



Strasbourg, 17 June 2013

Opinion No. 705 / 2012

CDL-AD(2013)017
Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OPINION

**ON THE LAW ON
NATIONAL REFERENDUM OF UKRAINE**

**Adopted by the Council for Democratic Elections
at its 45th meeting
(Venice, 13 June 2013)
and by the Venice Commission
at its 95th Plenary Session
(Venice, 14-15 June 2013)**

**on the basis of comments by
Mr Peter PACZOLAY (Member, Hungary)
Mr Angel SANCHEZ NAVARRO (Member, Spain)
Mr Kaarlo TUORI (Member, Finland)**

Table of content

I.	Introduction	3
II.	Comments on the Text of the Law	4
A.	General remarks on the new law on referendum.....	4
B.	Provisions on changing the Constitution through a referendum.	6
C.	Some specific comments on the concrete articles of the new law on referendum	8
1.	General provisions	8
2.	Wording of the referendum questions.....	8
3.	Equality of treatment between the supporters and the opponents of a referendum.	9
4.	Administration of referendums.....	9
5.	Voters' lists.....	9
6.	Referendum campaign.	10
a)	Funding of referendum campaign.	10
b)	Referendum campaign and mass media.....	11
7.	Participation of non-citizens in the referendum process.....	11
III.	Conclusion	12

I. Introduction

1. On 29 November 2012, the Chairperson of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, Mr Andres Herkel, requested the Venice Commission to prepare an opinion on the text of the Law of Ukraine N° 5475-VI "On National Referendum" (Doc. CDL-REF (2013) 015) hereinafter, the "law on referendum". Messrs P. Paczolay, K. Tuori and A. Sanchez-Navarro were appointed as reporting members and provided comments on the Law. The following opinion is based on their contributions.
2. The law on referendum was adopted by the Verkhovna Rada of Ukraine (hereinafter "the Rada") in November 2012 and entered into force on 6 November 2012.
3. This opinion is based on an unofficial English translation of the law. This opinion focuses mostly on issues related to the all-Ukraine referendum on a new Constitution or constitutional amendments, notably on provisions related to referendum organised on popular initiative. However, several other issues are commented upon such as the question submitted to referendum, the organisation of referendum commissions, the funding of referendums, campaign and the role of the media as well as voter registration. Any legal review based on translated laws may be affected by issues of interpretation resulting from translation.
4. Prior opinions of the Venice Commission provide good background for understanding the development of the legislation on referendums in Ukraine. The law incorporates some of the previous recommendations of the Venice Commission and tries to improve the legal basis for organising referendums in Ukraine.
5. This opinion should also be read in conjunction with the following documents:
 - Code of Good Practice in Electoral Matters. Guidelines and Explanatory Report, adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002), CDL-AD (2002)023rev;
 - 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), CDL-AD (2007) 008;
 - Previous Venice Commission opinions as noted herein:
 - o CDL-INF(2000)011 – Opinion on constitutional referendum in Ukraine, adopted by the Commission at its 42nd Plenary Session (Venice, 31 March 2000);
 - o CDL-AD(2008)015 – Opinion on the Draft Constitution of Ukraine (prepared by a working group headed by Mr V.M. Shapoval) adopted by the Venice Commission at its 75th Plenary Session (Venice, 13-14 June 2008);
 - o CDL-AD(2009)030 – Opinion on the Draft Law on the All-Ukrainian Referendum by Mr O. Lavrynovych (Member of Parliament of Ukraine) endorsed by the Venice Commission at its 77th Plenary Session (Venice, 12-13 December 2008)
 - o CDL-AD(2009)024 – Opinion on the Draft Law of Ukraine amending the Constitution presented by the President of Ukraine adopted by the Venice Commission at its 79th Plenary Session (Venice, 12-13 June 2009);
 - o CDL-AD(2010)044 – Opinion on the Constitutional Situation in Ukraine adopted by the Venice Commission at its 85th Plenary Session (Venice (17-18 December 2010);

- CDL-AD(2011)002 – Opinion on the concept paper on the establishment and functioning of a constitutional assembly of Ukraine - Adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011);
 - CDL-AD(2011)037 – Joint Opinion on the Draft Law on Election of People's Deputies of Ukraine adopted by the Council for Democratic Elections at its 38th meeting (Venice, 13 October 2011) and by the Venice Commission at its 88th Plenary Session (Venice, 14-15 October 2011);
6. This opinion does not comment on the legislative processes which resulted in the adoption of this law. However, it is an established principle that legislation regulating fundamental rights, such as the right to hold referendums should be adopted openly, following public debate, and with broad support in order to ensure confidence and trust of different political forces and civil society.
 7. This opinion is provided with the goal of assisting the authorities in Ukraine, political parties, and civil society in their efforts to develop a sound legal framework for direct democracy through referendums.
 8. This opinion was adopted by the Council for Democratic Elections at its 45th meeting (Venice, 13 June 2013) and by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013).

II. Comments on the Text of the Law

A. General remarks on the new law on referendum

9. The new law aims at establishing a legal framework for organising referendums provided for in corresponding Articles of the Constitution of Ukraine. It replaces a 1991 Law on referendums which has been amended on several occasions.
10. The legislator addresses the main issues on organisation of referendums in a detailed way. The law provides a classification of different kinds of referendum, defines different actors involved and their respective functions and responsibilities, establishes the main principles for the conduct of the voting, as well as concrete rules about the formulation of questions proposed in a referendum.
11. The 2012 law allows the people to directly decide any question by referendum, except for matters relating to taxation, state budgets, criminal amnesty, or any proposal that would result in restriction of human or citizen rights and freedoms. According to the text, multiple questions can be included in a single referendum proposal.
12. Based on the provisions of the Constitution, Article 3 of the law establishes 4 kinds of national referendums: constitutional, ratification (on territorial issues), legislative and general (on issues other than those provided for explicitly in the Constitution of Ukraine).
13. According to Article 72 of the Constitution of Ukraine¹ the All-Ukrainian referendum may be called by the Rada or by the President of Ukraine, in accordance with their powers determined by the Constitution. In addition, it can be held on a popular initiative at the request of at least three million citizens of Ukraine eligible to vote, provided that the signatures in favour of the referendum have been collected in at least two-thirds of the oblasts with at least 100,000

¹ This opinion refers to the English version of the text of the Constitution of Ukraine published on the official Web-site of the President of Ukraine : <http://www.president.gov.ua/en> .

signatures gathered in each oblast. Such a referendum shall be called by the President (Article 106(6)).

14. Article 73 of the Constitution lays down that alterations to the territory of Ukraine must be decided on in an all-Ukrainian referendum. Article 85(2) provides that it is up to the Verkhovna Rada to call such a referendum. According to Article 156 of the Constitution amendments to Title I General Principles, Title III Elections, Referendum, and Title XIII Making Amendments to the Constitution of Ukraine must be submitted to an All-Ukrainian referendum, after they have been approved by the Rada with a two-third majority. In this case, the President calls the referendum.
15. The wording of Article 72 implies that the Rada and the President can only call the referendum in cases explicitly stipulated in the Constitution: the Rada on territorial changes and the President on constitutional amendments referred to in Article 156 and in order to implement a popular initiative. By contrast, the only explicit definition of the range of subjects which can be submitted to referendum on popular initiative is a negative one. According to Article 74 a referendum shall not be permitted with regard to draft laws on taxation, budgetary or amnesty issues.
16. The provisions in the Law on National Referendum follow the interpretation of the limited power of the Rada and the President to call a referendum, as well as the general scope of a referendum on a popular initiative. However, some of the provisions of the new Law allowing to call a referendum on popular initiative on constitutional changes at closer examination risk to be problematic not only in respect of some of the internationally recognised standards in the field of referendums, but also in the way they interpret the text of the Constitution of Ukraine. The Venice Commission has already indicated in its opinions on the previous draft laws on the referendum that some of their provisions were going beyond the constitutional norm and could result in politically motivated manipulation of the referendum, notably, in changing the Constitution in a way not foreseen by the text of the Constitution of Ukraine.² Unfortunately the new law includes similar provisions.
17. The text of the Law presents several other problems as to the procedures used for holding referendums. Some of these issues will be examined in the following section on specific articles of the law.
18. It can be said that the almost unlimited scope of questions that can be put to a referendum under the law is problematic from the perspective of international standards, which make it clear that referendums should not be used to undermine a constitutionally mandated division of powers.³ There is nothing in the law that would prevent a referendum on a matter that has been specifically reserved in the Constitution for either the President or parliament, such as, for example, the appointment or dismissal of high officials. Moreover, this problem is even more obvious in the light of Article 95 paragraph 1 of the Law which provides that the results of a national referendum by popular initiative *“are final, they require no approval of any public authority and are binding upon Ukrainian citizens and public authorities.”*
19. As a general observation, it can also be pointed out that the Law is very long and complex. It has a number of repetitive provisions and some of its Articles include so many technical details that they risk to confuse both the members of the electoral administration who will have to implement it and voters in general. That is the case, for instance, of the provisions related to the features and procedures for printing and transferring the ballots (arts. 77-79), the preparation

² Doc. CDL-Ad(2009)003, par 10.

³ The Code of Good Practice on Referendums, (CDL-AD (2007)008), III.1. See also CDL-INF(2000)011 - Opinion on constitutional referendum in Ukraine, adopted by the Commission at its 42nd Plenary Session (Venice, 31 March 2000).

and procedures for voting and counting (Articles 81-85, the latter including 36 points), the content of protocols (Articles. 86, 91, 93) and several others.

20. Many of these technical problems could be settled through the adoption of a Unified Electoral Code that would provide a clear set of rules on elections and referendums, notably on technical aspects of operation of electoral administration and registration of voters.⁴

B. Provisions on changing the Constitution through a referendum. (5)

21. The procedure for changing the constitution established in Articles 154 – 156 is quite rigid and well defined offering two possible ways.
22. For introducing changes to most parts of the Constitution the initiative belongs to the President, or to a third of the Members of Parliament, and has to be presented to the Verkhovna Rada:

Article 154. *“A draft law on making amendments to the Constitution of Ukraine may be submitted to the Verkhovna Rada of Ukraine by the President of Ukraine or by the people's deputies of Ukraine comprising at least one-third of the constitutional membership of the Verkhovna Rada of Ukraine”.*

In this case the adoption requires two successive votes in the Rada, with a qualified majority of two-thirds in the final one:

Article 155. *“A draft law on making amendments to the Constitution of Ukraine, except for Title I General Principles, Title III Elections, Referendum, and Title XIII Making Amendments to the Constitution of Ukraine, previously adopted by the majority of the constitutional membership of the Verkhovna Rada of Ukraine, shall be deemed adopted, if at least two-thirds of the constitutional members of the Verkhovna Rada of Ukraine vote in its favour at the succeeding regular session of the Verkhovna Rada of Ukraine”.*

23. For introducing changes to Titles I, III and XIII the procedure also involves both the President and the Rada. The way it is initiated is similar, although now it requires two-thirds majority of Members of Parliament; and has to be presented also to the Verkhovna Rada:

Article 156. *“A draft law on making amendments to Title I General Principles, Title III Elections, Referendum, and Title XIII Making Amendments to the Constitution of Ukraine shall be submitted to the Verkhovna Rada of Ukraine by the President of Ukraine, or by not less than two-thirds of the constitutional membership of the Verkhovna Rada of Ukraine...”.*

The decision is taken in two successive votes: the first, with a qualified majority of two-thirds in the Parliament; the second, by the people through referendum called by the President.

Article 156. *“... provided that it is adopted by at least two-thirds of the constitutional members of the Verkhovna Rada of Ukraine, be approved by an All-Ukrainian referendum called by the President of Ukraine”.*

24. A possibility to adopt a Constitution through a referendum called on the basis of popular initiative

⁴ This approach seems to be justified since the explanatory memorandum to the Code of Good Practice on Referendums suggests that “conditions for according the right to vote are normally the same for both referendums and elections”, I.1.1.1.6, page 14 (CDL-AD (2007)008). The Venice Commission made a similar recommendation when it examined the draft law on the all-Ukrainian referendum in 2008 (see doc. CDL-AD(2009)004).

does not seem to be foreseen by the current Constitution of Ukraine.

25. Before the adoption of the present law the issue of constitutional referendums was subject of two decisions by the Constitutional Court of Ukraine in 2008. The Constitutional Court stated that a new Constitution could be adopted by a referendum; however it did not say whether the adoption of a new Constitution would also have to satisfy the other requirements for amendment set out in Title XIII (i.e. approval by the President and 2/3 of the members of parliament).⁵
26. Therefore the most problematic provisions in the law under examination concern the possibility to hold referendums on popular initiative on a new Constitution or constitutional amendments. According to Article 3(3) (1) matters submitted to a national referendum can include both approving a new version of the Constitution and amending the Constitution. Article 15(2) even gives room to the interpretation that a new Constitution can only be adopted through a national referendum: *“Through a national referendum, the Ukrainian people as the bearer of sovereignty and the only source of power in Ukraine can exercise their exclusive right to determine and change the constitutional arrangement in Ukraine by adopting the Constitution of Ukraine (constituent power) in the manner established by this Law”*. In addition, Article 15(3) provides that *“through a national referendum by popular initiative the Ukrainian people as the bearer of sovereignty and the only source of power in Ukraine can express their will and approve, in the manner established by this Law, a new version of the Constitution of Ukraine, make amendments to the Constitution of Ukraine, repeal, reject or deem invalid a law on amending the Constitution of Ukraine”*.
27. Articles 15 and 16 do not give any role to the Parliament. However, the Venice Commission in its previous opinions on constitutional reforms in Ukraine *“has underlined the need to secure the legitimacy of any constitutional reform in Ukraine”*, which *“can only be achieved if constitutional amendments are made after extensive, open and free public discussions involving the opposition and civil society, and in strict accordance with the constitutional provisions on amendment through decisions of the Verkhovna Rada by a qualified majority”*⁶. In its 2011 opinion on the concept paper of the establishment and functioning of the Constitutional Assembly of Ukraine the Venice Commission strongly encouraged *“the Ukrainian authorities to engage in a process of constitutional change that is based on the regular constitutional procedure for constitutional amendments and on the democratic participation of all actors of society concerned”*.⁷ The Code of good practice on referendums recommends:
- “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.”*⁸
28. Allowing for a national referendum on popular initiative on a new Constitution or on constitutional amendments (as it appears in the examined law on referendum, notably its Articles 15 and 16) would make it possible to circumvent the requirement of a qualified majority in the Verkhovna Rada. The Commission strongly believes that this would be detrimental to constitutional stability and legitimacy in Ukraine.

⁵ See Decisions of the Constitutional Court of Ukraine N° 6-rp/2008 of 16 April 2008 on the adoption of Constitutions and laws by referendum and N° 6-rp/2005, 5 October 2005 on popular participation in decision making (<http://www.ccu.gov.ua>).

⁶ See CDL-AD(2010)044, paragraph 73.

⁷ See CDL-AD(2011)002, paragraph 7.

⁸ Code of Good practice on referendums, II.6.

29. In several earlier opinions on constitutional reforms in Ukraine, the Venice Commission has underlined that not only constitutional amendments but even a new Constitution must be adopted in the procedure prescribed by the Constitution in force and that the requirement of qualified majority in the Verkhovna Rada must be respected.⁹

C. Some specific comments on the concrete articles of the new law on referendum

1. General provisions

30. The law on national referendum has 108 Articles (and 4 “miscellaneous” provisions) organised in 13 sections.

31. Article 1 gives the definition of a referendum as *“one of the forms of direct democracy in Ukraine and a way to exercise the will of Ukrainian people through adoption (approval) of major national decisions by the people (hereinafter referred to as the citizens) who give their votes by secret ballot in the manner established by this Law.”*

32. Article 5 on general principles and 7 on equal voting rights give a complete list of rights of citizens to participate in a referendum. However, the right of citizens to oppose proposals to be submitted to a referendum is not sufficiently dealt with in these articles and in the rest of the text. The Venice Commission would like to remind one of the recommendations of the Code of Good practice on referendums, which provides that *“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”*.¹⁰ The text of the law should include more provisions on the right of citizens to campaign against the proposal to be submitted to a referendum.

2. Wording of the referendum questions

33. Article 19 of the Law provides that the wording of referendum questions must be “clear and precise”. However, the text does not establish more specific safeguards. Under the Venice Commission Code of Good Practice on Referendums, referendum questions should satisfy three basic criteria:

- a) Unity of Form - the proposal should not combine a specifically worded draft amendment with a generally worded proposal or question of principle;*
- b) Unity of Content - except in the case of total revision of a text (such as a Constitution or law), there should 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;*
- c) Unity of Hierarchical Level - the same question should not simultaneously apply to legislation of different hierarchical levels.*

The criteria mentioned above provide important safeguards against referendum questions that are phrased in a manipulative or misleading way. The Venice Commission is of opinion that the

⁹ See among others docs CDL-INF (2000) 11, CDL-AD(2008)015, CDL-AD(2009)024, CDL-AD(2010)044 and CDL-AD(2011)002.

¹⁰ Code of Good practice on referendums, I.2.2.c.

wording of Article 19 should include a more specific requirement as to the question submitted to the voters.

3. Equality of treatment between the supporters and the opponents of a referendum.

34. Article 24 of the law provides a list of “parties to the respective national referendum process”. It is surprising that national observers other than representatives of the initiative group of the referendum are not mentioned (the same observation can be made as to the list of observers provided in Article 65 of the law). This omission is surprising since Article 70.2 clearly establishes the right of citizens to carry out *“any activities that encourage voters to vote in favour or against the referendum, including any printed, verbal, sound, audio and visual types and forms of ideological influence on people not prohibited by law that directly or indirectly draw one’s attention to the referendum issue [...]”*. The absence of concrete provisions allowing different parties and citizens to participate more actively in the referendum process could create pre-conditions for unequal treatment of supporters and opponents of a proposed referendum.

4. Administration of referendums.

35. Section 4 of the Law deals with the organisation of referendum commissions providing in its Article 42 for a three-tier referendum administration comprising the CEC, territorial commissions (TCs) and precinct commissions (PCs).
36. According to Article 42.2 *“the Central Election Commission is at the top of the system of referendum commissions organising and holding national referendums and is considered to be the commission of the highest level in regard to all referendum district and precinct commissions specified by this Law”*. As far as the lower commissions are concerned, their way of establishment and composition differs from the electoral commissions. They are much smaller than election commissions: the number of members of TCs must not exceed 15 (Article 45.3), while PCs have 11 members (Article 46.2), regardless of the number of citizens assigned to precinct.
37. The Law grants the right to propose candidates for membership on TCs and PCs to the chairpersons of the regional councils and executive committees of the local councils or mayors. If those local authorities do not nominate commission members, then members are nominated by the head of the state Administration, who is appointed by the President. It is unclear from the law how candidates suggested by the nominating entities will be selected by the CEC or TCs. The procedure is not only extremely complex; it creates a risk of excluding from the membership in different referendum commissions representatives of different political forces and civil society.
38. An additional comment can be made as to the referendum administration design in general. Most of the provisions concerning the organisation of the referendum could (and possibly should) perfectly be dealt with in an unified Electoral Code, making it unnecessary to repeat – and making it much easier to understand - many rules related to crucial aspects of the organisation of referendums through referendum precincts (or “polling stations”, Article 37.3, Section 3, Articles 38-41), the system of referendum commissions (Section 4, Articles 42-52), preparation of Voter Lists (Section 5, arts. 53-58), and so on. In fact, there are many clauses providing that, in case of coincidence between a referendum and any election, the electoral organisation will prevail and replace the specific provisions for referendum (Article 44.4).

5. Voters’ lists.

39. The law provides a system of registration of voters which differs substantially from the one used for elections. According to Article 53 preliminary voter lists are to be compiled by the voter register maintenance bodies (established by the Law on State Register of Voters of Ukraine) and submitted to the TCs no later than 20 days before the day of referendum, while the TCs are required to submit the lists to the respective PECs no later than 17 days prior to the day of voting (paragraphs 5 and 6).
40. Contrary to the law on parliamentary elections which provides that in case of inaccuracies, voters can file a complaint no later than 5 days before the voting day, Article 54.6 of the Law on national referendum allows to file a complaint no later than one day before the vote. This deadline seems to be too short.
41. As a consequence of this delay for an appeal against inaccuracies in the list, the law allows TCs and PCs to make changes to the voter lists for a referendum, even on the day of voting. Allowing last minute changes to the voter list may open the door to fraud and abuse. The Law should follow the approach of the parliamentary election law, which places jurisdiction over voter list related cases solely in courts in accordance with the Code of Good practice in Electoral matters which provides that :

“There should be an administrative procedure – subject to judicial control – or a judicial procedure enabling electors not on the register to have their names included. In some countries, the closing date for entry in the supplementary register may be, for example, 15 days before the election or election day itself. The latter case, whilst admirably broad-minded, relies on decisions made by a court obliged to sit on polling day, and is thus ill-suited to the organisational needs on which democracies are based. In any event polling stations should not be permitted to register voters on election day itself.”¹¹

42. The Commission would like to remind that a similar provision is included in the Code of good practice on referendums: *“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”¹².*

6. Referendum campaign.

43. According to Article 71 of the Law, referendum campaigning starts on the day of publication of the decision to hold the referendum and completes at midnight on the last Friday before the day of voting.

a) Funding of referendum campaign.

44. According to Article 59 and 62 of the Law, referendum campaigning can be funded from the State budget of Ukraine, referendum funds established by initiative groups either for or against a referendum proposal, and from the bank accounts of political parties and NGOs.
45. The Law does not limit the amount of money that can be spent for campaigning and provides that referendum funds will be administered by the fund managers who are required to file financial reports on the receipt and use of funds with the CEC no later than on the 15th day following the day of the referendum. Donations to referendum funds can be made by individual

¹¹ CDL-AD(2002)023rev., 1.2.7.iv.

¹² CDL-AD(2007)008, I.1.2.iv.

citizens, political parties and NGOs. Individual citizens may donate no more than 400 minimum monthly wages (Article 64.2). However, the law places no limit on the amount that political parties and NGOs may donate¹³. This could create problems as to transparency of the process.

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

“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”.

Unfortunately, the corresponding provisions of the Law on National referendum do not seem to meet the requirement of transparency. The Venice Commission is of opinion that the law should require full disclosure, before and after referendum, of sources and amounts of financial contributions and the types and amounts of referendum campaign expenditures. This would provide timely and relevant campaign finance information to the public and would increase transparency of the process.

b) Referendum campaign and mass media.

47. The requirement of a mass media “equal and impartial treatment” of the referendum process, and the “unbiased and balanced coverage of the positions in favour and against the issue” (Article 7.3.4; see also Article 22.6) is not always easy to guarantee. It is a difficult task if it is considered in any type of media, as it seems to be the case in Article 75.1 (*“The referendum process shall be covered in mass media of any ownership type... in compliance with the principles of objectivity, impartiality and balanced coverage”*). All media should try to be objective, with regard to facts. And the social pluralism, combined with the freedom of speech and press, implies that public-owned media have to (try, at least, to be) also impartial and balanced, as far as they are funded by public means and, therefore, they “belong” to the public opinion, where there are different opinions, as the very organisation of the referendum shows. The principle of impartiality (or, better to say, of equal treatment) may also be applied to the conditions of paid publicity (i.e.: advertisements should not be more expensive for different subjects in the same media), as it is provided for with relation to the use of buildings (premises).
48. At the same time, private-owned media may have their own positions, and therefore may favour their own opinions and give them wider and better coverage, thus being absolutely partial. It is not only constitutionally arguable, but also politically and socially unrealistic, to require all media, independently of their ideological bias, to treat “equally and impartially” to the parties to the process of referendum, and give “*objective and balanced coverage of the positions for and against the referendum question*”¹⁴: the balanced coverage of positions should be guaranteed as a result of the concurrence of many different media, and not as a requirement of any of them.

7. Participation of non-citizens in the referendum process.

49. The Law adopts a quite restrictive approach as to participation of non-citizens in the referendum process. An absolute prohibition for foreigners and stateless persons and entities to participate in any of the aspects of the referendum process is questionable. Such restriction might be logical with regard to participation in the initiative group (limited to Ukrainian citizens); but it seems

¹³ The provisions of the Law on national referendum are similar to the law on elections of Members of Parliament, which was subject to a joint OSCE/ODIHR and Venice Commission in 2011 (CDL-AD(2011)037). Recommendations of this opinion are also applicable to the corresponding provisions on referendum funding of the examined law.

¹⁴ See Code of Good practice on referendums I.3.1.

excessive when referred even to economic contributions (64.3.1) or acts of campaigning, including “involvement in journalist activities or participation in concerts, exhibitions, sports events and other public events organized during the referendum process” (Article 76.1.1), up to the point of foreseeing the suspension of broadcasting national or international channels (Article 76.10).

III. Conclusion

50. The law provides detailed regulation of national referendums in Ukraine. The text takes into account a number of international standards as to the organisation of a referendum. It gives a reasonable classification of different referendums, the definition of actors and their respective functions and responsibilities, establishes the principles on which the conduct of the voting is based, sets the rules about the question posed in the referendum and describes the legal effects of the different kinds of referendums. The Commission welcomes the adoption of a new law on referendum which replaces a 1991 text. This piece of legislation was long needed since the adoption of a new Constitution of Ukraine in 1996.
51. However, the 2012 law presents a number of serious problems. First of all, the adopted law provides for the organisation of a referendum on the popular initiative to amend the Constitution without a prior vote of the Verkhovna Rada by a constitutional majority which is contrary to the previous recommendations of the Venice Commission on the constitutional process. The Commission is of opinion that allowing for a national referendum on popular initiative on a new Constitution or on constitutional amendments (as it appears in the examined law on referendum) would make it possible to circumvent the requirement of a qualified majority in the Verkhovna Rada. The Commission strongly believes that this would be detrimental to constitutional stability and legitimacy in Ukraine.
52. The Venice Commission reiterates that constitutional amendments must be adopted in the procedure prescribed by the Constitution in force and that the requirement of qualified majority in the Verkhovna Rada must be respected.
53. There are other shortcomings in such areas as the respect of the principle of equality between supporters and opponents of the referendum, the composition of referendum commissions and financing of referendum campaigns. Provisions of the law on registration of voters and on the role of mass media during the referendum campaign should be significantly improved as well. This lack of safeguards of rights of different political forces, the civil society and citizens for organising referendums adds to concerns on the possibility to hold constitutional referendums on popular initiative.
54. The Venice Commission stand ready to assist the authorities of Ukraine in their efforts to create a legal framework for referendums in conformity with Council of Europe and other international standards.