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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

# CODE OF GOOD PRACTICE ON REFERENDUMS

**adopted by the Council for Democratic Elections**
**at its 19th meeting**
**(Venice, 16 December 2006)**
**and the Venice Commission**
**at its 70th plenary session**
**(Venice, 16-17 March 2007)**

**on the basis of contributions by**
**Mr Pieter van DIJK (member, the Netherlands)**
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**Mr Giorgio MALINVERNI (member, Switzerland)**

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***INTRODUCTION***

*1. In response to a request from the Parliamentary Assembly, the Council for Democratic Elections and subsequently the Venice Commission adopted the Code of Good Practice in Electoral Matters in 2002[1].*

*2. This document was approved by the Parliamentary Assembly at its 2003 session (first part) and by the Congress of Local and Regional Authorities of the Council of Europe at its Spring 2003 session.*

*3. In a solemn declaration dated 13 May 2004[2], the Committee of Ministers recognised "the importance of the Code of Good Practice in Electoral Matters, which reflects the principles of Europe's electoral heritage, as a reference document for the Council of Europe in this area, and as a basis for possible further development of the legal framework of democratic elections in European countries".*

*4. As democracy spreads through Europe, both pluralist elections and the use of referendums has become increasingly common.*

*5. Accordingly, for several years the Parliamentary Assembly has taken an interest in the issue of referendums and good practice in this area. Its work led, on 29 April 2005, to the adoption of Recommendation 1704 (2005) on "Referendums: towards good practices in Europe"[3]. The Assembly worked in co-operation with the Venice Commission in this connection; the latter submitted comments on the aforementioned recommendation at the Committee of Ministers' request[4] and drew up a summary report based on replies to a questionnaire sent to its members on the issue of referendums. This report is entitled: "Referendums in Europe – An analysis of the legal rules in European States"[5].*

*6. It was decided that a Council of Europe background paper on referendums should be drafted to accompany the Code of Good Practice in Electoral Matters. The Council for Democratic Elections took on this task, on the basis of contributions by three members of the Venice Commission, Mr Pieter van Dijk (Netherlands), Mr François Luchaire (Andorra) and Mr Giorgio Malinverni (Switzerland).*

*7. The guidelines on the organisation of referendums were adopted by the Council for Democratic Elections at its 18th meeting (Venice, 12 October 2006) and by the Venice Commission at its 68th plenary session (Venice, 13-14 October 2006).*

*8. These guidelines are accompanied by an explanatory memorandum, which was adopted by the Council for Democratic Elections at its 19th meeting (Venice, 16 December 2006) and by the Venice Commission at its 70th plenary session (Venice, 16-17 March 2007).*

*9. On 23 November 2007, the Standing Committee acting on behalf of the Parliamentary Assembly of the Council of Europe, asked by Recommendation 1821(2007) 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*

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[1] CDL-AD(2002)023rev.
[2] CM(2004)83 final.
[3] See also doc. 10498, containing the Political Affairs Committee's report (Rapporteur: Mr Mikko Elo, Finland, Socialist Group), to which is appended a working paper prepared by the Research and Documentation Centre on Direct Democracy of the Geneva Law Faculty.
[4] CDL-AD(2005)028.
[5] CDL-AD(2005)034; see also the questionnaire, CDL(2004)031, the replies, CDL-EL(2004)011, and the tables summarising the replies to the questionnaire, CDL-AD(2005)034add and CDL-AD(2005)034add2.

*good practice to national delegations and parliaments so that it could be applied in Council of Europe member states without delay.*

*10. At its 14th 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.*[6]

*11. 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.*

[6] Resolution 235 (2007).

# *GUIDELINES ON THE HOLDING OF REFERENDUMS*

**Adopted by the Council for Democratic Elections**
**at its 18th meeting**
**(Venice, 12 October 2006)**
**and the Venice Commission**
**at its 68th plenary session**
**(Venice, 13-14 October 2006)**

## I. Referendums and Europe's electoral heritage

### 1. Universal suffrage

#### 1.1. Rule and exceptions

Universal suffrage means in principle that all human beings have the right to vote. This right may, however, and indeed should, be subject to certain conditions:

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 elections after a certain period of residence.

c. Residence:
i. a residence requirement may be imposed;
ii. residence in this case means habitual residence;
iii. a length of residence requirement may be imposed on nationals solely for local or regional elections;
iv. the requisite period of residence should be reasonable and, as a rule, should not exceed six months;
v. it is desirable that the right to vote be accorded to citizens residing abroad.

d. Deprivation of the right to vote:
i. provision may be made for depriving individuals of their right to vote, but only subject to the following cumulative conditions:
ii. it must be provided for by law;
iii. the proportionality principle must be observed;
iv. the deprivation must be based on mental incapacity or a criminal conviction for a serious offence;
v. 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:

i. electoral registers must be permanent or refer to a register that is constantly updated (population register or register of births, marriages and deaths);
ii. there must be regular up-dates, at least once a year. Where voters are not registered automatically, registration must be possible over a relatively long period;
iii. electoral registers must be public;
iv. 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;
v. a similar procedure should allow voters to have incorrect inscriptions amended within a reasonable time;
vi. 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 final publication of the register.

## 2. Equal suffrage

### 2.1. Equal voting rights

Each voter has in principle one vote; where the electoral system provides voters with more than one vote (for example, where there are alternatives), each voter has the same number of votes[7].

### 2.2. Equality of opportunity

a. Equality of opportunity must be guaranteed for the supporters and opponents of the proposal being voted on. This entails 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, it is advisable that equality be ensured between 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. It is advisable that equality be ensured between the proposal's supporters and opponents. Such backing may, however, be restricted to supporters and opponents of the proposal who account for a minimum percentage of the electorate. If equality is ensured between political parties, it 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.

[7] See, however, I.2.3.

e. Financial or other conditions for radio and television advertising must be the same for the proposal's supporters and opponents.

f. In conformity with freedom of expression, legal provision should be made to ensure that there is a minimum access to privately owned audiovisual 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.

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.

i. Sanctions must be imposed in the case of breaches of the duty of neutrality.

2.3. Equality and national minorities

a. Special rules providing for an exception to the normal vote-counting rules, in a proportional way, in the case of a referendum concerning the situation of national minorities do not, in principle, run counter to equal suffrage.

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 their duty of neutrality (see 1.2.2.a. above), which is one of the means of ensuring that voters can form an opinion freely.

b. Contrary to the case of elections, it is not necessary to prohibit completely intervention by the authorities in support of or against the proposal submitted to a referendum. However, the public authorities (national, regional and local) must not influence the outcome of the vote by excessive, one-sided campaigning. The use of public funds by the authorities for campaigning purposes must be prohibited.

c. The question put to the vote must be clear; it must not be misleading; it must not suggest an answer; electors 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.

d. 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 of the opposing one.

e. The above information must be available in all the official languages and in the languages of the national minorities.

f. Sanctions must be imposed in the case of breaches of the duty of neutrality and of voters' freedom to form an opinion.

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 citizens;
ii. voters should always have the possibility of voting in a polling station. Other means of voting are acceptable under the following conditions:
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 not be possible;
iv. 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;
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. polling stations must include representatives of a number of parties, and the presence of observers appointed by the latter 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. the state must punish any kind of electoral fraud.

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

i. that the executive must organise referendums provided for by the legislative system; this is particularly important when it is not subject to the executive's initiative;
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 with which must be punishable by disqualification of any ballot paper whose content is disclosed.

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.

d. There should be sanctions against the violation of secret suffrage.

## II. Conditions for implementing these principles

1. Respect for fundamental rights

a. 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[8].

b. Restrictions on these freedoms must have a basis in law, be in the public interest and comply with the principle of proportionality.

2. 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.

b. The fundamental aspects of referendum law should not be open to amendment less than one year before a referendum, or should be written in the Constitution or at a level superior to ordinary law.

c. 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[9];
- 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.

3. Procedural guarantees

3.1. Organisation of the referendum by an impartial body

a. An impartial body must be in charge of organising the referendum.

[8] In particular, street demonstrations to support or oppose the text submitted to a referendum may be subject to authorisation: such authorisation may be refused only on the basis of overriding public interest, in accordance with the general rules applicable to public demonstrations.

[9] See sections III.2 and III.3.

b. Where there is no longstanding tradition of administrative authorities' impartiality in electoral matters, independent, impartial electoral commissions must be set up at all levels, from the national level to polling station level.

c. The central commission must be permanent in nature.

d. It should include:
i. at least one member of the judiciary or other independent legal expert;
ii. representatives of parties already in Parliament or having scored at least a given percentage of the vote; these persons must be qualified in electoral matters.
It may include:
iii. a representative of the Ministry of the Interior;
iv. representatives of national minorities.

e. 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 (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.

3.2. 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 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 where 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, with the reasons for their being banned.

d. Observation should cover respect by the authorities of their duty of neutrality.

3.3. An effective system of appeal

a. The appeal body in referendum matters should be either an electoral commission or a court. In any case, final appeal to a court must be possible.

b. The procedure must be simple and devoid of formalism, in particular where the admissibility of appeals is concerned.

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;
- 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.

3.4. Funding

a. The general rules on the funding of political parties and electoral campaigns must be applied to both public and private funding.

b. The use of public funds by the authorities for campaigning purposes must be prohibited[10].

## III. Specific rules

1. The rule of law

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.

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;

[10] 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: it is desirable that the same question should not simultaneously apply to legislation of different hierarchical levels.

3. 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 or to the Council of Europe's statutory principles (democracy, human rights and the rule of law).

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

4. 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)

a. Everyone enjoying political 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. Everyone (regardless of whether he or she enjoys political rights) must be entitled to collect signatures.

d. 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 and in accordance with the principle of equality.

e. 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.

f. All signatures must be checked. In order to facilitate checking, lists of signatures should preferably contain the names of electors registered in the same municipality.

g. 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; sub-division may be envisaged to correct a lack of substantive unity.

5. 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. 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.
iv. 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.
v. In the event of rejection of a text adopted by Parliament and put to the popular vote at the request of a section of the electorate, a similar new text must not be put to the vote unless a referendum is requested.

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.

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 the popular initiatives, it may be entitled to put forward a counter-proposal 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.

7. Quorum

It is advisable not to provide for:

a. a turn-out quorum (threshold, minimum percentage), because it assimilates voters who abstain to those who vote no;

b. an approval quorum (approval by a minimum percentage of registered voters), since it risks involving a difficult political situation if the draft is adopted by a simple majority lower than the necessary threshold.

8. Effects of referendums

a. The effects of legally binding or consultative referendums must be clearly specified in the Constitution or by law.

b. Referendums on questions of principle or other generally-worded proposals should preferably not be binding. If they are binding, the subsequent procedure should be laid down in specific rules.

## *EXPLANATORY MEMORANDUM*

### *GENERAL REMARKS*

1. 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[11] 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.

2. A number of textual adjustments were necessary, such as replacing the word "election" with "referendum". Others, resulting from the specific nature of referendums, will not be further discussed. For instance, no reference is made to the right to stand for election (see point I.1.1.a, for example), the submission of candidatures[12] or the distribution of seats between the constituencies (equal voting power)[13]; the possibility of electors casting more than one vote relates to alternatives rather than preference vote or cross-voting (point I.2.1); election (or rather referendum) observation must be extended to the signature collection period (point II.3.2.b).

3. In addition, the Code of Good Practice in Electoral Matters has been clarified in response to questions raised in connection with its application. For instance, the requirement for permanent electoral rolls is satisfied if they refer to a register that is constantly updated (population register or register of births, marriages and deaths) (point I.1.2.i); it is expressly stated that observers must be able to go wherever referendum-related operations are taking place (point II.3.2.c).

4. Other points take into account the adoption of new texts by the Venice Commission[14] or by Council of Europe organs[15].

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

1.1. Rule and exceptions

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.iii-iv).

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[11] CDL-AD(2002)023rev, pp. 19 ff.
[12] Cf. CDL-AD(2002)023rev, I.1.3.
[13] Cf. CDL-AD(2002)023rev, I.2.2.
[14] CDL-AD(2005)043, Interpretive Declaration on the Stability of the Electoral Law.
[15] Recommendation Rec(2004)11 of the Committee of Ministers on legal, operational and technical standards for e-voting.

7. It is desirable that the right to vote be accorded to citizens residing abroad, at least for national referendums. It is important to ensure that this does not lead to fraud, however. 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.v).

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 being voted on notably as concerns the coverage by the media, in particular in news broadcasts, as well as public subsidies and other forms of backing; in this framework, account may be taken of the number of political parties supporting each option or their election results (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 (point I.2.2.c).

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 proportional, 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).

2.3. Equality and national minorities

11. As in the case of elections, there may sometimes be grounds for taking into account the specific circumstances of national minorities. 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.

3. Free suffrage

3.1. Freedom of voters to form an opinion[16]

[16] 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.

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 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 every level (national, regional or local), must not engage in excessive, one-sided campaigning, but show neutrality. Clearly, this does not mean they will not take a stand, but they must provide a certain amount of 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):

- 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;
- another possibility would be for the authorities to send voters balanced campaign material from the proposal's supporters and opponents – corresponding, *mutatis mutandis*, to candidates' election addresses made available to citizens prior to some elections.

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 must not be misleading; it must not suggest an 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; and it must not ask an open question necessitating a more detailed answer. Lastly, electors must be informed of the impact of their votes, and thus of the 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?) (point I.3.1.c).

3.2. Freedom of voters to express their wishes

16. The paragraph on electronic voting has been brought into line with the new standards introduced by the Council of Europe through the adoption of Recommendation Rec(2004)11 of the Committee of Ministers on legal, operational and technical standards for e-voting (point I.3.2.a.iv).

17. 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).

18. 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 their wishes in accordance with rules prescribed by law, and 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.

## *II. Conditions for implementing these principles*

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

19. The wording of the guidelines is slightly less restrictive than the Code of Good Practice in Electoral Matters[17] 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 the requirement for a procedural statute is the norm (point II.2.a).

20. 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 into account 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 Interpretive Declaration on the Stability of the Electoral Law adopted by the Venice Commission in 2005[18]: 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 direct democracy 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.2.b).

### 3. Procedural guarantees

#### 3.1 Organisation of the referendum by an impartial body

21. 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.3.1.e).

#### 3.2 An effective system of appeal

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. The review of validity, whether obligatory or optional, should take place before the text is put to the vote: this will avoid the people 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.3.3.d, cf. points III.2-3).

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[17] CDL-AD(2002)023rev, II.2.a.
[18] CDL-AD(2005)043.

23. Unlike elections, which take place in a number of constituencies, referendums involve a whole territory. 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; careful consideration must be given to calling a new partial ballot rather than an entire new referendum, however, so as to avoid the massive concentration of campaign resources in a limited area (point II.3.3.e).

3.3. Funding

24. National rules on both public and private funding of political parties and election campaigns must be applicable to referendum campaigns (point II.3.4.a). As in the case of elections, funding must be transparent, particularly when it comes to campaign accounts. 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 must be annulled[19]. It should be pointed out that the principle of equality of opportunity applies to public funding; equality should be ensured between a proposal's supporters and opponents (point I.2.2.d).

25. 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.3.4.b, cf. point I.3.1.b).

## *III. Specific rules*

1. The rule of law

26. 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[20], applies to referendums just as it does to every other area. The principle of the sovereignty of the people allows the latter to take decisions only in accordance with the law. 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. On the other hand, referendums must be organised where the legal system provides for them (point I.3.2.b.i).

2. The procedural validity of texts submitted to a referendum

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

28. 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?")[21].

[19] Cf . CDL-AD(2002)023rev, par. 107 ff.
[20] See the Preamble to the Statute of the Council of Europe (ETS 001).
[21] CDL-AD(2005)034, par. 64.

29. A "yes" vote on a specifically-worded draft – at least in the case of a legally binding referendum – means a 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.

30. 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 people. 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[22].

31. 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. The substantive validity of texts submitted to a referendum

32. Under the principle of the rule of law, the people 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.

33. 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).

34. In order to prevent unlawful referendums, texts that are procedurally or substantively invalid must not be put to a referendum.

4. 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)

35. (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.

36. Entitlement to collect signatures must not be confined to registered electors, but apply to everyone, including foreigners and minors (particularly in respect of texts concerning their status) (point III.4.c).

[22] 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.

37. 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.4.d).

38. 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.4.e).

39. It is important that all signatures are checked (point III.4.f). 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 high number of invalid signatures or, on the contrary, might not contain any while other sheets of signatures might be full of them. At the very most, some signatures need not be checked once it has been established beyond doubt that the number of valid signatures required by law has been collected[23].

40. In addition, a popular initiative – or a request for a referendum – should be declared partially invalid where it is possible to modify the proposed text, without distorting it, so that it complies with the law. An authority must have the power 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 sub-division of a text that is not consistent with unity of content, form or hierarchical level.

5. Parallelism in procedures and rules governing the referendum

41. 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 (a few years at the most) a text rejected in a referendum may not be adopted by a procedure without referendum. An optional referendum at the request of a section of the electorate is regarded as a referendum procedure: unless such a referendum is requested, a text rejected the first time round may therefore be adopted without a popular vote (points III.5.a.i and v). A similar rule applies to the revision of a provision approved in a referendum (point III.5.a.ii).

42. 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.5.a.iii);
- Parliament may revise a rule of law superior to that adopted by the popular vote without a referendum; it is entitled to do so in accordance with the principle of hierarchy of legal rules[24], but this should be avoided for a certain period of time (point III.5.a.iv).

43. The foregoing does not apply to consultative referendums, which are not legally binding on the authorities. The political wisdom of Parliament going against the wishes of (the majority of) the people is clearly another matter.

44. 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

[23] In relation to the submission of candidatures for elections, cf. CDL-AD(2002)023rev, I.1.3.iv.
[24] CDL-INF(2000)013.

time (point III.5.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.5.b).

45. Constitutional rules relating to referendums should enjoy direct popular legitimacy, ie they should 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.5.d).

6. Opinion of Parliament

46. 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. 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 vote at the same time[25].

47. 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 be informed of Parliament's position.

48. 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 given it in time.

49. In the case of regional or local referendums, the regional or local assembly shall take over the role played by Parliament at the national level.

7. Quorum

50. Based on its experience in the area of referendums, the Venice Commission has decided to recommend that no provision be made for rules on quorums.

51. 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.

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

[25] The issue of voting procedures where a popular initiative and a counter-proposal are put to the popular vote is highly specific, which is why the guidelines do not comment on it.

8. Effects of referendums

53. If electors are to cast an informed vote, it is essential for them to be informed of the effects of their votes; it must therefore 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).

54. Where a legally binding referendum concerns 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). It is preferable, therefore, for referendums on questions of principle or generally-worded proposals to be consultative. If they are legally binding, the subsequent procedure should be laid down in specific constitutional or legislative rules. It should be possible to appeal before the courts in the event that Parliament fails to act (point III.8.b).