Executive summary

On June 9, 2020, President Zelenskyy registered Draft Law No 3612 titled “On direct democracy through national referendum” in the Verkhovna Rada. This draft was prepared based on the earlier Draft Law “On National Referendum,” which was elaborated by the Working Group for developing legislative initiatives in the area of direct democracy in March 2020. The Working Group consisted of 25 representatives of ministries, civil society organizations, Members of Parliament, and independent experts.

Overall, the President’s draft is very similar to that developed by the Working Group. Several recommendations proposed by the stakeholders during a series of public discussions held through April and May 2020 were taken into account. Importantly, the President’s proposal incorporates the following recommendations proposed by IFES:

- The referendum ballot may only contain one question (instead of three in the original draft law);
- The procedure for collection and verification of support signatures is now better regulated;
- The referendum spending limit has been cut in half compared to the original draft law (from 40,000 minimum monthly salaries to 20,000 minimum monthly salaries);
- The definition of referendum campaigning is aligned with the election code; and
- A decision adopted through a referendum would become effective within 10 days following the official promulgation of the referendum results (rather than immediately after its promulgation).

Thus, Draft Law No 3612 is a significant step forward in bringing the regulation of referendums in Ukraine into compliance with international standards and best practices. It profoundly minimizes the risk of abusing or manipulating referendums to adopt political decisions in circumvention of Parliament and ensures equal conditions for supporters and opponents of the referendum question. It is positive to note that it incorporates key provisions from the Code of Good Practice on Referendums of the Venice Commission in regulating the preparation and the conduct of a national referendum.

Still, some provisions governing national referendums raise concerns, in particular: the lack of precise requirements for the formulation of referendum questions, the possibility to hold referendums on issues of “national importance” with no clear guidance how “national importance” should be interpreted, as well as the vague introduction of e-voting without clear regulation. Other shortcomings include:

- A lack of transparency of referendum funding;
- The possibility of establishing referendum commissions with no balanced representation of the referendum proposal’s supporters and opponents;
• The provisions governing the role of NGOs in referendum campaigning;
• The lack of regulation of referendum campaigning on the internet;
• The absence of rules on debates between supporters and opponents of referendum questions and on the allocation of free airtime; and
• The possibility that referendum complaints can be rejected on technical grounds without being considered on their merits, as well as other problematic norms.

Most provisions of Draft Law No 3612 have been brought in line with the election code, thereby harmonizing election and referendum procedures. Inconsistencies remain with regard to campaigning restrictions, timelines for submission and review of complaints, and instruments to ensure accessibility of the referendum process for voters with disabilities. However, the President’s draft does not yet incorporate amendments to the election code proposed in Draft Law No 3485, which was adopted during the first reading on June 4, 2020 in order to improve a number of election procedures for national and local elections. If Draft Law No 3485, as expected, is adopted during the current Rada session, Draft Law No 3612 should be brought into compliance with this law.

Therefore, the Draft Law No 3612 could and should further be improved. IFES will stand by to provide technical assistance and advice to improve the draft law and ensure that the legal framework governing referendums is consistent with international standards and best practices. Below are the recommendations offered by IFES Ukraine for the consideration by the MPs and other stakeholders.

**Recommendations**

**Referendum Initiative and Referendum Subject**

1. The requirements for the referendum question must be brought in line with the Venice Commission’s Code of Good Practice on Referendum, in particular with regard to the unity of form and content of the question;
2. The draft law needs to provide for the criteria whereby specific issues are considered the “issues of national importance” and can be put on the vote during the referendum.
3. Only entire laws should be abrogated by referendum rather than specific provisions of the laws.
4. The registration of referendum initiative groups should take place after the Constitutional Court has delivered its opinion on the constitutionality of the proposed question/draft law.

**Referendum Administration**

1. It should be possible to submit documents (complaints/appeals, proposals for membership of lower-level commissions) to referendum commissions in electronic form. Referendum commissions should be able to create and use electronic documentation, primarily to facilitate the vote count and the results tabulation.
2. District and precinct referendum commissions should be composed with equal (parity) representation of supporters and opponents of the referendum question.
3. Potential members of referendum commissions should take part in mandatory training on the referendum procedures and subsequently be certified by the Central Election Commission’s Training Center before they are appointed members of the respective commission.
4. The possibility to enter changes to the voting results when completing corrected vote-counting protocols are further limited.
5. The Law on Public Procurement is amended to allow referendum commissions to perform public procurement under the accelerated referendum process, still meeting the general
standards for transparency and accountability stipulated by this law.

6. The list of documentation based on which a new electoral address of a voter is determined is extended to include court decisions determining the domicile/residency registration of a person in a civil or administrative court procedure.

7. Provisions for electronic voting should be excluded from the Draft Law No 3612.

Campaign and Campaign Finance

1. The procedure for returning unspent budget funds allocated to conduct a referendum, as well as the procedure for submitting reports of income and expenditures, should be brought in line with the similar provisions under the Election Code.

2. The ceiling on party and candidate campaign funds in an all-Ukrainian referendum should be further lowered.

3. The mandate of the CEC and the National Agency for Prevention of Corruption concerning oversight with referendum campaigning funds should be clearly determined.

4. The campaign finance provisions of the draft referendum law should be brought in line with the amendments to the Law on Political Parties introduced in December 2019, including requirements to the form and structure of financial reports and the procedure for their submission.

5. Contributions by the members of the initiative groups, parties, and civil society organizations made of their own funds should be limited to the amount which private donors – physical and legal persons – may donate to referendum campaign funds.

6. There should be mandatory televised debates between supporters and opponents of the referendum question on the channels of the public service provider (Suspilne TV/Radio).

7. Information posters of supporters and opponents of the referendum question should be disseminated well in advance of referendum day.

8. A limited amount of airtime on the public service provider/public radio free of charge for referendum subjects should be allocated from the State budget.

9. Proportional, effective, and dissuasive sanctions for violations of the rules for campaigning/coverage of the pace of the referendum process in media should be introduced.

10. The procedure for campaigning through the Internet and online, and oversight with such campaigning should be adequately regulated.

Complaints and Appeals

1. The procedure and deadlines for challenging violations of referendum legislation should be brought in line with the similar provisions envisioned in the Election Code.

2. The deadline for submitting complaints to referendum commissions should be extended to five days.

3. Referendum commissions should be obliged to consider complaints that do not meet the formal requirements to such complaints if the factual data addressed in the complaint and the evidence allow the commission to consider the complaint on its merits.

Persons with disabilities

1. The provisions that require the State Register of Voters (SRV) to mark and automatically add voters with permanent physical disabilities to the home-voting excerpt without the voter’s consent should be excluded from Draft Law 3612.

2. The provisions of the Draft Law No 3612 regarding use of accessible formats and universal design should be further specified.
Background

Once the 2012 National Referendum Law was recognized unconstitutional, a legal vacuum emerged in the regulation of national and local referendums in Ukraine. Until this vacuum is filled, it is not possible to hold referendum in Ukraine. This makes it impossible to change specific chapters of the Constitution (i.e., chapters I, III, and XIII requiring approval by the national referendum) and also restricts citizens’ right to participate in public affairs directly, through referendums. Following their inauguration in 2019, the new Parliament established a Working Group (WG) to draft a new version of the National Referendum Law. The WG finalized the draft National Referendum Law in March 2020 and forwarded it for online public consultations that were held through April and May 2020. The WG draft law and proposals suggested during public consultations by IFES and others served as the basis for the President’s recent draft law No 3612. This draft was registered in Parliament on June 9, 2020. The text below analyzes the key provisions of this draft law in more detail. The recommendations listed above for fixing its flaws and bringing the draft law No 3612 into conformity with the international standards and best practices in the respective area are based on this analysis.

The subject of the national referendum, referendum questions and initiation of the referendum

According to the Draft Law No 3612, the following issues can be decided by the national referendum:

- Amendments to specific chapters of the Constitution of Ukraine (namely, Chapters I, III, and XIII);
- Issues of the national importance;
- Approval of the law of Ukraine that ratifies international agreement whereby the territory of Ukraine is to be changed; and
- Abrogation of the law or particular provisions of the valid law.

The possibility of deciding some of the above issues by the national referendum appears to be questionable. In particular, given that many provisions in the law are closely connected, their exclusion from the law/abrogation of a specific provision can make it impossible to apply the law entirely. Therefore, consideration should be given to removing from the Draft the provisions whereby cancelation of specific legal provisions from the effective laws can be decided by the national referendum.

Under the Draft Law No 3612, the issues of the national importance include all the issues “that affect the entire Ukrainian nation and constitutes public interest.” This definition is too vague and can raise doubts as to whether a particular topic can be defined as the “issue of the national importance” and subsequently be decided by the national referendum. Of note, the legal frameworks of several European states do not provide for or even explicitly prohibits referendums on broadly formulated proposals. For instance, in Armenia, Denmark, France, Ireland, the Netherlands, and Turkey, only precisely formulated drafts can be subject to referendums.\footnote{European Commission for Democracy Through Law (Venice Commission), Referendums in Europe – An Analysis of the Legal Rules in European States, p.66; \url{https://www.venice.coe.int/webforms/documents/default.aspx?pdfFile=CDL-AD(2005)034-e}} If the Draft Law No 3612 is still to provide for the possibility of deciding the issues of the national importance by referendums, the list of such
issues or, at least, criteria whereby a particular issue can be referred to “issue of national importance,” should be specified in the Draft Law No 3612.

According to the Venice Commission’s Code of Good Practice on Referendums, the questions submitted to a referendum must respect the unity of form (the same question must not combine a specifically worded draft amendment with a generally-worded proposal or a question of principle); unity of content (there must be an intrinsic connection between the various parts of each question put to the vote, to guarantee the free suffrage of the voter, who must not be called to accept or refuse as full provisions without an intrinsic link), and unity of hierarchical level (the same question should not simultaneously apply to the legislation of different hierarchical levels, such as issues falling within the scope of regulation by the Constitution and law). The referendum question must be clear (not obscure or ambiguous); it must not be misleading; it must not suggest an answer. Instead, Article 19 of the Draft Law No 3612 that lists the requirements to the referendum questions, only requires that the referendum questions must be clear and understandable and avoid misinterpretations. In the absence of other requirements to the referendum questions, the possibility of deciding the “issues of the national importance” by referendums poses the risk that both the principle of unity of form and the principle of unity of hierarchical level can be violated. The requirements to the referendum questions foreseen in Article 19 of the Draft Law No 3612 should be brought in compliance with the Venice Commission’s Code of Good Practice on Referendums to provide that referendum questions must respect the principles of unity of form, content and hierarchical level and must not suggest an answer.

The Draft Law No 3612 makes it clear that only one proposal/question can be decided by national referendum at a time. In contrast, the WG draft law stipulated that up to three proposals could be decided by the referendum. IFES suggested limiting the number of referendum questions to one and welcomes that its recommendation has been addressed.

The Draft provides that if the CEC has doubts with respect to the constitutionality of the question to be decided by the referendum, it must suspend the registration of the initiative group and forward to the President a submission seeking the President to apply to the Constitutional Court with respect to the constitutionality of the referendum question or constitutionality of the draft law to be decided by the national referendum. If within 40 days after the receipt of such submission the President of Ukraine fails to apply to the Constitutional court or if the Constitutional Court fails to institute constitutional complaint proceedings based on the President’s complaint, the CEC must renew the registration of the initiative group, and, within five days following the renewal of the registration process, either to register the initiative group or to refuse of its registration. Such an approach creates preconditions either for holding referendums on potentially unconstitutional issues or for halting the preparations to the referendum by refusing to register the initiative group by the CEC. The Draft Law should make it clear that the CEC must register the initiative group only if it has received the Constitutional Court’s opinion on constitutionality of the referendum question/draft law to be decided by the referendum.

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The Draft provides that voters can support the initiative to hold referendums in one of three ways, namely, by signing paper signature lists, by forwarding a statement of support to the referendum initiative to the regional/local branch of the CEC, or by submitting a statement of support electronically, through the CEC’s “Vybory” electronic system. IFES has previously criticized the similar provisions in the WG draft as allowing for the three possible options for collecting signatures in support of holding the referendum without clarifying how the CEC and its territorial branches interact/exchange information with the initiative group would have undermined the overall oversight of the initiative group over how many signatures have been collected by a specific date, as well as would have resulted in collecting fewer signatures in some regions than required by the law. This recommendation was adequately addressed in the President’s Draft. The Draft provides that the information on the number of signatures in support of the referendum received through the “Vybory” system and CEC branches must be published on the CEC website daily. This is a welcome improvement.

The procedure for verification of the voter signatures in support of the referendum remains unclear. The Draft does not explicitly require that all the signatures must be verified, while the Code of Good Practice on Referendums requires verification of all signatures. The verification procedure is supposed to be approved by the CEC instead of regulating this procedure directly in the law. This may open the door to selective verification or potential abuse. The Draft Law No 3612 should explicitly require all signatures in support of the referendum to be verified. The verification procedure should be specified in the law and should not be left at the discretion of the CEC.

The Draft Law No 3612 provides that not only political parties but also NGOs can be registered as supporters of/opponents to the referendum questions.

While such an approach does not directly violate the international standards, it may lead to the politicization of the NGOs as some of them would be associated with political parties registered as supporters of the referendum question (in the case when NGO is registered as a supporter of the referendum question) or parties registered as opponents of the referendum question (if the NGO in question was registered as an opponent to the referendum question). The mandatory registration of an NGO as either supporter or opponent to the referendum question would also mean that NGOs that were registered neither as supporters nor as opponents to the referendum question would not be allowed to comment in any form on the referendum question(s) as all such comments would very likely be treated as referendum campaigning, especially if they encourage the voters to vote for or not to vote for the referendum question. Establishing a de facto prohibition to comment on the referendum question(s) for NGOs that were not registered as supporters or opponents may be inconsistent with Art.10 of the European Convention of Human Rights and Fundamental Freedoms. According to the Venice Commission’s Code of Good Practice on Referendums, “democratic referendums are not possible without respect for human rights, in particular, the freedom of expression and of the press...[...]...restrictions on these freedoms must have a basis in law, be in the public interest and comply with the principle of proportionality”\(^4\). In addition to that, imposing such an obligation (as well as prohibitions related to this obligation) for the NGOs in the absence of the...

\(^4\) Code of Good Practice on Referendums, p.II.1;
same obligations and prohibitions for the citizens can be viewed as the violation of the principle of equality of the parties, NGOs and citizens in referendum campaigning.

Different countries regulate NGO participation in referendum campaigning differently. Some states, such as the United Kingdom and Canada, require the NGOs and individual citizens to register as referendum campaigners only in the case when the referendum campaigning expenses made by the NGO or citizen in question exceed a certain limit, CAD 5000 in Canada\(^5\) or GBP 10,000 in the UK\(^6\). In other states, the legal framework fails to specify who is entitled to participate in the referendum campaigning (Estonia\(^7\)) or allows NGOs to participate in the referendum campaigning on equal conditions with political parties (Moldova\(^8\)), or allows to campaign during the referendums only to political parties (Montenegro\(^9\) and Hungary\(^10\)). In Portugal, the right to register as supporters and opponents to the referendum questions is granted to the citizen groups (comprising no less than 5000 citizens) as well as to the NGOs specified by political parties that conduct referendum campaigning through such NGOs.\(^11\)

If the Draft Law No 3612 is to provide for the possibility of registering the NGOs as supporters or opponents to the referendum question(s), such a registration should not prevent non-registered NGOs from expressing their opinions on the referendum questions.

Therefore, consideration should be given to introducing amendments the Draft Law No 3612 to provide for 1) the possibility of commenting the referendum questions by NGOs in principle; 2) criteria/conditions based on which an NGO that expresses its opinion on the referendum question must be a subject to mandatory registration as a supporter or opponent to the referendum question. For instance, registration can be required from an NGO if the amount of expenses on coverage of the referendum question exceeds a certain level or the information distributed by an NGO in question has the signs of referendum campaigning. If the latter approach is taking on board, the Draft Law No 3612 needs to clearly delineate between “commenting on referendum question/information coverage of the referendum” and “referendum campaigning” itself. Another possible solution can be to provide in the Draft that some specific means of campaigning (for instance, use TV or outdoor advertising) are available only to the registered referendum campaigners and are not available to NGOs that were not registered as supporters/opponents to the referendum question(s).

**Referendum management bodies**

According to the Draft Law, preparations to and holding of the referendum are managed by a three-

\(^5\) Canada, 1992 Referendum Act (An Act to provide for referendums on the Constitution of Canada); paragraph 15 (1); [https://www.legislationline.org/documents/action/popup/id/6032](https://www.legislationline.org/documents/action/popup/id/6032)


\(^9\) Montenegro, Law on the Referendum on State-Legal Status; Art. 27.


tier system of referendum commissions that includes the Central Election Commission, the District Referendum Commissions, and Precinct Referendum Commissions. In contrast to the elections, the draft National Referendum Law provides for the establishment of a separate Precinct Referendum Commission for organizing e-voting. This commission would be in charge of organizing e-voting for the referendum questions in the entire territory of Ukraine and abroad (Art.39 of the Draft Law). Article 57 of the Draft makes it clear that each voter would be allowed to apply to the Voter Register Maintenance Body no later than five days before the referendum to be included on the voter list at the polling station in charge of organizing e-voting.

It is unclear from the Draft Law how the e-voting would be organized, i.e., directly at the designated e-voting polling station (for instance, by using voting machines or computers placed at the polling station) or at the place of the voter's stay through the CEC online voting system that would be used to cast the votes electronically. If the e-voting is organized at the polling station, only a limited number of voters would be able to cast their votes – even if the Draft does not limit the maximum number of voters for such polling stations. In this case, e-voting at that polling station would turn into e-voting experiment aimed to test e-voting technology that would not allow to simplify voting procedure in the entire territory of Ukraine significantly and to figure out (due to the limited use of such an experiment) all the weaknesses of the e-voting. It would also exclude many voters from voting in the referendum as not all those who would be included on the voter lists at the e-voting polling station would be able to vote due to the long queues or other reasons not dependent on the voters. E-voting at the polling station through e-voting machines also poses a number of threats similar to those that Internet voting does have (covered in detail below).

If the e-voting is organized at the place of a voter's stay through, such an approach can be criticized likewise for a number of reasons. First, shift to Internet voting in elections and referendums should be preceded by a number of preconditions which include not only procurement and testing of the e-voting equipment, but also establishing mechanisms aimed to ensure credibility of the e-voting and voting outcomes, as well as effective and reliable protection of the Internet voting system from any unauthorized interference. IFES has repeatedly highlighted that the possibility of introduction of Internet voting should be carefully measured, especially given that many European states that tested e-voting systems decided to abstain from using e-voting broadly (with Estonia being the only exception to this rule). In addition to that, to make sure that the electoral legal framework is harmonized with the legal framework governing the referendums, the overall approach towards introducing e-voting should be the same for both elections and referendums, if e-voting is allowed in referendums, it should also be permitted during the elections and vice versa. Second, e-voting during the referendum would inevitably be administered by the CEC; the CEC will be in charge of protecting the e-voting system from unauthorized interference, of informing the voters on the voting procedure and, ultimately, of establishing the referendum results. Therefore, if referendum legal framework would allow for e-voting, the overall administration of e-voting should be a part of the mandate of the CEC (whose powers expand to the entire territory of Ukraine) rather than of the Precinct Referendum Commission whose powers can be exercised only in the territory of the referendum precinct. Finally, there is a high risk that the politicization of the work of e-voting commission and lack of professionalism of its members may harm preparations to/overall administration of the e-voting that would undermine voters' trust in the e-voting. Therefore, if the referendum legal framework is to provide for e-voting in the national referendums, e-voting should be administered by the CEC. The Draft Law No 3612 should specify the e-voting procedure while shifting to e-voting itself should be preceded by the
creation of appropriate preconditions allowing to use this voting instrument in line with the international standards (the issues related to voting are covered in the section “Voting, vote counting and establishment of the referendum results” of this report).

The provisions of the Draft Law setting up the general principles of operations of the referendum commissions, document flow/decision-making procedures, the status of members of the referendum commissions are generally harmonized with the respective provisions of the Election Code. This should be welcomed. However, consideration should be given to amending both the Election Code and the Draft with provisions that would provide for automatized document flow within the system of election and referendum commissions. To date, some NGOs have already developed software that could significantly improve and automatize the document flow within the commissions and commissions' operations in general, in particular, by enabling the commissions to create minutes of the meetings, to draft resolutions and to prepare other documents used/created by the commissions using such a software. The Draft Law and Election Code should be amended to provide for the possibility of submitting the documents to the election and referendum commissions in electronic format (including applications, complaints, submissions of the nominees to the lower-level commissions), the possibility of preparing and issuing the electronic documents by the commissions themselves, including during the vote counting and establishing the voting results (in particular, e-copies of the vote-counting protocols).

The Draft specifies the powers of the Precinct Referendum Commissions and District Referendum Commissions related to preparations and holding of the referendums (Articles 43 та 44 of the Draft). At the same time, the powers of the CEC are not properly specified in the Draft Law No 3612 as Article 24 provides only for the very general regulation of what the CEC must do in relation to preparations to the referendum while most powers of the CEC are specified in other Articles of the Draft. In previous election laws, the CEC powers were listed in one separate Article and were covered in a greater level of detail in other Articles that made the election laws more user-friendly for election contestants, in particular, those without a legal background or election-related experience. The same approach should be applied to the Draft Law No 3612. Article 42 of the Draft Law No 3612 should be amended to specify the powers of the CEC with regards to preparations to/holding of the national referendum.

According to the Venice Commission’s Code of Good Practice on Referendums, “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.” One of the critical flaws of the Draft is that it does not provide for the mechanisms aimed to ensure a balanced representation of the supporters and opponents of the referendum question(s) on the Precinct and District Referendum Commissions. The absence of such a balance may lead to excessive politicization of the respective commissions and result in a biased treatment of some referendum subjects. For instance, Article 45 of the Draft provides the members of the District and Precinct Referendum Commissions can be nominated by the referendum initiative group (which is a supporter of the referendum proposal per se), by the political parties that managed to create party factions in the current parliament (the commissioners proposed by such parties must be appointed to the respective commissions, regardless whether a party in question supports or opposes to the referendum question(s); moreover, the parties that have factions in the current Rada are not even required to be registered as supporters and opponents of the referendum proposal(s)), as well as by the parties that registered as supporters or opponents of the referendum question(s). The referendum initiative group and parties with factions
in the Rada are guaranteed representation in any commission to which they suggested nominees. In contrast, representation of other parties, i.e., those registered as supporters or opponents of the referendum question, depends on whether their nominees have been selected to the respective commission through the lottery. Therefore, depending on the attitude of the parliamentary parties to the referendum proposal(s), some commissions can be dominated by the referendum proposals supporters, while others – by referendum question opponents. The Draft Law needs to be amended to provide that the District and Precinct Referendum Commissions are formed in a way so that the opponents and supporters of the referendum question are equally represented on each commission. The parties which created their factions in the current parliament should be allowed to propose referendum commission nominees only if they registered as opponents or supporters of the referendum question(s).

Unfortunately, neither the Election Code nor the Draft Law provides for mandatory training and certification of the election/referendum commissioners on election-/referendum-related matters. At the same time, both the Code and the Draft allow replacing the election and referendum commissioners by those who nominated the commissioners in question at any time and for any reason. Unlimited possibility of replacing the commissioners and absence of mandatory training of the commission members are inconsistent with the Venice Commission's Code of Good Practice in Electoral Matters (which supplements the Code of Good Practice on Referendums, in particular, as regards the procedures for organizing the elections and referendums). Unrestricted replacements and absence of mandatory training and CEC-led certification of the commissioners significantly decrease the level of professionalism of the election and referendum commissioners and diminish the effectiveness of the training programs for commissioners delivered within the framework of the international technical assistance programs. For that reason, the Election Code and the Draft need to be amended to provide for mandatory training of those who are nominated to the election/referendum commissions on electoral/referendum issues with the subsequent certification of the nominees by the CEC Training Center before their appointment to the respective commissions.

During preparations for the 2019 parliamentary and presidential elections, the CEC repeatedly faced difficulties with procuring election-related goods and services within the narrow timeframes envisioned in the Public Procurement Law. Short timelines for preparations for the elections and lengthy procurement procedures did not allow the CEC to procure the goods or services without violating the provisions of the election law or the procurement legislation. Both the Election Code and the Draft Law No 3612 fail to provide for effective measures to resolve that long-standing problem. Moreover, a short duration of the referendum process (60 days) would mean that procuring the referendum-related goods and services would be even more difficult than before. The transitional provisions of the Draft Law No 3612 should provide for amending the Public Procurement Law to enable the election and referendum commissions to conduct effective public procurement within the narrow timelines of the election and referendum processes while respecting the general principles of transparency and accountability of the public procurement foreseen in the Public Procurement Law.

Voter lists

The provisions of the Draft governing compiling and updating the voter lists, the deadlines for delivery of the preliminary and updated voter lists to the Precinct Referendum Commissions are completely harmonized with the respective provisions of the Election Code. Another positive development in the
Draft (and Election Code) is that no changes are allowed to the updated voter lists on the election/referendum day. This development addresses the recommendation of the Code of Good Practice in Electoral Matters.

Similarly to the elections, during the national referendum, any voter will be allowed no later than on the fifth day after the start of the referendum process to file an application to the respective Voter Register Maintenance Body seeking to change the voter’s address through a simplified procedure. To do that, a voter alongside with the request for such a change will be required to submit the documents confirming the new voter’s address, such as renting contract with a landlord for the apartment in which the voter actually resides, a document confirming that voter conducts business activities at the respective address, a document confirming the ownership rights on the apartment located at the new address, IDP certificate, etc. The list of individual documents is exhaustive. However, not all economic migrants would have the required documents, and the procedure for changing the voter’s address would be cumbersome for some of them. If the requirement to submit a document confirming a voter’s address is maintained, the list of documents that serve the grounds for changing a voter’s address should be supplemented by the court decisions issued within the framework of civil court procedure or administrative adjudication procedure whereby the actual place of residence of a person is established.

The voters who would not be able to file applications to change their voter’s address before the legally established deadline would still have an opportunity to change the place of voting without changing the voter’s address. The Draft Law provides for the same procedure for changing the place of voting without changing the voter’s address, as foreseen in the Election Code for the national elections. In particular, voters would be allowed to file the respective applications no later than in five days before the vote, and will also be allowed to file such applications electronically. In general, the provisions of the Draft Law No 3612 governing the compiling and updating the voter lists during the national referendum would allow all the voters wishing to participate in the referendum to exercise their voting rights at the place of actual residence, either through changing the voter’s address or by changing the place of voting without changing the voter’s address. This would ensure the effective implementation of the principles of direct and equal suffrage.

Referendum finance

The Draft Law stipulates that the CEC local branch is required to return the remaining budget funds that were not spent on preparations to the referendum within five days after the date when the referendum results were established. Within 15 days following the establishment of the referendum results, the local CEC branches must deliver to the respective regional TEC branch the financial report on receipt and use of the state budget funds allocated for preparations to and holding of the national referendum. Such a procedure for returning the remaining budget funds and reporting on their use is different from the parliamentary elections in which the respective obligations are imposed on the District Election Commissions. Given the economic downturn caused by the COVID-19 pandemic, it is unclear whether it would be possible to establish the regional and local CEC branches in the absence of the needed funds in the state budget of Ukraine. The procedure for returning remaining budget funds that have not been used for the referendum-related purposes, as well as the procedure for reporting on the receipt and use of those funds, should be harmonized with the respective provisions of the Election Code applicable to the national elections. If the CEC branches are to be in charge of returning the unused budget funds and reporting on their use, the transitional provisions of the
Draft Law No 3612 should specify who would exercise these powers if the CEC local and regional branches are not established.

The provisions governing referendum campaigning finance through the election funds of the parties and NGOs registered as supporters or opponents of the referendum proposal(s) are very much the same as provisions governing campaign finance in the national elections. One of the Draft Law's welcome developments is that it sets up a referendum campaign spending limit. Each registered party or NGO would not be allowed to spend on referendum campaigning more than 20,000 minimum monthly salaries. However, this spending limit appears to be too high (UAH 105,000,000 or USD 4,000,000) to prevent excessive funding of referendum campaigning. The referendum spending limit for parties and NGOs registered as opponents and supporters of the referendum questions should be significantly decreased, especially given that the overall referendum process lasts as long as 60 days.

Art. 72 of the Draft Law requires that the referendum fund of the NGO registered as supporter or opponent of the referendum proposal can be formed from the NGO own funds (except for the budget funds, the funds received within the framework of the international technical assistance projects, grant agreements providing that such funds were received by the NGO directly or through other persons) as well as from private donations of the legal and physical persons who are allowed to make donations to political parties under the Law on Political Parties in Ukraine. Given that NGOs do not necessarily receive state funding or the funds of the technical assistance projects through separate bank accounts and such funds are not necessarily separated from other NGO funds, it would be hardly – if at all - possible to ensure that NGOs respect the above restrictions imposed by the Draft Law. In their current version, these provisions pose the risk that some NGOs would be accused of funding the referendum campaigning from the legally prohibited sources. In addition to that, the legal framework governing the NGO activities provides for much softer restrictions on NGOs compared to the restrictions applicable to the funding of political parties. For instance, the Law on Political Parties in Ukraine explicitly prohibits any donations to political parties from the legal persons with shares in the authorized capital owned by foreign legal or physical persons; such legal persons are also prohibited from making donations to the election funds. These restrictions, however, do not apply to the NGOs. Hence, despite the legal prohibition to make donations to the NGO referendum funds by the donors who are not allowed to fund political parties, such donors still can transfer the funds to NGOs directly without violating any legal requirements. In contrast, NGOs can then transfer those donations to their referendum funds as NGO’s own funds. These inconsistencies can be addressed and fixed in one of the three different ways: 1) by prohibiting NGOs to fund referendum campaigning and by excluding the NGOs from the list of those who are allowed to campaign during a referendum (in this case, NGOs still should be allowed to comment on referendum proposals subject to restrictions imposed by the law); or 2) by including a provision into the Draft Law No 3612 whereby NGOs are allowed to use on referendum campaigning only those funds, the sources of which can be identified and which have not been received from the donors who are not allowed to make donations to political parties; or 3) by prohibiting NGOs to spend any own funds on referendum campaigning.

The Draft states that no spending limits apply to the election funds created by the initiative group of the national referendum. Accordingly, the initiative group would have an advantage in funding referendum campaigning that other supporters and opponents of the referendum question would not have. According to the Venice Commission’s Code of Good Practice on Referendums, “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.\textsuperscript{12} If the Draft is to provide for the referendum campaign spending limits, these limits should equally apply to spend by both the supporters (including initiative groups) and by opponents of the referendum proposal.

The Draft stipulates that the pre-referendum and post-referendum financial reports of the referendum fund managers are to be reviewed and analyzed by the National Agency for Prevention of Corruption (NAPC) and by the CEC. The mandates of the NAPC and CEC in terms of the referendum campaign finance oversight and review of the referendum finance reports are not properly delineated, thus posing the risks of overlaps and ineffective oversight. The Draft needs to be amended to specify the supervisory powers of the NAPC and CEC re referendum campaign finance.

The Draft suggests that the referendum campaign finance oversight by the NAPC and CEC is de facto limited to verification of the timeliness, accuracy, completeness, and reliability of the referendum finance reports submitted before and after the referendum. It is unclear from the Draft whether the controlling agencies – and if so, to which extent and by which means – are entitled to supervise the referendum campaign finance beyond the referendum funds, in particular, funding the referendum by so-called “third parties,” through cash, donations in-kind, etc. The Draft should, therefore, specify the procedure for referendum campaign finance oversight, regardless of whether the respective funding is made through the referendum funds.

Similar to the Election Code, the Draft fails to incorporate the most recent amendments to the Law on Political Parties in Ukraine introduced in December 2019. These amendments, in particular, established new format and structure of the party quarterly financial reports, released party donors from the obligation to file written statements to the banks whereby they confirm their compliance with the requirements to the donors foreseen in the Law on Political Parties in Ukraine, allowed for making donations to political parties through online platforms, i.e., without going to the banks. However, the format and structure of the referendum campaign finance report are inconsistent with the format and structure of the party financial reports; the donations to the referendum funds can be made only through the banks, while donors are still required to submit statements of compliance to the banks. The provisions of the Draft setting the requirements to the format and structure of the referendum campaign finance reports, as well as the procedure for filing the respective reports and other related provisions, should be aligned with the December 2019 amendments to the Law on Political Parties in Ukraine.

The Draft Law No 3612 fails to introduce any limitations on the value of own donations that can be made by NGOs, political parties, and members of the referendum initiative groups to their own referendum funds. The absence of any restrictions on the value of own donations of the electoral contestants to their election funds was criticized by the Venice Commission and Office of Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe (OSCE/ODIHR) in relation to campaign finance in elections. The Draft needs to be amended to restrict the maximum value of donation that can be made by the members of the referendum initiative groups, NGOs, and political parties to their own referendum funds. The maximum permissible value of one’s own donation should be consistent with the maximum value of the private donation that can be made to the referendum fund by the legal or physical person.

\textsuperscript{12} Venice Commission, Code of Good Practice on Referendums, p.2.2.h.
Informational and media coverage of referendums

Overall, the provisions of the Draft Law No 3612 governing the media coverage of the referendum are almost the same as the provisions governing the media coverage of the elections under the Election Code.

One of the negative developments is that the Draft Law No 3612 does not provide for any TV debates between the supporters and opponents of the referendum proposal. Given that the overall referendum process is limited to only 60 days, holding such debates would have enabled the voters to receive sufficient and well-balanced information on the issues to be decided by the referendum, as well as on the outcomes of the vote for or against the referendum proposal. Debates between the supporters and opponents of the referendum questions are foreseen in the legislation of a number of states, for instance, in Lithuania.13 The Draft Law should be amended to provide for a series of TV debates between the supporters and opponents of the referendum proposals on public service broadcasting channels. During such debates, the airtime between the supporters and opponents of the referendum question should be divided equally. The Draft should also specify at least general requirements and key principles for holding such debates as in the case with the election of the President of Ukraine.

The Draft Law mandates the CEC to ensure publication and delivery of the referendum informational materials to the Precinct Referendum Commissions. These materials include referendum posters that must explain the voting procedures and sanctions for violations, as well as the texts of the proposal to be approved by the referendum, such as draft law, international agreement, etc. The number of such materials to be printed for each polling station is not specified in the Draft and will be subject to approval by the CEC. It is unclear from the Draft Law No 3612 in which format the text of the referendum proposal would be published, i.e., whether it would be published on the poster or in a small handbook/booklet as in the case of the parliamentary elections. Obviously, if the text of the referendum proposal would be printed on the poster, voters would face the problems with reviewing those texts, in particular, if the referendum proposal (Draft Law No 3612, international agreement) is large and/or the poster is placed in a hardly accessible part of the voting premises. The Draft Law No 3612 should require the texts of the referendum proposals to be printed in the form of a booklet or a leaflet; it should also specify the number of the respective posters and pamphlets to be printed and delivered to each polling station by the CEC.

The Draft Law explicitly prohibits any referendum campaigning on the day preceding the vote and on the voting day itself. However, Article 92 of the Draft Law No 3612 provides that referendum initiative group, as well as each party or NGO, registered as supporter or opponent of the referendum question, has the right to publish information poster (up to 2,500 printed characters) per each polling station at the expense of its own referendum fund to explain the arguments for or against the referendum proposal. Such posters are to be placed at the polling stations and would be available even on the voting day. Since the information in the poster would encourage a voter to vote for or not vote for a referendum proposal, such posters would be de facto referendum campaigning materials that are prohibited from being placed on the day preceding the vote and on the voting day. Also, the premises

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of the precinct commissions often have limited space posing the risk of manipulations with posters. For instance, the posters encouraging voters to vote for a referendum question can be placed in a more accessible part of the premises, while the posters encouraging not to vote for a referendum question can be placed in the less accessible place or even in stacks on the table as the case was with candidate/party posters during some elections in the past. The Code of Good Practice on Referendums recommends that “a 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”\(^\text{14}\) rather than shortly before the voting day or on the voting day itself.

**Informing the voters on whether to vote for or not to vote for a referendum proposal must be ended by the deadline, after which no referendum campaigning is allowed. The provisions whereby the posters of the proposal's supporters and opponents are placed at the polling stations on the voting day should be removed from the Draft.**

**Referendum campaigning**

Draft Law No 3612 allows to conduct referendum campaigning only to those who were registered as supporters or opponents of the referendum proposal(s); in addition to that, campaigning can be funded only via referendum funds of the respective supporters and opponents. If an NGO that was not registered as a supporter or opponent of the referendum proposal issues a critical report on the issue related to the referendum subject, such a report can be treated as referendum campaigning as it actually discourages voters from voting for the referendum proposal. This would create the grounds for holding such NGO liable for violating the referendum campaigning rules. **The right to freedom of expression should be exercised not only by the citizens but also by NGOs for which expressing criticism/concerns about public policy issues or government activities is an integral part of the NGO's overall role in a democratic society. The Draft should not condition the possibility of expressing criticism against the referendum proposal by registration/non-registration of NGO as supporter or opponent of the referendum proposal.**

The Draft does not provide for the allocation of free (i.e., paid from the state budget) airtime or printed space for referendum campaigning to the supporters and opponents of the referendum proposal. Under the Draft Law No 3612, the referendum campaign expenses can be covered only from the election funds of the referendum initiative group, political party or NGO registered as supporter or opponent of the referendum proposal. Allocation of free airtime and/or printed space for the respective purposes (including for debates on TV) is an important precondition for voter awareness of the referendum proposal and referendum outcomes, as well as for ensuring a level playing field for supporters and opponents of the referendum question. Many European states introduced a requirement into their referendum legal framework whereby the airtime on public service broadcasting channels must be distributed equally between the supporters and opponents of the referendum proposal (Albania, Azerbaijan, Bulgaria, Cyprus, Lithuania, the Northern Macedonia, Sweden and Switzerland)\(^\text{15}\). The Draft Law should be supplemented by the provisions that would provide for the allocation of a limited amount of airtime on public service broadcasting channels for

\(^{14}\) Code of Good Practice on Referendums, p.3.1.d.

referendum campaigning at the expense of the state budget funds. Such airtime should be equally distributed between the supporters and opponents of the referendum proposal.

While the Draft Law stipulates that the National Broadcasting Council (NBC) is in charge of supervising media coverage of referendums and referendum campaigning, **the respective supervisory powers are not specified.** This poses the risk that some media would be arbitrary prosecuted for alleged violations while others would escape liability for committed offenses. The Draft should specify the powers of the agencies in charge of supervising referendum campaigning and coverage of referendums by audiovisual and printed media.

Sanctions for violating the provisions governing media coverage of referendums, as foreseen in the Draft, can hardly be considered proportionate. In contrast to the Election Code that does not provide for the possibility of suspending the broadcasting licenses or printing out the media outlets in the case when media committed certain violations of the campaigning rules, the Draft still allows them to suspend licenses and halt printing out the printed media. The respective provisions should be removed from the Draft. At the same time, the system of sanctions for violating the referendum coverage/referendum campaigning requirements should be strengthened so that the respective sanctions are effective, proportionate, and dissuasive.

The Draft Law No 3612 does not regulate the referendum campaigning on the Internet and through online platforms. Consideration should be given to amending the bill to introduce the respective regulation.

**Voting, vote counting, and establishment of the referendum results**

The procedures for preparations for voting itself, vote counting, and establishing the referendum results, as foreseen in the Draft, are very much the same as the procedures established by the Election Code. The key difference between the Draft Law No 3612 and Election Code is that in parliamentary elections, voters vote for the party list and candidate on that list. In contrast, under the Draft voters vote in support or against the referendum proposal.

The critical innovation of Draft Law No 3612 is the introduction of **e-voting** that would be organized by the special Precinct Referendum Commission authorized to organize e-voting. The procedure for e-voting is not properly covered by the Draft. The Draft only states that only those voters who were included on the voter lists at the respective PRC would be allowed to cast their votes electronically, that votes would be cast through the CEC electronic system and that in case of security threats, the voting can be suspended or canceled. In contrast to Estonia, where the e-voting procedure is regulated in detail by a separate chapter of the Riigikogu Election Act, the Draft Law No 3612 includes only a few provisions on e-voting.

Testing and practical use of e-voting in European states demonstrated that the citizens do not feel confident about this instrument of voting due to lack of transparency (since the voting is secret and nobody can check how a particular voter has voted, the voting outcome by large depends on whether the e-system was able to process the electronic votes in a correct and accurate manner and without unauthorized external interference). E-voting also poses several risks, including the risks of abuses and unauthorized interference with the system operations, that may overweight the benefits of this instrument. For these reasons, the experiments with voting turned to be a success only in Estonia, while many other states (including Netherlands, Ireland, Germany, and the United Kingdom) that tested e-voting in some elections, decided not to use e-voting broadly. While some allege that e-voting has a positive effect on voter turnout, research suggests that it has little to no effect on voter turnout.
According to the Code of Good Practice in Electoral Matters, “electronic voting methods must be secure and reliable: they are secure if the system can withstand deliberate attack; they are reliable if they can function on their own, irrespective of any shortcomings in the hardware or software...[...]...furthermore, the system’s transparency must be guaranteed in the sense that it must be possible to check that it functions appropriately”. The Code of Good Practice on Referendums provides that electronic voting “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.”

Given that vote-buying is not something uncommon for the Ukrainian elections (e-voting does not exclude the risk of buying and selling “Internet votes”), that election security risks (in particular, those connected to Russian interference with operations of the Ukrainian electronic systems in the past) remain pronounced, and that majority of state institutions do not enjoy a high level of citizen trust, shifting to Internet voting in elections and referendums in Ukraine seems to be a premature decision. If the Draft is to provide for e-voting during the referendum(s), the respective provisions in the Draft should be clear to the voters and as detailed as practically possible.

Similar to the Election Code and previous electoral legal framework, the Draft fails to specify to which extent the vote-counting protocol data can be changed by the Precinct Referendum Commission in the case when the protocols are updated due to technical errors that can be fixed without vote recount. In previous elections, there have been a number of cases when the election commissions corrected not only the protocol data with technical errors that were supposed to be updated but also the data that did not require any change and were related to the voting results. The Draft should make it clear that only the data with errors should be subject to updates; it should be prohibited to make changes to the figures/data that were entered correctly and do not require any changes.

Under the Draft, precinct results can be invalidated by the Precinct Referendum Commission or by the District Referendum Commission if the number of cases of illegal voting or other violations exceeds a certain level (5-10 percent of the total number of those who voted at the polling station). Establishing “fraud tolerance thresholds” has been repeatedly criticized by the OSCE/ODIHR and Venice Commission. The Venice Commission’s Code of Good Practice on Referendums recommends canceling the referendum results (entirely or within a particular district) if the outcome was affected by violations. According to the Draft, the referendum results can be invalidated neither within a particular constituency nor nationally. The Draft Law could be amended to provide that precinct/district results, as well as results of the entire referendum, can be canceled in the case when the scale of violations committed in relation to a referendum does not allow to establish the genuine will of the voters.

Referendum dispute resolution

The procedure for challenging the decisions, actions, or inaction that violate the legal framework governing the referendums is different from the respective procedure applicable to the elections
under the Election Code. In particular, according to the Election Code, the CEC is entitled to consider complaints only against the inaction of the District Election Commissions (DECs), while complaints against the decisions and actions of the DECs can be filed only to the courts. The Draft Law No 3612, however, provides that the CEC must consider complaints not only against the inaction of the District Referendum Commissions but also against decisions and actions of the DRCs, as well as complaints against the DRC members. Further, under the Election Code, the PECs do not review any complaints, while the Draft provides that PRCs can review complaints against their members. Of note, none of the previous election laws allowed the PECs to consider complaints against their members, and such complaints could be lodged only with the DECs. In contrast, the PECs were entitled to consider complaints only against the violations committed during voting by the observers, candidate proxies, and party agents. The deadlines for filing and reviewing complaints by the respective commissions also differ. The Election Code stipulates that election complaint can be filed within two days following the day when the alleged violation was committed, while the Draft Law allows three days for filing a complaint and three days for its consideration. The draft provisions establishing the terms for filing and considering complaints, the scope of jurisdiction of the referendum commissions, as well as the overall procedure for dealing with the referendum complaints must be harmonized with the respective provisions of the Election Code. In both the Draft and Election Code the deadlines for filing complaints should be extended to five days following the day when the alleged violation was committed. This would contribute to ensuring the right to effective remedy and enable the election/referendum contestants to properly prepare their complaints and related evidence.

Similarly to previous election laws, the Election Code and the Draft Law establish a detailed list of requirements the election complaints must comply with. Failure to adhere even to one of those requirements would result in rejection of complaint by the commission. The international election observation missions have repeatedly criticized the formalistic approach towards rejection of complaints due to technical defects, as almost 60 percent of all complaints filed in relation to electoral violations were rejected by the commissions without considering their merits due to failure to comply with the formalistic requirements. The Election Code and the Draft need to be amended to require the election/referendum commission to accept and review election complaints that fail to comply with the requirements to the complaint format if the substance of the complaint and available evidence allows considering the complaint on its merits.

**Accessibility of referendums to people with disabilities**

The Draft Law introduces several mechanisms aimed to ensure the accessibility of the referendums to voters with disabilities. They include the use of accessible formats during the referendum campaigning while posting referendum-related information on the CEC website, as well as the use of the tactile ballot guides, etc. The Draft, however, still includes some discriminatory provisions that were reflected in the previous election laws effective before the adoption of the Election Code, such as provision on mandatory inclusion of a voter with permanent disabilities on the excerpt from a voter list for homebound voting. Many other mechanisms for better accessibility of referendums are only mentioned in the Draft Law No 3612 and are not specified. To be effective, they need to be regulated in more detail.

The provisions that provide for mandatory inclusion of the voters with permanent disabilities on the excerpt from a voter list for homebound voting without the respective voter’s consent should be removed from the Draft Law. The draft provisions on the use of accessible formats during referendums should be further specified. The voters with limited moving capacity should be allowed to turn to the
Voter Register Maintenance Bodies (including through the voter’s “electronic office” on the SRV website) to request specific accessibility instruments they need to exercise their right to vote in referendum effective manner.

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