the right to vote:  
Provision may be made for depriving individuals of their right to vote in referendums, but only subject to the following cumulative conditions:
  - i. it must be provided for by law;
  - ii. the proportionality principle must be observed;
  - iii. the deprivation must be based on mental incapacity or a criminal conviction for a serious offence;
  - iv. furthermore, the withdrawal of political rights or finding of mental incapacity may only be imposed by express decision of a court of law.

##### 1.2. Electoral registers

Fulfilment of the following criteria is essential if electoral registers are to be reliable:

- a. electoral registers must be permanent or refer to a register that is constantly updated (population register or register of births, marriages and deaths);
- b. there must be regular updates; which have to guarantee that the voters' register is accurate before each referendum. Where voters are not registered automatically, registration must be possible over a relatively long period of time;

- c. electoral registers must be public;
- d. there should be an administrative procedure – subject to judicial control – or a judicial procedure, allowing for the registration of a voter who was not registered; the registration should not take place as a result of a decision taken by the polling station on election day;
- e. a similar procedure should allow voters to have incorrect inscriptions amended within a reasonable time;
- f. provision may be made for a supplementary register as a means of giving the vote to persons who have moved or reached statutory voting age since the final publication of the register.

## 2. Equal suffrage

### 2.1. Equal voting rights

Each voter has one vote on each question submitted to referendum.<sup>8</sup>

### 2.2. Equality of opportunity

- a. Equality of opportunity must be guaranteed for the supporters and opponents of the proposal being voted on. This implies a neutral attitude by administrative authorities, in particular with regard to:
  - i. the referendum campaign;
  - ii. coverage by the media, in particular by the publicly owned media;
  - iii. public funding of campaign and its actors;
  - iv. billposting and advertising;
  - v. the right to demonstrate on public thoroughfares.
- b. In public radio and television broadcasts on the referendum campaign, equal access must be ensured to the proposal's supporters and opponents.
- c. Balanced coverage must be guaranteed to the proposal's supporters and opponents in other public mass media broadcasts, especially news broadcasts. Account may be taken of the number of political parties supporting each option or their election results.
- d. Equality must be ensured in terms of public subsidies and other forms of backing. Equality may be guaranteed either by:
  - i. Equal financing of political parties. Equality may be strict or proportional. If it is strict, political parties are treated on an equal footing irrespective of their current parliamentary strength or support among the electorate. If it is proportional, political parties must be treated according to the results achieved in the elections. In any case, both supporters and opponents of the proposal (or alternatives) should have an adequate financing;
  - ii. Equal financing of organisations (including political parties) which support any of the alternative answers to the question put to the referendum.
- e. Financial or other conditions for radio and television advertising must be the same for the proposal's supporters and opponents.

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<sup>8</sup> This is without prejudice to point I.2.3 on minority issues.



- f. In conformity with freedom of expression, legal provision should be made to ensure that there is a minimum access to privately owned audio-visual media, with regard to the referendum campaign and to advertising, for all participants in the referendum.
- g. Political party and referendum campaign funding must be transparent, including in-kind contributions and third-party campaigning. Campaign funding should become public at least prior to the referendum.
- h. The principle of equality of opportunity can, in certain cases, lead to a limitation of spending by political parties and other parties involved in the referendum debate, especially on advertising. It can also lead to a limitation of individual donations as well as of the total amount of all donations.
- i. Sanctions must be imposed in the case of breaches of the duty of neutrality as expressed in the previous paragraphs.

### 2.3. Equality and national minorities

- a. Rules that provide for different calculation of votes as an exception to the normal vote-counting rules in the case of a referendum concerning the situation of national minorities do not, in principle, run counter to equal suffrage. The principle of proportionality must be respected.
- b. Voters must not find themselves obliged to reveal their membership of a national minority.

## 3. Free suffrage

### 3.1. Freedom of voters to form an opinion

- a. Administrative authorities must observe throughout the campaign period their duty of neutrality (see I.2.2.a. above), which is one of the means of ensuring that voters can form an opinion freely.
- b. The use of public resources by the authorities for campaigning purposes must be prohibited. Political parties and their representatives, including those who are elected representatives or hold a public office, are entitled to take actively part in the campaign. Particular duties of reserve may apply to the persons belonging to the public authority responsible for the organisation or supervision of the referendum.
- c. The question put to the vote must be clear and comprehensible; it must not be misleading; it must be unbiased, not suggesting an answer; voters must be informed of the effects of the referendum; voters must be able to answer the questions asked solely by yes, no or a blank vote. It is suitable that the questions follow a fixed format. Multiple-option questions can be envisaged (see below III.5.b).
- d. An impartial body (see II.4.1 below) must exercise prior scrutiny on the clarity of the question.

- e. An impartial body must provide balanced 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 sent directly to citizens and be received sufficiently far in advance of the vote;
  - ii. the text submitted to referendum and the date of the referendum must be published in the official gazette 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 of the opposing one.
- f. The above information must be available in all the official languages and in the languages of the national minorities.
- g. Transparency must be ensured, in particular concerning campaign funding. Voters should also be able to identify the origin of campaign messaging. Internet intermediaries should provide access to data on paid political advertising.
- h. Sanctions must be imposed in the case of breaches of the duty of neutrality and of voters' freedom to form an opinion, including breaches of the finance campaign rules and other campaign regulations.

### 3.2. Freedom of voters to express their wishes and action to combat fraud

#### a. Voting procedure

- i. voting procedures must be readily understandable by voters;
- ii. voters should always have the possibility of voting in a polling station. Other means of voting are acceptable under the following conditions (iii-vi);
- iii. postal voting should be allowed only where the postal service is safe and reliable; the right to vote using postal votes may be confined to people who are in hospital or imprisoned or to persons with reduced mobility or to electors residing abroad; fraud and intimidation must be ruled out;
- iv. electronic voting should be in conformity with Committee of Ministers' Recommendation CM/Rec(2017)5 on standards for e-voting. In particular, it should be used only if it is secure, 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;
- v. very strict rules must apply to voting by proxy; the number of proxies a single voter may hold must be limited;
- vi. mobile ballot boxes should only be allowed under strict conditions that avoid all risks of fraud;
- vii. at least two criteria should be used to assess the accuracy of the outcome of the ballot: the number of votes cast and the number of voting slips placed in the ballot box;
- viii. voting slips must not be tampered with or marked in any way by polling station officials;
- ix. unused and invalid voting slips must never leave the polling station;
- x. the presence of observers appointed by the parties or by other groups that have taken a stand on the issue put to the vote must be permitted during voting and counting;

- xi. military personnel should vote at their place of residence whenever possible. Otherwise, it is advisable that they be registered to vote at the polling station nearest to their duty station;
- xii. counting should preferably take place in polling stations;
- xiii. counting must be transparent. Observers, representatives of the proposal's supporters and opponents and the media must be allowed to be present. These persons must also have access to the records;
- xiv. results must be transmitted to the higher level in an open manner;
- xv. electoral fraud must be punished with effective sanctions.

b. Freedom of voters to express their wishes also implies:

- i. That the executive must organise all referendums provided for by the legal order;
- ii. compliance with the procedural rules; in particular, referendums must be held within the time-limit prescribed by law;
- iii. the right to accurate establishment of the result by the body responsible for organising the referendum, in a transparent manner, and formal publication in the official gazette.

#### 4. Secret suffrage

- a. For the voter, secrecy of voting is not only a right, but also a duty. Non-compliance must be punishable by disqualification of any ballot paper whose content is disclosed. Secret suffrage does not restrict the voters' right to express their view outside the polling station.
- b. Voting must be individual. Family voting and any other form of control by one voter over the vote of another must be prohibited.
- c. The list of persons actually voting should not be published.<sup>9</sup>
- d. There should be sanctions against the violation of the secret ballot.

### **II. Conditions for implementing these principles**

#### 1. The rule of law

The use of referendums must comply with the legal system as a whole. 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 competence.<sup>10</sup>

#### 2. Respect for fundamental rights

Democratic referendums are not possible without respect for human rights, in particular freedom of expression and of the press, freedom of movement inside the country, freedom of assembly and freedom of association for political purposes, including freedom to set up political parties.<sup>11</sup>

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<sup>9</sup> On access to the lists of those who have voted, see the Interpretative Declaration to the Code of Good Practice in Electoral Matters on the Publication of Lists of Voters Having Participated in Elections, [CDL-AD\(2016\)028](#).

<sup>10</sup> On the respect of the hierarchy of norms, international law and Council of Europe membership conditions, see below III.1.

<sup>11</sup> In particular, street demonstrations to support or oppose the text submitted to a referendum may be subject to notification: Any restrictions imposed on assemblies must have a formal basis in law and be based on one or more of the legitimate grounds prescribed by relevant international and regional human rights instruments. See Guidelines on Freedom of Peaceful Assembly (3rd Edition, CDL-AD(2019)017, paras 25ff, 28.

### 3. Regulatory levels and stability of referendum law

- a. Apart from rules on technical matters and detail (which may be included in regulations of the executive), rules of referendum law should have at least the rank of a statute and not be adopted *ad hoc* for a specific referendum.
- b. The fundamental aspects of referendum law should not be open to amendments to be applied during the year following their enactment or should be written in the constitution or at a level superior to ordinary law.
- c. Adoption of legislation on referendums should take place by broad consensus after extensive public consultations with all the stakeholders.
- d. Fundamental rules include, in particular, those concerning:
  - the composition of electoral commissions or any other body responsible for organising the referendum
  - the franchise and electoral registers;
  - the procedural and substantive validity of the text put to a referendum;<sup>12</sup>
  - the effects of the referendum (with the exception of rules concerning matters of detail);
  - the participation of the proposal's supporters and opponents to broadcasts of public media.

### 4. Procedural guarantees

#### 4.1. Organisation and supervision of the referendum by an impartial body

- a. An impartial body must be in charge of organising the referendum. Unless there is a longstanding tradition of administrative authorities' impartiality in electoral matters, independent commissions must be set up at all levels, from the national level to polling-station level.
- b. The central electoral commission or another impartial authority should have the following powers:
  - to check the validity of any proposed referendum question and approve its final wording;
  - to provide official information – including, when voting on a specifically-worded proposal, the legal text submitted to referendum;
  - to make official public statements in real time relating to violations or major infringements of the relevant rules;
  - to supervise the conduct of the campaign, take all necessary measures to ensure that it is properly held;
  - to enforce its decisions and to sanction possible breaches;
  - prior to vote, and in order to avoid having to declare a vote totally invalid, to correct faulty drafting, for example:
    - when the question is obscure, misleading or suggestive;
    - when rules on procedural or substantive validity have been violated; in this event, partial invalidity may be declared if the remaining text is coherent; sub-division may be envisaged to correct a lack of substantive unity.<sup>13</sup>
- c. In case an impartial body distinct from the central electoral commission is in charge of organising and supervising referendums, it should not imperatively be a permanent body in countries with few referendums, but legislation should define its composition *in abstracto*.

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<sup>12</sup> See sections III.1 and III.2.

<sup>13</sup> See sections III.1 and III.2.

- d. The central commission should include at least one member of the judiciary or other independent legal expert; it may include a representative of the Ministry of the Interior, as well as representatives of national minorities.
- e. Political parties or supporters and opponents of the proposal must be able to observe the work of the impartial body. Membership of supporters and opponents may be limited to lower commissions, which are not permanent. Equality between political parties may be construed strictly or on a proportional basis (see I.2.2.d.).
- f. The bodies appointing members of commissions must not be free to dismiss them at will.
- g. Members of commissions must receive standard training.
- h. It is desirable that commissions take decisions by a qualified majority or by consensus.

#### 4.2. Observation of the referendum

- a. Both national and international observers should be given the widest possible opportunity to participate in a referendum observation exercise.
- b. Observation must not be confined to election day itself, but must include the assessment of the question put to the referendum, the referendum campaign and, where appropriate, the voter registration period and the signature collection period. It must make it possible to determine whether irregularities occurred before, during or after the vote. It must always be possible during vote counting.
- c. Observers should be able to go everywhere operations connected with the referendum are taking place (for example, vote counting and verification). The places where observers are not entitled to be present should be clearly specified by law, and the reasons for such exclusion should be clearly stated.
- d. Observation should cover respect by the authorities of their duty of neutrality.

#### 4.3. An effective system of appeal

- a. The appeal body in referendum matters should be impartial and independent, endowed with the necessary powers of cognition and decision to afford an effective remedy, established by law and bound to apply the law, with limited discretion. A final appeal to a court of law is the preferred option in most Council of Europe member states.
- b. The procedure must be simple and devoid of formalism, notably for the admissibility of appeals.
- c. The appeal procedure and, in particular, the powers and responsibilities of the various bodies should be clearly regulated by law, so as to avoid conflicts of jurisdiction (whether positive or negative). The law must specifically designate the competent body in each case.
- d. The appeal body must be competent to deal with the sphere covered by these guidelines, in particular with:
  - the franchise and electoral registers;
  - the completion of popular initiatives and requests for referendums from a section of the electorate;

- the procedural and, where applicable, substantive validity of texts submitted to a referendum: the review of the validity of texts should take place before the vote; domestic law determines whether such review is obligatory or optional;
  - campaign financing issues;
  - respect for free suffrage;
  - the results of the ballot.
- e. The appeal body must have authority to annul the referendum where irregularities may have affected the outcome. It must be possible to annul the entire referendum or merely the results for one polling station or constituency. In the event of annulment of the global result, a new referendum must be called.
- f. All voters must be entitled to appeal. A reasonable quorum may be imposed for appeals by voters against the results of a referendum.
- g. Time-limits for lodging and deciding appeals must be short.
- h. The applicant's right to a hearing involving both parties must be protected.
- i. Where the appeal body is a higher electoral commission, it must be able *ex officio* to rectify or set aside decisions taken by lower electoral commissions.

#### 4.4. Funding

- a. The general rules on the funding of political parties and electoral campaigns must be applied to both public and private funding, including the rules on transparency and limitation of spending and individual donations (see above I.2.2.g-h).
- b. An impartial body should control campaign financing.
- c. The use of public funds by the authorities for campaigning purposes must be prohibited.<sup>14</sup>

### **III. Specific rules**

#### 1. The substantive validity of texts submitted to a referendum

Texts submitted to a referendum must comply with all superior law (principle of the hierarchy of norms).

They must not be contrary to international law, to the Council of Europe's statutory principles (democracy, human rights and the rule of law) or to Council of Europe membership conditions. States may add further limitations.

Texts that contradict the requirements mentioned under III.2 and III.3 may not be put to the popular vote.

#### 2. The procedural validity of texts submitted to a referendum

Questions submitted to a referendum must respect:

- **unity of form**: the same question must not combine a specifically worded draft amendment with a generally-worded proposal or a question of principle;

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<sup>14</sup> See point I.3.1.b. above.

- unity of content: except in the case of total revision of a text (constitution, law), 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; the revision of several chapters of a text at the same time is equivalent to a total revision;

- unity of hierarchical level: the same question must not simultaneously apply to legislation of different hierarchical levels.

### 3. Specific rules applicable to referendums held at the request of a section of the electorate and to popular initiatives

- a. Everyone enjoying electoral rights is entitled to sign a popular initiative or request for a referendum.
- b. The time-limit for collecting signatures (particularly the day on which the time-limit starts to run and the last day of the time-limit) must be clearly specified, as well as the number of signatures to be collected.
- c. It is advisable to require a number of signatures which is sufficiently high to ensure that only questions which are of interest to a substantial part of the electorate will be put to referendum, thereby safeguarding the character of the referendum as complementary to representative democracy. On the other hand, the requirement of a sufficient number of proponents of a referendum should not be so high as to make the possibility of a referendum merely theoretical. Furthermore, this number should be proportional to the number of registered voters.
- d. Everyone enjoying electoral rights must be entitled to collect signatures. This right may be extended to other categories of people.
- e. If authorisation is required in order to gather signatures for popular initiatives or requests for a referendum on public thoroughfares, such authorisation may be refused only in specific cases provided for by law, on the basis of overriding public interest for public safety and in accordance with the principle of equality.
- f. Payment from private sources for the collection of signatures for popular initiatives and requests for referendums should, as a rule, be prohibited. If permitted, it must be regulated, with regard to both the total amount allocated and the amount paid to each person.
- g. Signatures must be checked, until it has been established beyond doubt that the number of valid signatures required by law has been collected or there are no more signatures to check.

### 4. Parallelism in procedures and rules governing the referendum

- a. When the referendum is legally binding:
  - i. For a certain period of time, a text that has been rejected in a referendum may not be adopted by a procedure without referendum;
  - ii. During the same period of time, a provision that has been accepted in a referendum may not be revised by another method;
  - iii. It is acceptable to exclude any new request for referendum on the same issue during this period;
  - iv. The above does not apply in the case of a referendum on partial revision of a text, where the previous referendum concerned a total revision;

- v. The revision of a rule of superior law that is contrary to the popular vote is not legally unacceptable but should be avoided during the above-mentioned period.
- b. When a text is adopted by referendum at the request of a section of the electorate, it should be possible to organise a further referendum on the same issue at the request of a section of the electorate, after the expiry, where applicable, of a reasonable period of time.
- c. When a text is adopted by referendum at the request of an authority other than parliament, it should be possible to revise it either by parliamentary means or by referendum, at the request of parliament or a section of the electorate, after the expiry, where applicable, of the same period of time.
- d. It is advisable for constitutional rules relating to referendums to be put to a referendum, compulsorily or at the request of a section of the electorate.

#### 5. Voting modalities:

- a. Questions submitted to referendum will preferably allow replies only by yes, no or a blank vote (binary question).
- b. A vote on two or more alternatives is, however, not excluded (multi-option referendum). For example:
  - i. Parliament may be entitled to put forward a counter-proposal to a popular initiative, which will be put to the popular vote at the same time;
  - ii. Two or more alternatives may be proposed.

In these cases:

- i. the voting system should ensure that a text is accepted only if it obtains an absolute majority;
- ii. if binary questions on each proposal are possible, it should be possible to vote “yes” or “no” to each of them;
- iii. if several options are submitted to the vote simultaneously; voting for the *status quo* should be possible.

If more than one option obtains a majority,

- i. the one with more votes could be applied, or
- ii. a subsidiary question could be asked as to which one is to be applied, or
- iii. (a) run-off(s) could be organised, or
- iv. preferential (alternative) vote could be applied.

#### 6. Opinion of parliament

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 popular initiatives, it may be entitled to put forward a counterproposal to the proposed text (see above III.5.b.i). 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>15</sup>

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<sup>15</sup> See also below III.9.b.



7. Quorum and special majorities

- a. It is advisable not to provide for:
  - i. a turn-out quorum (threshold, minimum percentage);
  - ii. an approval quorum (approval by a minimum percentage of registered voters).
- b. An approval quorum or a specific majority requirement is acceptable for referendums on matters of fundamental constitutional significance.
- c. The requirement of a multiple majority (the majority of voters taking part in the referendum plus the majority in a specified number of entities) is acceptable in federal and regional states, in particular for constitutional revisions.

8. Effects of referendums

- a. The effects of legally binding or consultative referendums must be clearly specified in the constitution or by law. After a consultative referendum, the executive or legislature should at least recommend a course of action.
- b. Before the vote, the voters should be informed about the proposed follow-up to referendums on questions of principle or generally worded proposals.
- c. The procedure for follow-up to binding referendums on questions of principle or generally worded proposals should be laid down in specific rules.

9. Date of the referendum

- a. The absolute minimum period between calling a referendum and polling day should be four weeks. A considerably longer period of preparation is desirable, however, particularly if the topic has not already been subject to widespread public discussion. The campaign period must not be shorter than for regular elections.
- b. The law should provide for a maximum period between the submission of signatures for a referendum or a popular initiative and the vote.
- c. It is suitable not to hold elections and referendums on the same day if the referendum is about the institution facing election.

## EXPLANATORY MEMORANDUM

### GENERAL REMARKS

18. This explanatory memorandum is intended to elaborate on those aspects of the above guidelines that are specific to referendums. Accordingly, it does not comment on the principles and general rules applicable to both elections and referendums. The explanatory memorandum to the Code of Good Practice in Electoral Matters<sup>16</sup> may be referred to in this connection. As far as possible, the guidelines on the holding of referendums echo the Code of Good Practice in Electoral Matters. Not every aspect of the guidelines will be discussed in detail.

5. It should be made clear that the guidelines apply to all referendums – national, regional and local – regardless of the nature of the question they concern (constitutional, legislative or other). Each reference to Parliament also applies to regional or local assemblies.

### I. Referendums and Europe's electoral heritage

#### 1. Universal suffrage

6. The conditions for according the right to vote are normally the same for both referendums and elections. In particular, a period of residence requirement may be imposed on nationals solely for local and regional referendums, and should not exceed six months other than in exceptional circumstances (point I.1.1.c.ii-iii).

7. The right to vote in referendums should be granted to citizens residing abroad under conditions not more onerous than those applying to elections. It is important to ensure mechanisms to counter fraud while granting the right to vote for citizens residing abroad. Accordingly, it is preferable not to record such people on the same register as residents, but to allow them to vote abroad or from abroad; in addition, this will help ensure that they exercise their right to vote, which is unlikely if they have to return to their home country for the sole purpose of voting (point I.1.1.c.iv).

#### 2. Equal suffrage

##### 2.2 Equality of opportunity

8. 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, notably as concerns the coverage by the media, in particular in news broadcasts, as well as public subsidies and other forms of backing (points I.2.2.a-e).

9. It would be unrealistic to require a perfect balance between a text's supporters and opponents in all cases. It may be that a degree of consensus emerges in one direction or the other – particularly in the case of a mandatory referendum on a proposal having required a qualified parliamentary majority. Supporters and opponents must always be guaranteed access to the public media, however. As long as this requirement is satisfied, account may be taken of the number of political parties supporting each option or of their election results, especially in news broadcasts

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<sup>16</sup> CDL-AD(2002)023rev2-cor, pp. 19 ff.

(point I.2.2.c). For the debate broadcast in public media, a strict balance between supporters and opponents should be guaranteed (point I.2.2.b).

10. Similarly, it is advisable to ensure equality between the proposal's supporters and opponents in terms of public subsidies and other forms of backing. Such backing may be restricted to supporters and opponents of the proposal who account for a minimum percentage of the electorate, provided that the support received by each side is balanced. If equality is ensured between political parties, it may be either strict or proportional, thus taking account of their election results. Allocating funds to the parties alone is not the ideal solution, however, as explained above (point I.2.2.d).

19. "The regulation of political party funding is essential to guarantee parties' independence from undue influence of private donors, as well as state and public bodies, to ensure that parties have the opportunity to compete in accordance with the principle of equal opportunity, and to provide for *transparency in political financing*."<sup>17</sup> According to international standards, legislation has to regulate private funding, including donations, in-kind and third-party contributions, as well as leases. It is advisable to provide for ceilings for individual donations and to exclude corporate donations to limit the ability of particular categories of persons or groups to gain political influence and influence the decision-making process through financial advantages.<sup>18</sup> Moreover, as noted by the United Nations Human Rights Committee in General Comment No. 25, "reasonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party".<sup>19</sup> This is also true for questions submitted to referendums.

### **2.3. Equality and national minorities**

11. As in the case of elections, there may sometimes be grounds for taking account of the specific circumstances of national minorities and to make an exception to the normal vote-counting rules. In particular, this would apply to a referendum on self-government for a territory with a relatively high concentration of a minority population: a double majority of electors within that territory and throughout the country may be required. The principle of proportionality must be respected.

## **3. Free suffrage**

### **3.1. Freedom of voters to form an opinion<sup>20</sup>**

12. In the case of elections, intervention by the authorities in support of a list or a candidate is unacceptable: their duty of neutrality is absolute. An authority must not use its position, or public funds, to stay in power; nor must it do so on behalf of its supporters in another organ.

13. The situation is different in the case of referendums, since it is legitimate for the different organs of government to convey their viewpoint in the debate for or against the text put to the vote. They must not abuse their position, however. In any event, the use of public funds by public authorities for campaigning purposes must be prohibited in order to guarantee equality of opportunity and the freedom of voters to form an opinion. In addition, the public authorities at

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<sup>17</sup> OSCE/ODIHR and Venice Commission, Guidelines on Political Party Regulation – 2<sup>nd</sup> edition, para. 206 (emphasis added).

<sup>18</sup> See for example OSCE/ODIHR and Venice Commission, Guidelines on Political Party Regulation – 2<sup>nd</sup> edition, part IV, paras 204ff.

<sup>19</sup> United Nations Human Rights Committee General Comment 25, Article 25: The right to participate in public affairs, voting rights and the right of equal access to public service, (UN Doc. CCPR/C/21/Rev.1/Add.7) (1996), para. 19. See OSCE/ODIHR and Venice Commission, Guidelines on Political Party Regulation – 2<sup>nd</sup> edition, paras 246ff,

<sup>20</sup> The term "voter" is used here in the broad sense: it refers to citizens (who may be foreign nationals) entitled to participate in a referendum.

every level (national, regional or local), must not engage in excessive, one-sided campaigning, but show objectivity. Clearly, this does not mean they will not take a stand, but they must provide all the necessary information in order to enable voters to arrive at an informed opinion. Voters must be able to acquaint themselves, sufficiently in advance, with both the text put to the vote and, above all, a detailed explanation (point I.3.1.d):

14. Both the text and the explanatory report or balanced campaign material must be sent directly to citizens sufficiently in advance of the vote (at least two weeks beforehand).

15. The clarity of the question is a crucial aspect of voters' freedom to form an opinion. The question put to the vote must be clear and comprehensible; it must not be misleading; it must be unbiased, not suggesting any or a specific answer, particularly by mentioning the presumed consequences of approving or rejecting the proposal. Voters must be able to answer the questions asked solely by yes, no or a blank vote. An open question necessitating a more detailed answer must not be asked. Lastly, electors must be informed of the impact of their votes (effect of the referendum), and thus of the legal effects of the referendum (is it legally binding or consultative? does a positive outcome lead to the adoption or repeal of a measure, or is it just one stage in a longer procedure?) It is suitable that the questions follow a fixed format. Multiple-option questions can be envisaged (point I.3.1.c).

16. It is essential for an *impartial body* to exercise a prior (formal) scrutiny of the clarity of the question (point I.3.1.d) and to provide balanced information. This body may be, but has not to be, the electoral management body in charge of organising the referendum.<sup>21</sup>

17. The best solution is for the authorities to provide voters with an explanatory report setting out not only the viewpoint of the executive and legislative authorities or that of persons sharing it, but also the opposing viewpoint, in a balanced way. Another possibility would be for the authorities to send voters balanced campaign material prepared by the proposal's supporters and opponents – corresponding, *mutatis mutandis*, to candidates' election addresses made available to citizens prior to some elections (point I.3.1.e): both supporters and opponents, or each party, would provide a leaflet.

18. Information must be available in the official languages and in the languages of national minorities; this is true not only for the explanatory report or additional information, but still more for the question submitted to the vote. Information in national minority languages which does not appear on the ballot paper itself, such as the explanatory report, should be easily accessible, including in the polling station.

19. The revised guidelines mention the principle of transparency, which did not appear in the first version of the Code. This principle first refers to funding, and in particular to the origin of campaign funds.<sup>22</sup> It also relates to an issue which was still secondary in 2007 but has now become crucial: the origin of campaign messaging. The importance of internet campaigns also implies that internet intermediaries should provide access to data on paid political advertising (point I.3.1.g).

### **3.2. Freedom of voters to express their wishes**

20. The paragraph on electronic voting has been brought into line with the new recommendation in the field, the Committee of Ministers' Recommendation CM/Rec(2017)5 on standards for e-voting (point I.3.2.a.iv).

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<sup>21</sup> On the organisation and supervision of the referendum by an impartial body, see below II.3.1.

<sup>22</sup> See below II.3.3.

21. Given the distinctive nature of referendums, in that they divide not only parties but also other groupings not seeking representation within elected organs, representatives of the proposal's supporters and opponents – including representatives independent of the parties – and observers appointed by both sides should have access to polling stations during both the voting itself and counting (points I.3.2.a.x and xiii).

22. The guidelines also emphasise another aspect of voters' freedom to express their wishes, which is also necessary in elections but is more likely to be violated in the case of referendums. Voters must be allowed to express a vote when this is provided for by law, and, more broadly, to express their wishes in accordance with the legal order, including procedural rules; moreover, they have the right to accurate establishment of the result (see point I.3.2.b). In particular, the time-limit prescribed by law must be observed. In the case of a referendum or a popular initiative requested by a section of the electorate, the authorities may actually be tempted to draw the process out until the question is no longer relevant.

### **3.3. Secret suffrage**

20. The revised guidelines make it clear that, while secret suffrage is not only a right, but also a duty, this duty does not extend outside the polling station, as it does not restrict the voters' right to express their view outside the polling station. Sanctions against the violation of the secret ballot could be related to e.g. taking photos of one's ballot paper in the polling booth and publishing them or showing them to others afterwards. Sanctions have to be efficient and proportional (see also points I.2.2.i, I.3.1.h, I.3.2.a.xv and II.4.1.b)

## **II. Conditions for implementing these principles**

### **1. The rule of law**

23. The principle of the rule of law, which is one of the three pillars of the Council of Europe along with democracy and human rights,<sup>23</sup> applies to referendums just as it does to every other area (of law). The principle of the sovereignty of the people allows the latter to take decisions only in accordance with the law. On the one hand, the use of referendums must be permitted only where it is provided for by the Constitution or a statute in conformity with the latter, and the procedural rules applicable to referendums must be followed. In no way may referendums be used as an alternative mechanism to those provided in the law to amend the Constitution or legislation. On the other hand, referendums must be organised where the legal system provides for them (point I.3.2.b.i).

### **2. Regulatory levels and stability of referendum law**

24. The wording of the Guidelines on the Holding of Referendums is slightly less restrictive than the Code of Good Practice in Electoral Matters<sup>24</sup> as regards the requirement that all rules of referendum law – apart from rules on technical matters and detail – should have the rank of a statute, using the term “should” rather than “must”. Where a referendum is requested by the executive, it is conceivable that the latter could set the rules for it. Such a situation is not entirely satisfactory, however, and, as a rule, referendum law should have at least the rank of a statute and not be adopted *ad hoc* for a specific referendum (point II.3.a).

25. Concerning stability of the law, the organisation of referendums should preferably be provided for by national Constitutions and laws enacted well in advance. At any event, *ad hoc* legislation for

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<sup>23</sup> See the Preamble to the Statute of the Council of Europe (ETS 001) and the Rule of Law checklist (CDL-AD(2016)007).

<sup>24</sup> CDL-AD(2002)023rev-cor, II.2.a.

their holding should be avoided. The list of fundamental aspects of referendum law, which should not be open to amendment less than one year before a referendum, at least if they are set out in ordinary legislation, takes account of the specific nature of referendums by including rules on the procedural and substantive validity of texts put to a referendum and the effects of referendums. It also emphasises the need for rules on the franchise and electoral registers, and access to the public media for the proposal's supporters and opponents. In addition, it must be understood in the light of the Venice Commission's Interpretative Declaration on the Stability of the Electoral Law:<sup>25</sup> in particular, the stability of referendum law cannot be invoked to maintain a situation contrary to the norms of Europe's electoral heritage in the area of referendums or to prevent the implementation of recommendations by international organisations. Furthermore, given that it is unusual for the date of a referendum to be known a year or more in advance (whereas elections normally take place at set intervals), it is a matter not so much of prohibiting legislative amendments during the year preceding the vote as of prohibiting the application of such amendments during the year following their enactment, in case there are suspicions of manipulation (point II.3.b).

26. The exception to the requirement of one-year stability, in case referendum law "is written in the Constitution or at a level superior to ordinary law", still appears in the revised text (point II.3.b). This is a way to ensure consensus with the opposition where the majority is not in a position to change such texts on its own, and not to give a blank check to a government which would be in a position to change at any time such superior rules without compromise with the opposition.

21. In general any reform of legislation to be applied during a referendum should occur early enough for it to be really applicable to the referendum.<sup>26</sup> Late amendment of the technical rules may lead to controversial application or difficulties for the electoral management bodies and thus discredit the legitimacy of the whole process. At least three months between the adoption of any amendments before the referendum would be advisable.

22. The Venice Commission made it clear in a number of its opinions that, in the field of referendums like in the field of elections, adoption of legislation should (as far as possible) take place by broad consensus after extensive public consultations with all the stakeholders, even if such adoption takes place much ahead of the vote.<sup>27</sup> This has been reflected in point II.3.c.

### **3. Procedural guarantees**

#### **3.1. Organisation and supervision of the referendum by an impartial body**

28. In countries with a longstanding tradition of administrative authorities' impartiality in electoral matters, the Code, like the Code of Good Practice in Electoral Matters, does not require that independent commissions are in charge of the whole process (point II.4.1.a). In any case, an impartial body – be it or not a central electoral commission in charge of organising the vote – should deal with a number of issues specific to referendums, relating *inter alia* to the question put to referendum, official information, supervising the conduct of the campaign and controlling party financing, which are detailed under point II.4.1.b.

29. In particular, the impartial body should be in a position to declare a popular initiative – or a request for a referendum – partially invalid where it is possible to modify the proposed text, without distorting it, so that it complies with the law, and to correct a question that is obscure or misleading or suggests an answer. In the event that the rules on procedural or substantive validity have been violated, it may also declare partial invalidity where the signatories would have approved the remaining part if it had been submitted on its own, or declare the subdivision

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<sup>25</sup> CDL-AD(2005)043.

<sup>26</sup> Cf. Venice Commission, [CDL-AD\(2005\)043](#), Interpretative Declaration on the Stability of the Electoral Law, II.5.

<sup>27</sup> This refers of course to legislation on referendums, not legislation to be adopted by referendum.

of a text that is not consistent with unity of content, unity of form or unity of hierarchical level (point II.4.1.b; cf. points III.1 and III.2).

30. The revised Code takes account of countries where referendums are exceptional or at least rare. In those countries, in case an impartial body distinct from the central electoral commission is in charge of organising and supervising referendums, it should not imperatively be a permanent body, but legislation should define its composition *in abstracto*.

31. Once again, the fact that referendums do not necessarily entail a divide along party lines but may involve other political players means a choice must be offered, as regards the membership of electoral commissions, between balanced representation of the parties and balanced representation of the proposal's supporters and opponents (point II.4.1.e).

### **3.2. An effective system of appeal**

32. The revised version of the Code maintains the absence of preference between appeals before electoral commissions and before courts and extends it to the highest instance. So does it not recommend any more a final appeal to a court, albeit it reminds that the option of such an appeal is the preferred option in most Council of Europe member states. Furthermore, the Code makes it clear that the appeal body should be impartial and independent, endowed with the necessary powers of cognition and decision so as to afford an effective remedy, established by law and bound to apply the law, with limited discretion. These criteria correspond with recent case-law of the European Court of Human Rights concerning electoral disputes.<sup>28</sup>

33. 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. The review of validity, whether obligatory or optional, should take place before the text is put to the vote: this will avoid the voters having to express their views – in vain – on a text that is subsequently ruled invalid because it is contrary to superior law (substantive invalidity) or the content of which breaches the requirements for procedural validity (point II.4.3.d, cf. points III.1-2).

34. Unlike elections, which take place in a number of constituencies, referendums involve an entire territory – be it at the level of the state or of a subordinate collectivity. Consequently, where partial annulment of the results does not affect the overall result, it must not give rise to a repeat ballot in the area in which the vote was annulled, since this would not lead to a different result. Unless the entire referendum is repeated, however, it must be possible to call a new partial referendum in part of the territory if the overall result is in question. However, careful consideration must be given to calling a new partial ballot rather than an entire new referendum, so as to avoid the massive concentration of campaign resources in a limited area (point II.4.3.e).

### **3.3. Funding**

35. General national rules on both public and private funding of political parties and election campaigns must also be applicable to referendum campaigns, including the rules on transparency and limitation of spending and individual donations (point II.4.4. a). In the event of a failure to abide by the statutory requirements, for instance if the cap on spending is exceeded by a significant margin, the vote may be annulled.<sup>29</sup> It should be pointed out that the principle of equality of opportunity applies to public funding, and that equality should be ensured between a proposal's supporters and opponents (point I.2.2.d).

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<sup>28</sup> ECtHR [GC], *Mugemangango v. Belgium*, application No. 310/15, judgment of 10 July 2020, §§ 94ff.

<sup>29</sup> Cf. CDL-AD(2002)023rev-cor, para. 107 ff.

36. It should always be an impartial body which controls party financing, even in the countries where referendums are organised by the administration. The impartial body aiming to supervise the referendum procedure should have its own official site, where all kinds of donations and contributions over and above a minimum sum of money (to be determined each time) should be posted in real time; omitting such posting should constitute a serious breach of the law and duly sanctioned.

37. There must be no use of public funds by the authorities for campaigning purposes, in order to guarantee equality of opportunity and the freedom of voters to form an opinion (point II.4.4.c, cf. point I.3.1.b).

### **III. Specific rules**

#### **1. The substantive validity of texts submitted to a referendum**

38. Under the principle of the rule of law, referendums – even if based on a popular initiative or request - are not exempt from compliance with the law. This applies to both procedural aspects and the substance of texts put to the vote, which must comply with all superior law. Legislative referendums must therefore comply with the Constitution; referendums within federated or regional entities must comply with the law of the central State, according to the distribution of powers in the State.

39. Irrespective of what national law has to say about the relationship between international and domestic law, texts put to a referendum must not be contrary to international law or to the Council of Europe's statutory principles (democracy, human rights and the rule of law). The revised guidelines add two points in this respect. First, texts submitted to referendums (like any other constitutional or legislative revision) should not be contrary to Council of Europe membership conditions, such as the abolition of the death penalty, or any commitment taken by states when acceding the Council of Europe. Second, it is made clear that these are general limits but that the state is free to add other ones, for example concerning the scope of referendums.

40. In order to prevent unlawful referendums, texts that are procedurally or substantively invalid must not be put to a referendum. This does not prevent the submission to referendums of texts directly aimed at denouncing an international treaty, as long as the latter can be denounced.

#### **2. The procedural validity of texts submitted to a referendum**

41. Procedural validity comprises three aspects: unity of form, unity of content and unity of hierarchical level.

42. The text submitted to referendum may be presented in various *forms*:

- a *specifically worded draft* of a constitutional amendment, legislative enactment or other measure;
- *repeal* of an existing provision;
- a *question of principle* (for example: "Are you in favour of amending the Constitution to introduce a presidential system of government?") or;
- a *concrete proposal*, not presented in the form of a specific provision and known as a "*generally worded proposal*" (for example: "Are you in favour of amending the Constitution in order to reduce the number of seats in Parliament from 300 to 200?").<sup>30</sup>

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<sup>30</sup> CDL-AD(2005)034, para. 64.



43. A “yes” vote on a specifically-worded draft – at least in the case of a legally binding referendum – means that a constitutional revision or a (new or revised) statute is enacted, and the procedure comes to an end, subject to procedural aspects such as publication and promulgation. On the other hand, a “yes” vote on a question of principle or a generally worded proposal is simply a stage, which will be followed by the drafting and subsequent enactment of a statute. Combining a specifically worded draft with a generally worded proposal or a question of principle would create confusion, preventing electors from being informed of the import of their votes and thereby prejudicing their free suffrage.

44. An even more stringent requirement of free suffrage is respect for *unity of content*. Electors must not be called to vote simultaneously on several questions without any intrinsic link, given that they may be in favour of one and against another. Where the revision of a text covers several separate aspects, a number of questions must therefore be put to the voters. However, total revision of a text, particularly a Constitution naturally cannot relate solely to aspects that are closely linked. In this case, therefore, the requirement for unity of content does not apply. Substantial revision of a text, involving a number of chapters, may be regarded as being equivalent to total revision; clearly, this does not mean the different chapters cannot be put separately to the popular vote.<sup>31</sup>

45. The rule of *unity of hierarchical level* is not as crucial as the previous two rules. It is desirable, however, that the same question should not simultaneously apply to legislation of different hierarchical levels, for example a constitutional revision and the associated implementing Act.

### **3. Specific rules applicable to referendums held at the request of a section of the electorate and to popular initiatives (where they are provided for in the Constitution)**

46. (Optional) referendums held at the request of a section of the electorate and popular initiatives entail the collection of signatures. The guidelines set out a number of rules in this respect, not all of which will be discussed in detail here.

47. Entitlement to collect signatures could be confined to registered electors. It can be extended to everyone, including foreigners and minors with capacity to judge (this is advisable in respect of texts concerning their status) (point III.3.d).

48. Authorisation may be required in order to gather signatures on public thoroughfares. As with any restriction of fundamental rights, such authorisation may be refused only where there is a legal basis for doing so and in accordance with the principles of public interest, proportionality and equality (point III.3.e).

49. The collection of signatures should not be remunerated or funded from private sources. Where remuneration is permitted, it must apply only to those who collect signatures, and not to electors who sign a popular initiative or a request for a referendum. It must be regulated, with regard to both the total amount allocated and the amount paid to each person collecting signatures (point III.3.f).

50. It is important that signatures are checked, until it has been established beyond doubt that the number of valid signatures required by law has been collected or there are no more signatures to check (point III.3.g). The success or failure of an initiative or a request for a referendum must not be determined on the basis of a sample, which might contain an unusually

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<sup>31</sup> The option of classifying a revision involving several chapters as a total revision may seem like a means of circumventing the unity of content rule. This overlooks the fact that a total constitutional revision often involves a more complicated process than a partial revision.

high number of invalid signatures or, on the contrary, might not contain any while other sheets of signatures might be full of them.<sup>32</sup>

51. As underlined by the Parliamentary Assembly, “referendums should, so far as possible, be called on subjects that are likely to attract significant public interest”.<sup>33</sup> Since it is not realistic to define in advance what is likely to attract significant public interest, the best way to address this requirement is to ask for a sufficiently high number of signatures, without making the possibility of a referendum merely theoretical. The revised guidelines recommend making the number of signatures proportional to the number of registered voters, in order not to have to adapt legislation regularly to the evolution of this number (point III.3.c).

#### **4. Parallelism in procedures and rules governing the referendum**

52. When the referendum is legally binding, the authorities must respect the people’s decision. The guidelines provide, for instance, that for a certain period of time (up to the end of the legislature) a text rejected in a referendum may not be adopted by a procedure without referendum. A similar rule applies to the revision of a provision approved in a referendum (point III.4.a.i-iii).

53. Two exceptions are provided for:

- where the Constitution provides for a referendum on a total revision of a text (in practice, the Constitution itself) but not on partial revision, a partial revision of that text does not necessarily have to be put to a popular vote (point III.4.a.iv); the partial revision must abide by the principle of unity of content, which should prevent abuses;
- Parliament may revise a legal norm superior and contrary to a norm adopted by the popular vote without a referendum; it is entitled to do so in accordance with the principle of hierarchy of legal rules,<sup>34</sup> but this should be avoided for a certain period of time (point III.4.a.v).

54. The foregoing requirements of course do not apply to consultative referendums.

55. The adoption of a text at the request of an authority other than Parliament, such as the head of state or government, must not freeze the legal situation indefinitely. Accordingly, the guidelines provide that such a text may be revised either by parliamentary means or at the request of a section of the electorate, where applicable after the expiry of a certain period of time (point III.4.c). When a text is adopted as the result of a popular initiative, it must be possible for the people to pronounce on the issue again at the request of another popular initiative, at least after the expiry, where applicable, of a certain period of time (point III.4.b). This does not exclude the competence of the Parliament to decide on the matter after such period of time.

56. Proposals to restrict the constitutional possibility to hold referendums should enjoy direct popular legitimacy, *i.e.* it is advisable that they be put to a referendum, compulsorily or at the request of a section of the electorate. In any event, should Parliament wish to introduce a measure limiting popular rights, it should have the power to do so only by means of a measure submitted to one of these forms of referendum (point III.4.d).

#### **5. Voting modalities**

57. The revised guidelines maintain the principle that questions submitted to referendum will preferably allow replies only by yes, no or a blank vote (binary question) (point III.5.a). However, exceptions (multi-option referendums) are possible in specific cases. First, as already expressed in the first version of the guidelines, where Parliament opposes a text but wishes to take a step in a similar direction, it is very helpful if it can put a counter-proposal to the popular

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<sup>32</sup> In relation to the submission of candidatures for elections, cf. CDL-AD(2002)023rev-cor, I.1.3.iv.

<sup>33</sup> Resolution 2251(2019), para. 4.3.

<sup>34</sup> CDL-INF(2000)013.

vote at the same time. Second, two or more alternatives may be proposed. The guidelines make it clear that in this case, only texts having received an absolute majority may be considered as accepted, that binary questions have to be answered by yes or no, and that vote for the *status quo* must be possible. More detailed rules are left to the national legislator, in particular whether it is possible to vote “yes” for several options simultaneously; the guidelines provide for possible ways to address the case in which more than one option obtains a majority: application of the option with more votes; subsidiary question – the option with more votes at the subsidiary question is accepted -; a run-off; preferential (alternative) voting (point III.5.b).

## **6. Opinion of Parliament**

58. In the case of popular initiatives, it is important for the people to be informed of Parliament’s opinion. Accordingly, the guidelines provide for Parliament to give its opinion.

59. Parliament’s opinion is all the more necessary when the referendum is requested by the executive. In such cases, it is important to ascertain whether the call to the people is designed to bypass Parliament. Electors must therefore be informed of Parliament’s position.

60. Consultation of Parliament must not give rise to delaying tactics. The law must therefore set a deadline for Parliament to give its opinion, and a deadline for the popular vote to take place, where necessary without Parliament’s opinion if the latter has not rendered it in time.

61. In the case of regional or local referendums, the regional or local assembly shall take over a role similar to that played by Parliament at the national level.

## **7. Quorum and special majorities**

62. Based on its experience in the area of referendums, and in line with the 2019 report of the Parliamentary Assembly the Venice Commission confirms its recommendation that no provision be made in principle for rules on quorums (thresholds).<sup>35</sup>

63. A turn-out quorum (minimum percentage) means that it is in the interests of a proposal’s opponents to abstain rather than to vote against it. For example, if 48% of electors are in favour of a proposal, 5% are against it and 47% intend to abstain, the 5% of opponents need only desert the ballot box in order to impose their viewpoint, even though they are very much in the minority. In addition, their absence from the campaign is liable to increase the number of abstentions and thus the likelihood that the quorum will not be reached. Encouraging either abstention or the imposition of a minority viewpoint is not healthy for democracy (point III.7.a). Moreover, there is a great temptation to falsify the turn-out rate in the face of weak opposition.

64. An approval quorum (approval by a minimum percentage of registered voters) may also be inconclusive, as it may be so high as to make change excessively difficult. If a text is approved – especially by a substantial margin – by a majority of voters without the quorum being reached, the political situation becomes very problematic, as the majority will feel that they have been deprived of their victory without an adequate reason. This risk of the turn-out rate being falsified is the same as for a turn-out quorum.

65. An approval quorum is nevertheless acceptable for referendums on matters of fundamental constitutional significance. An alternative could be a qualified majority requirement. The existence of a matter of fundamental constitutional significance should be admitted only in exceptional circumstances, implying for example a fundamental change of the political system (e.g. federal v. centralised or strongly presidential v. parliamentary) or, when admitted by the Constitution, secession (point III.7.b). Moreover, the requirement of a multiple majority (the majority of voters

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<sup>35</sup> Doc. 14791, 3.4.2.

taking part in the referendum plus the majority in a specified number of entities) is acceptable in federal and regional states, in particular for constitutional revisions (point III.7.c).

## **8. Effects of referendums**

66. If electors are to cast an informed vote, it is essential for them to be informed of the effects of their votes. For instance, it must be clearly specified in the Constitution or by law whether referendums are legally binding or consultative (point III.8.a, cf. point I.3.1.c on free suffrage).

67. Where a referendum concerns a question of principle or a generally worded proposal, it may be difficult for voters to know the consequences of their vote. Voters should therefore be informed about the proposed follow-up in advance of the vote (point III.8.b).

68. In the case of a legally binding referendum on a question of principle or a generally worded proposal, it is up to Parliament to implement the people's decision. Parliament may be obstructive, particularly where its direct interests are affected (reducing the number of members of Parliament or the allowances paid to them, for example). In order to avoid such obstruction, the procedure for follow-up to binding referendums on questions of principle or generally worded proposals should be laid down in specific rules (point III.8.c). It should be possible to appeal before the courts in the event that the Parliament fails to act.

69. In the case of consultative referendums, the executive or legislature should at least recommend a course of action (point III.8.a).

## **9. Date of the referendum**

70. Even more than in parliamentary legislative procedures, those which lead to a referendum should allow for enough time for thorough reflection. Therefore, it is advisable that the process lasts at least several months prior to the vote, not including the time dedicated to the collection of signatures in the case of popular initiatives. The absolute minimum period between calling a referendum and polling day should be four weeks, and the campaign period must not be shorter than for regular elections (point III.9.a). On the other side, authorities should not indefinitely delay the holding of a referendum, in particular in order to prevent the adoption of a popular initiative. Thus, the law should provide for a maximum period between the submission of signatures for a referendum or a popular initiative and the vote (point III.9.b).

71. While the simultaneous holding of elections and referendums can be expedient from a practical point of view, confusion should be avoided between the issues at stake in an election and in a referendum. In some cases, differences in suffrage rights in elections and referendums may add to confusion. For those reasons, the guidelines recommend not to hold elections and referendums on the same day if the referendum is about the institution facing election (point III.9.c).