Chapter from Julie Smith (ed.), *The Palgrave Handbook of European Referendums* (Basingstoke: Palgrave Macmillan, 2021).

Note: This is the final typescript version of the chapter. Some further changes took place at the proofs stage, and pagination does not reflect final pagination. **Please cite only the published version.**

Chapter 4. The Rules of Referendums – Alan Renwick and Jess Sargeant

Referendums, like any large-scale processes of democratic decision-making, need to take place within a framework of rules. This chapter examines such rules. We survey how referendums are regulated in Europe today and how they ought to be regulated. We find that there are many important gaps in current regulatory frameworks: much more could be done to ensure that referendums play the most positive role they could in the overall democratic system.

Making such judgements clearly requires a framework for evaluation. We are helped towards that by the Venice Commission (formally, the European Commission for Democracy through Law), which is the Council of Europe's constitutional advisory body. In 2007, it published a *Code of Good Practice on Referendums*, which sets out recommendations for many aspects of referendum conduct. This is founded largely on the principles of universal, equal, free, and secret suffrage. Equal suffrage implies a requirement for balance and state neutrality in the design of referendum processes. Free suffrage implies not only that voters can freely express their wishes, but also that they can freely form their opinions, without being subjected to undue coercion or campaigns of misinformation, and with access to the information they want from sources they trust. The Venice Commission also grounds its recommendations on the principles of protecting human rights and the rule of law.

Beyond these principles, we suggest that referendums should also contribute to the effective functioning of the democratic system as a whole. No democracy beyond the tiniest community can operate without representative institutions. Direct democratic instruments such as referendums must exist alongside these and not undermine them. Furthermore, democracy involves not just voting, but also the processes of listening, discussing, deliberating, bargaining, and compromising that must precede any decision. Referendums should not circumvent these processes but should rather be designed to enhance them.[1]

Collectively, these principles imply that we should view referendums holistically, looking not just at the vote itself, but also at the entire process of calling a referendum and conducting the campaign. We identify five key dimensions of referendum regulation that demand attention:

[1] Our thinking on these matters is informed by our having served, respectively, as Research Director and Research Assistant for the UK's Independent Commission on Referendums (see Independent Commission on Referendums 2018). Alan Renwick has also acted as advisor to the Rapporteur of the Committee on Political Affairs and Democracy of the Parliamentary Assembly of the Council of Europe for an inquiry into referendum rules, and this chapter draws on his work in that role. The views expressed here are, however, our own.

- *when referendums take place*: whether this is decided by rules or is a matter of political choice; who can call a referendum; what topics can be put to a referendum; and what procedures surround a decision on whether to call a referendum
- *the structure of the vote*: who can vote; the nature of the referendum question and process for setting it; and the administration of the vote
- *the status of the result*: whether it is binding or advisory, and whether the outcome is subject to special thresholds
- *the conduct of the campaign:* rules protecting both fairness between the sides and the quality of information available to voters
- *enforcement of the rules*: sanctions for rule breaches; and rules on when a referendum should be partially or fully re-run.

The following sections address these five areas in turn, examining the rules that exist and where there are important deficiencies. Before that, we briefly consider a prior, overarching question: where do the rules governing referendums sit?

4.1 Where referendum rules sit

There are four possible locations for the rules on referendums:

- in the constitution or other entrenched higher law
- in ordinary legislation that applies to referendums in general
- in legislation specific to a particular referendum
- in executive orders or secondary legislation not subject to full parliamentary scrutiny (see also the chapter by Norton elsewhere in this volume).

In addition, a fifth possibility is that regulations on some aspects of referendum conduct simply do not exist in some countries.

In practice, most European democracies set out certain basic features of referendum conduct – such as the franchise and who can call a referendum – in constitutional law. This conforms to a Venice Commission recommendation that such key matters should not be susceptible to short-term manipulation. There are only a few exceptions. The United Kingdom, lacking entrenched constitutional law, places some basic referendum conduct rules in ordinary standing legislation, though these are far from comprehensive (see also the chapters by Blick and Norton in this volume). The only European democracy that holds national referendums but has no standing rules of any kind is Norway: here, all legal provisions relating to a referendum must be established anew when a referendum is called (see also the chapter by Fossum and Rosén).

Some rules, if they are to exist, must be written in constitutional or standing legislation: by definition, rules on when and how a referendum may be called cannot be established by the legislation that calls a referendum. Conversely, some rules are necessarily specific to a particular vote: such as the referendum question (unless it is prescribed by formula) and the date of the vote. Other rules can be located at any level. In practice, even countries with constitutional provisions on referendums typically supplement these through ordinary legislation.

4.2 When referendums take place

Having considered the nature of referendum rules, we turn now to their content. The first set of issues concerns when referendums take place. There are three basic approaches to determining this. First, rules may state that referendums *must* take place in certain conditions. Second, rules might provide that referendums *cannot* take place in certain conditions. Third, whether a referendum is held or not may be left as a matter for choice. We can address the first two of these quickly. The third requires more detailed discussion of who can exercise this choice and in what circumstances. In addition, for any of these approaches there is an important question regarding the processes through which a referendum may be called.

4.2.i Rules Requiring or Banning referendums

Rules requiring referendums in certain circumstances are common, set out in the country's constitution or ordinary law. They mainly apply to constitutional changes. For example, referendums are required for all constitutional amendments in Ireland (Article 46), Denmark (Section 88) and Romania (Article 151), amendments to certain parts of the constitution in Lithuania (Article 148), Latvia (Article 77), Malta (Article 66) and Iceland (Article 79), and for total constitutional revisions in Austria (Article 44(3)) and Spain (Section 168).[2] Although the UK lacks a codified constitution, ordinary legislation requires referendums before certain key constitutional changes – notably, the abolition of the Scottish Parliament or Welsh Assembly.

At the opposite end of the spectrum, no European country explicitly prohibits referendums altogether. Germany is the only European democracy where no national referendum has been held since the Second World War, but, even here, a referendum would be required for a complete revision of the constitution (Article 146).

Rules restricting the subject matter of referendums are more common. Financial, budgetary, and tax laws are often protected from referendums (see Denmark, Section 42(6); Italy, Article 75; Portugal, Article 115(4)), as is legislation relating to treaties. In Slovakia (Article 93(3)) and Slovenia (Article 90), legislation relating to fundamental freedoms and human rights cannot be put to referendum. Hungary (Article 8(3)) and Portugal (Article 115(4)) bar referendums on constitutional amendments.

4.2.ii Referendums by Choice: Who, How, and on What?

Beyond the requirements set out in the preceding paragraphs, many European democracies allow optional referendums. Legal frameworks set out who can call a referendum, by what mechanisms, on what topics.

Looking across Europe's democracies, we find five types of actor that can call an optional referendum: the legislature (that is, the majority within the legislature); the executive (or the executive and legislature together); ordinary citizens via petition; a minority of parliamentarians; or regional authorities. Current provisions are summarised in Table 4.1. As discussed below, many of these entitlements to call referendums are restricted to particular topics or circumstances.

[2] Unless otherwise stated, where an article or section of a law is cited in this chapter, it relates to the relevant country's national constitution.

Table 4.1 - Who can call a referendum in Europe's democracies

Country	Mandatory	Majority in Legislature	Executive	Executive and Legislature	Citizens	Minority of MPs	Regional Authorities
Austria	✓	✓				✓	
Belgium		✓					
Bulgaria		✓			✓		
Croatia	✓	✓	✓		✓		
Cyprus		✓					
Czech Republic	✓						
Denmark	✓	✓				✓	
Estonia	✓	✓					
Finland		✓					
France	✓		✓	✓			
Germany	✓						
Greece		✓					
Hungary				✓	✓		
Iceland	✓	✓	✓				
Ireland	✓			✓			
Italy					✓	✓	✓
Latvia	✓	✓	✓		✓		
Lithuania	✓	✓			✓		
Luxembourg		✓			✓	✓	
Malta	✓	✓			✓		
The Netherlands		✓			*		
Norway		✓					
Poland		✓		✓		✓	
Portugal				✓			
Romania	✓			✓			
Slovakia	✓	✓		✓	✓		
Slovenia		✓			✓	✓	
Spain	✓			✓		✓	
Sweden		✓				✓	
Switzerland	✓	✓			✓		✓
Turkey	✓		✓				
UK	✓	✓					

Sources: Authors' compilation from the IDEA Direct Democracy Database (IDEA n.d.) and from national constitutions and other relevant legislation.

*The Netherlands introduced provision for citizen-initiated referendums in 2015, but this was repealed in 2018. Note: This table does not include indirect procedures allowing citizens to petition parliament to call a referendum.

In most European democracies, the legislature can call a referendum on any matter within its competency. In some cases, this role is specified in constitutional or other law. Where no explicit provision exists, as in the UK and Norway, the legislature can call a referendum ad hoc, by passing primary legislation to enable one.

The executive may also play a role in calling referendums. In some cases, such as France (Article 11) and Croatia (Article 87), the president can call a referendum without parliamentary support, provided she or he has authorisation from the government. This creates the risk that the executive can subvert parliament and gain a mandate for new provisions through a referendum alone. In France, however,

it is possible for parliament to prevent the president from calling a referendum on the advice of the government if it passes a censure motion (Morel, 1997: 71). Elsewhere – notably, in Iceland – the president can trigger a referendum by refusing to sign a bill that has passed through the legislature (Article 26). Here the president cannot force a measure through without parliamentary consent but can introduce the possibility of a popular veto of measures that parliament has passed.

In other cases, the executive is empowered to call a referendum upon the recommendation or authorisation of the legislature. In Portugal, the parliament or government submits a draft referendum to the President who then decides whether to call a referendum (Article 115, Section 1). Referendums in Spain are proposed by the prime minister after parliamentary authorisation (Section 92(2). In Poland, a referendum may be called by the lower house of parliament on its own or by the president and the upper house acting together (Article 125(2)).

Eleven European countries allow citizens to initiate a referendum by petition on at least some matters, as summarised in Table 4.2.

Table 4.2 Citizen-initiated referendums in European democracies

Country	Signatures required	Scope
Bulgaria	400,000	Any subject except changes to constitution, taxes, and other specified exemptions
Croatia	10% of registered electors	Any subject
Hungary	200,000	Any subject except changes to constitution, taxes, and other specified exemptions
Italy	500,000	Proposals to repeal a law in whole or part; can repeal constitutional changes in limited circumstances; cannot repeal tax, budget, or treaty changes
Latvia	10% of registered electors	Any law suspended by the president or a third of parliament, or any proposal, with exceptions including the budget and taxes
Lithuania	300,000	Any subject
Luxembourg	25,000	A proposed constitutional amendment that has passed for the first time in parliament
Malta	10% of registered electors	Proposals to repeal existing laws; cannot repeal constitution, fiscal legislation, or certain other existing laws
Slovakia	350,000	Any subject except changes to constitution, taxes, and other specified exemptions
Slovenia	40,000	Proposals to repeal recently passed laws, with exceptions including taxes and treaties
Switzerland	New proposal – 100,000 Existing law – 50,000	Constitutional amendments Repeal of recently passed laws

Sources: National constitutions.

Provisions for a minority of members of the legislature to trigger a referendum can act as a minority veto. Such provisions are relatively common, particularly on constitutional amendments: a tenth of legislators can call such a referendum in Spain, a quarter in Luxembourg, and a third in Austria or

Slovenia. In Italy, a fifth of parliamentarians can request a referendum on a constitutional amendment unless the amendment was approved by two-thirds of the members of each house (Article 138; see also Uleri elsewhere in this volume); in Sweden, a third of MPs can request a referendum on a constitutional amendment, provided they do so within fifteen days of the *Riksdag* adopting the proposal (Chapter 8, Article 16). Some countries' constitutions also allow a minority of parliamentarians to trigger referendums on other matters: in Denmark (Section 42(1)), a third of MPs can do so on a bill that is not yet law.

Finally, Italy and Switzerland allow regional authorities to trigger national referendums. In Italy, a referendum takes place on the request of five regional councils (Articles 75 and 138). Eight cantons can trigger a referendum in Switzerland (Article 141).

There are often restrictions on when these actors can call a referendum, and on what subject matter. For example, Switzerland (Article 139) and Latvia (Article 78) are unusual in allowing citizens to propose constitutional amendments directly, meaning that changes to the constitution could be mandated without the consent, and possibly against the wishes, of the legislature.

Elsewhere, a referendum request must pertain to a specific piece of legislation, either that is already in force – as in Italy (Article 75) and Malta (1973 Referenda Act: Article 14) – or that has been passed through the legislature and is awaiting final approval – as in Denmark (Section 42(1) and (2)), Austria (Article 43), Ireland (Article 27), Iceland (Article 26), and Slovenia (Article 90).

Referendums on general principles rather than specific legal texts – so-called 'pre-legislative' referendums – are also widely permitted. That can be because no laws expressly prevent them – as, for example, in the UK and Norway – or because specific laws allow them. In Spain, 'political decisions of special importance' can be put to a consultative referendum (Section 92(1)). The Austrian National Council can also call a referendum 'on a matter of fundamental and overall national importance' by passing a motion containing a question (Article 49b). A 2010 Icelandic law permits parliament to call a referendum on any topic without restriction by parliamentary resolution (Act on the Conduct of Referendums 91/2010: Article 1). Countries such as Bulgaria and Lithuania allow citizen-initiated referendums on almost any subject. Pre-legislative referendums such as these can be problematic. If the proposal put to referendum is unclear, voters may find it difficult to make an informed decision, and political actors will lack a clear instruction as to how to implement the result.

4.2.iii Steps before Calling a Referendum

A proposal put to a post-legislative referendum goes through the full legislative process before it is referred to voters, creating scope for scrutiny and debate. Indeed, for proposed constitutional amendments, there are often requirements for parliamentary supermajorities or repeated parliamentary votes, ensuring that broad consent among representatives is required. In Romania, for example, a proposed constitutional amendment must secure a two-thirds majority in both chambers of parliament before it goes to voters in a referendum (Article 151). In Denmark, such a proposal must pass through the legislature twice on either side of a general election before a referendum can be called (Section 88).

By contrast, serious preparation for abrogative or pre-legislative referendums is rare, creating a risk that voters are asked to decide on under-developed proposals. We have argued elsewhere that this created serious problems following the UK's 2016 Brexit referendum (Renwick, Palese, and Sargeant 2018). Proposals for citizen-initiated referendums are often subject to legal or administrative checks to ensure, for example, that they are constitutional or do not raise multiple distinct issues in a single question (see the section 4.3.ii below). But scrutiny of the actual desirability of the proposals is much

less common. Switzerland offers an exception: several years typically pass between a petition and the popular vote, during which parliament debates the proposal, takes a view on it, and can formulate its own counterproposal (Lutz 2012; see also Serdult elsewhere in this volume).

Some European countries have begun to use innovative mechanisms for developing and scrutinising referendum proposals. Most notably, the Irish *Oireachtas* has twice in recent years established deliberative bodies comprising randomly selected citizens – and, in the case of the Constitutional Convention of 2012–14, parliamentarians – which were tasked with considering a series of constitutional issues and making recommendations. These formed the bases for referendum proposals on same-sex marriage (see Farrell et al elsewhere in this volume) and the minimum age for presidential candidates in 2015 and on abortion and blasphemy in 2018 (McGreevy 2018).

The steps taken before a referendum is called are as important as the campaign and the vote themselves. They determine how the prevailing situation is diagnosed and what proposals appear on the ballot paper; they also help shape how the issues are framed during the campaign. They are thus fundamental in determining whether the referendum addresses the issues that concern voters and whether voters can make a free, informed choice. However, few democracies have given sufficient thought to these steps: this is an area where the law is often silent. Greater attention would be desirable, and innovations such as those seen in Ireland deserve serious consideration.

4.3 The Structure of the Vote

We now turn to the basic structure of the vote itself: the franchise, the referendum question, and the administration of the vote.

4.3.i Who can vote

There are two ways to think of how the referendum franchise ought to be determined: one says it should be fixed in advance for all referendums and so protected from political interference; the other proposes that it should be tailored to specific referendums, to accommodate those who will be significantly affected by the result (Independent Commission on Referendums 2018: 69–70). These two approaches are most likely to generate divergent prescriptions in referendums on matters of sovereignty, where the boundaries or powers of 'the people' are at stake. For example, there was debate in the UK before the 2016 referendum on whether EU citizens resident in the UK (as well as 16 and 17-year-olds) should be allowed to vote (Scott 2015: 4–7). The Venice Commission comes out firmly for the first approach, saying the franchise should be fixed in advance and not changed in the year preceding a referendum (Venice Commission 2007: II.2.b–c). Most experts would concur: whatever the merits of tailoring the franchise in theory, in practice it would risk political manipulation by those in power.

Almost all European countries follow this approach, specifying, either in the constitution or occasionally in other standing legislation, that the franchise for national referendums is the same as for national parliamentary elections. The exceptions are the UK and Norway, which have no standing franchise for national referendums: who can vote is specified in the primary legislation enabling a referendum.

4.3.ii Setting the Question

Many countries, including Austria (Volksabstimmungsgesetz 1972, 9(2) and (3)), Ireland (Referendum Act 1994: Section 24), and Italy (Law 352 of 25 May 1970: Articles 16 and 27), specify a fixed format for referendum questions in legislation. This applies when the referendum relates to a specific piece

of legislation or a constitutional amendment. In Ireland, for example, the question asks, ‘Do you approve of the proposal to amend the Constitution contained in the undermentioned Bill?’ and then provides the name of the bill.

In most other circumstances, the question is formulated by the authority proposing the referendum. The danger with this is that the proposal’s sponsors may seek to introduce biases. Some countries employ political checks and balances. In Portugal, for example, a proposed citizen-initiated referendum goes to the relevant parliamentary committee, which can request changes that the legislature then votes on (Law no. 15-A/98 of 3 April 1998 (rev. 2016): Articles 12, 20 and 23). Switzerland’s constitution requires the Federal Assembly to declare a referendum initiative invalid if it combines excessively disparate matters (Article 139(3)). Elsewhere, an independent body plays a role in formulating the question. The respective Electoral Commissions advise the national parliament on wording for some referendums in Iceland (Act on the Conduct of Referendums 91/2010 2010: Article 3) and all referendums in the UK (Political Parties, Elections and Referendums Act 2000: Article 104 (2) and (4)).

Such independent mechanisms for ensuring questions are clear and unbiased and do not combine multiple issues in one vote are essential. It is therefore striking that many European democracies lack them. The absence of such provisions can undermine perceived legitimacy and increases the danger that a referendum could deliver a skewed measure of public opinion.

4.3.iii Administration of the Vote

Most democracies have comprehensive rules for the conduct and administration of the poll to ensure the integrity of the ballot; such rules are central to ensuring a free and fair vote. Independent electoral commissions are most commonly responsible for the administration and management of the referendum poll. For example, in Spain the Central Electoral Commission is charged with electoral administration, management of the poll and compliance with electoral and referendum legislation (Organic Law 5/1985, of June 19, of the General Electoral Regime: Article 19). In some cases, however, this is the responsibility of the government: in Italy, for example, the Interior Minister (see Ministero Dell’Interno, n.d.), and in Ireland the Department for Housing Planning and Local Government.

4.4 The Status of the Result

The next dimension of referendums that we examine is the status of the result. Here there are two important issues. First, are referendum results binding or advisory? Second, what threshold must be met for the proposal put in a referendum to be deemed to have passed?

4.4.i Binding or advisory?

A referendum result is legally binding, in the conventional sense, if it prevents the legislature from passing a law contradicting that result, at least for a period of time. To be binding in this sense, provision for a referendum must be set out in a country’s higher law, most commonly in its constitution. The UK’s uncodified constitution and central constitutional principle of parliamentary sovereignty prevents it from holding referendums that bind parliament. Similarly, Norway, Belgium and the Netherlands have no provisions for referendums in their constitutions, and so legally binding referendums are not possible.

In Denmark, all referendums specified in the constitution are binding, but advisory referendums have also been held on the basis of ad-hoc legislation. A 2011 Icelandic law enabled the holding of

consultative referendums, but only those triggered through the procedures laid out in the constitution can be binding.

Broadly speaking, post-legislative referendums – on legal texts that have already passed through the legislature – are binding whereas votes held on general proposals or principles are advisory. For example, in Lithuania, all constitutional and abrogative citizen-initiated referendums are binding, but those in which citizens propose the topic themselves are advisory (Lithuania Law on Referendum 4 June 2002 No IX-929 (rev. 2012): Article 5). Austria, Croatia, Portugal, Spain and Sweden have explicit provisions for both kinds of referendum. Many countries – including France, Greece, Hungary, Ireland, Italy, Latvia, Poland, Slovenia, and Switzerland – provide in their constitutions only for legally binding referendums. In Estonia, if the parliament puts a law to referendum and it is rejected, not only is the law not brought into force but a general election is automatically triggered (Article 105). (Perhaps in consequence, only one national referendum has been held since the current constitution came into force. That was on EU accession, where an affirmative result was not in serious doubt.)

For two reasons, however, the distinction between legally binding and advisory referendums is less stark than it might appear at first blush. The first reason is that there are in fact more than two possible legal statuses for referendums: a referendum result can be 'binding' in a more limited sense than the conventional meaning set out above. In the UK, for example, while a referendum cannot bind parliament, it can bind the executive. The law enabling a 2011 referendum on the voting system provided that, if the referendum passed (which in the end it did not), the responsible minister would have to bring into force sections of that law setting out the new voting rules, though parliament would have been free in law to repeal them had it wished (see also the chapter by Blick elsewhere in this volume). Under the Dutch law on citizen-initiated referendums in force between 2015 and 2018, if voters backed the repeal of a law, a bill providing for this had to be brought forward and debated, but parliament was free not to adopt it (Jacobs 2018; see also the chapter by van den Akker elsewhere in this volume). Switzerland exhibits a different kind of pattern. Referendum results there are binding in theory, but the authorities often have considerable flexibility in deciding how to implement them. Thus, while a 2014 vote required the introduction of immigration quotas, for example, the law that was finally passed to give effect to this provided for measures more limited than quotas (Summermatter and Miserez 2017).

Second, even when they are legally only advisory, referendums are often treated as binding politically. The most noteworthy recent example is the UK's 2016 Brexit referendum. Others include the Norwegian EU accession referendum of 1994 and Sweden's referendum on euro membership in 2003 (see the chapters respectively by Oscarsson and Fossum & Rosén elsewhere in this volume). In all these cases, most parliamentarians wanted to take one course, but they conceded when voters chose to go the other way.

The legal status of a referendum is often subject to certain validity requirements, the most common being special thresholds. We discuss these next.

4.4.ii What threshold is required?

Every referendum has a threshold that must be reached for a proposal to win: the default threshold is 50 per cent of valid votes cast plus one. However, some democracies supplement or vary this threshold to place additional validity requirements on a referendum result. There are four main kinds of special threshold: turnout thresholds; electorate thresholds; multiple majority thresholds; and supermajority thresholds.

Supermajority thresholds, which require support for the change option to be higher than 50 per cent plus one, have been used in some Canadian provincial referendums (Fournier et al. 2011: 128), but are not used in any European democracy. We therefore do not consider them further here.

A *turnout threshold* specifies a certain percentage of the eligible voters who must cast their vote in order for a referendum to be valid or binding. Such thresholds are premised on the logic that, if a referendum is to be considered an expression of public will, a certain proportion of the electorate need to participate. The most common requirement is that 50 per cent of eligible voters participate. This is required for all referendums in Lithuania (Law on Referendum 4 June 2002 No IX-929 (rev. 2012), article 7(1), 8(1)), Slovakia (Article 98), Romania (Law No. 3 22 February 2000 on the Organisation and Conduct of the Referendum: Article 5(2)) and Hungary (Article 8(4)), for abrogative referendums in Italy (Article 75) and Malta (1973 Referenda Act: Article 20(1)), and for constitutional amendments in Slovenia (Article 170). Until it was repealed, the Dutch law on citizen-initiated referendums set a 30 per cent turnout threshold.

Rather than stipulating a percentage of eligible voters, Latvia requires that turnout in a referendum on a law must be at least half the level of the turnout at the previous parliamentary election for the result to be valid (Article 74). For a referendum to be binding in Bulgaria, turnout must be at least as high as at the last election; if this requirement is not met but turnout still reaches 20 per cent of eligible voters, the proposition must be considered in the National Assembly (Direct Citizen Participation in State and Local Government Act 4/12.06.2009: Article 23). Similarly, referendums are only binding in Portugal (Article 115(11)) and Poland (Article 125(3)) if turnout is above 50 per cent. A Greek referendum on a specific law or social issue is binding at 50 per cent turnout; a referendum on a 'crucial national issue' is binding on a turnout of 40 per cent (Law 4023, Expanding Direct and Participatory Democracy through Referenda: Article 16).

An *electorate threshold* (sometimes referred to as an 'approval quorum') requires a certain percentage of the eligible electorate to vote for a particular option before it wins. This is intended to prevent an active minority from imposing its will on a passive majority. Four European democracies require such thresholds, two of which require different thresholds for different types of referendums, as summarised in Table 4.3.

Table 4.3 Electorate threshold requirements in European democracies

Country	Procedure	Subject matter	Electorate
Denmark	Mandatory	Constitutional amendment	40%
	Mandatory	Lowering the voting age	30%
	Initiated by minority of parliamentarians	Legislation	30%
Ireland	Initiated by Executive and Legislature	Legislation	30%
Lithuania	Mandatory	Amendment Article 1 of the constitution: 'the State of Lithuania shall be a democratic republic'	75%
	Mandatory	Amendment to the constitutional act: 'On Non-Alignment of the Republic of Lithuania to Post-Soviet Eastern Alliances'	75%
	Mandatory	Constitutional amendments	50%
	Citizen-initiated	Law or provision proposed by citizens	1/3
Slovenia	Citizen-initiated	Legislation	20%

Multiple majority thresholds require that a majority vote for a proposition not only nationally, but also in a specified number of geographical areas. Such thresholds are designed to protect minorities and ensure that proposals have broad support rather than support that is concentrated in certain localities. Multiple majority thresholds are typically seen in federal systems. Switzerland is the only European country to use them: most referendums on constitutional amendments and on 'accession to organisations for collective security or to supranational communities' need a majority of votes overall and in a majority of the cantons for the proposals to pass (Article 140).

Multiple majority thresholds can be sensible where they reflect the wider structures of a federal system. By contrast, the Venice Commission (2007: section III.7) argues strongly against turnout and electorate thresholds, believing that the former give campaigners for the less popular option an incentive to invalidate the referendum by trying to suppress turnout, while the latter can block change even if it is accepted by a substantial majority of voters. In Denmark in 2009, for example, a constitutional amendment to end gender discrimination in the royal succession had overwhelming public backing, gaining the support of over 85 per cent of those voting; but it almost failed, as low turnout meant that the 40 per cent electorate threshold was only narrowly surpassed.

4.5 Conduct of the Campaign (I): Fairness between the sides

Our fourth dimension of referendum regulation – relating to the conduct of the campaign – raises many issues that have caused much concern in recent years. For this reason, we divide it into the two aspects that have been most contentious. In this section, we focus on mechanisms for ensuring there is a fair balance between the sides in a referendum campaign. In the following section, we look at the information available to voters as they decide how to cast their ballots.

There is general agreement that fairness between the sides in a referendum campaign matters: if voters are to make a free choice, they must be able to hear both sides of the argument and they must not be subject to any undue interference or pressure (e.g. Chambers 2001: 235; LeDuc 2015: 144). There is less agreement, however, on what exactly fairness requires. One view is that it demands balance between the sides: that each side should have equal voice irrespective of who supports it and how much support it has. Another view is that fairness ought to take account of how popular each side is: if one side is supported only by a small fringe, it could create 'false balance' to give it equal weight with its opposition, misleading voters into thinking widely rejected ideas are credible. In practice, both of these views tend to be manifest in different aspects of referendum campaign regulation.

We focus here on fairness in three domains: the role of government in referendum campaigns; the rules around campaign finance; and media coverage.

4.5.i The Role of Government

Though ostensibly highly democratic, referendums can become the opposite of that if they are used by powerful figures to cement their authority, particularly if in so doing they bypass checks and balances or subvert the rule of law. As detailed by Batory and Kalaysioğlu & Kocapinar elsewhere in this volume, there have recently been serious concerns about such plebiscitary use of referendums in countries such as Hungary and Turkey, where the resources of the state were deployed overwhelmingly to skew the referendum debate. There are also less egregious cases: in the UK in

2016, for example, there was widespread disquiet when the government spent substantial public funds on a leaflet putting the case for staying in the EU just before the start of the official campaign.

It is rare for governments to be restricted from expressing a view on a referendum question. The Venice Commission acknowledges that, unlike in elections, where the authorities should not support any party or candidate, in referendum campaigns 'it is legitimate for the different organs of government to convey their viewpoint in the debate' (Venice Commission, 2007: 17). Portugal offers an exception to this, where the referendum law requires strict neutrality (Law no. 15-A/98 of 3 April 1998 (rev. 2016): Article 45). Elsewhere, by contrast, an opportunity for the government to present its advice to voters is sometimes institutionalised into the referendum process. In Switzerland, for example, the referendum booklet prepared for each ballot and sent to all voters is prepared by the federal government, though it must 'take account of the opinions of significant minorities' (Federal Act on Political Rights, 17 December 1976, amended as of 1 November 2015, Article 11.2). Such provisions reflect the idea that voters have a right to know the perspective of their elected government when making their own choice.

Restrictions on governments tend to focus, rather, on the use of public funds. Ireland has particularly tight rules in this regard. A court case was brought against the government in 1995 for using public funds to encourage a Yes vote in a referendum on divorce. The court ruled that this violated the constitutional rights to equality, freedom of expression and democratic procedure in a referendum (*McKenna v An Taoiseach* [1995] S.C. Nos 361 and 366 of 1995). As a result of the judgement, the Irish government now spends public funds on independent, neutral public information provisions, which we discuss further in the following section. Similarly, in Switzerland, although there is no legislation restricting the role of the federal government in referendum campaigns, the political rights of freedom to form an opinion and the unaltered expression of will have been interpreted to mean that the use of public funds on one side is unconstitutional (Serdült, 2010). The UK has a prohibition on the use of state resources in the final four weeks before the vote.

Such provisions fit (to varying degrees) with strong Venice Commission guidance that '[t]he use of public funds by the authorities for campaigning purposes must be prohibited' (section I.3.1.b).

By contrast, some countries – even some long-established democracies – have no restriction on government campaigning in referendums. For example, in France, the government's arguments for the ratification of a constitutional amendment are sent out with the referendum ballot papers (Richard and Pabst 2013). This is the area of the Venice Commission's *Code of Good Practice on Referendums* where compliance among Council of Europe member states is weakest. That has the potential to undermine the fairness – and therefore also the legitimacy – of referendum processes.

4.5.ii Campaign finance

The 'campaign finance' heading encompasses a number of issues: regulation of or limits on campaign spending; equivalent rules for donations to campaigns; and whether public funding is available for campaigning (cf. Reidy and Suiter 2015: 162).

The last of these flows on from the preceding point about the role of government. The Venice Commission, in line with the requirement for state neutrality mentioned above, says that 'Equality must be ensured in terms of public subsidies and other forms of backing' (section I.2.2.d). It then goes on, however, to allow for the differing notions of fairness outlined above. While it says 'It is advisable that equality be ensured between the proposal's supporters and opponents', it also allows that 'backing may … be restricted to supporters and opponents of the proposal who account for a minimum

percentage of the electorate', and it also suggests that funding may be distributed to political parties, either equally or proportionally 'to the results achieved in the elections' (section I.2.2.d). In practice, there is wide variation in state funding between countries.

Some, such as Ireland, provide no funding to campaigners. Others, including the UK and the Netherlands, provide equal funding to the two sides: the UK does so by designating an umbrella organisation on each side of the argument to receive public benefits; in the Netherlands, campaigners apply to the Referendum Commission, which awards grants for activities from two equal funds. Others still, such as Denmark, France, and Spain, distribute funds to parties in proportion to their strength. This can lead to very unequal funding if most parliamentary parties line up on one side of the debate: in the year of the Danish euro referendum of 2000, for example, pro-euro parties received almost three times as much state funding as anti-euro parties (Hobolt 2010).

The Venice Commission says little about other aspects of campaign finance, except that it should be transparent and that spending limits are permissible (section I.2.2.g–h). Campaign expenses are in fact commonly scrutinised through a requirement to submit audited accounts. In Lithuania (Law on funding of, control over funding of, political parties and political campaigns 23 August 2004 – No IX-2428 Vilnius (amended 2011): Article 21), Spain (Organic Law 5/1985, of June 19, of the General Electoral Regime: Articles 131-134), and Portugal (Financing of Political Parties, Law no 19/2003 of 20 June: Articles 15 and 19), this is required for all political parties and campaigns groups. In Denmark (Hobolt 2010) and France (Decree No. 2005-238 of 17 March 2005 on the campaign for the referendum: Article 10), the law only applies to political parties in receipt of public funding. Denmark, France, and Ireland have no spending limits for referendums. In Lithuania (Law on funding of, control over funding of, political parties and political campaigns 23 August 2004 – No IX-2428 Vilnius (amended 2011) Article 17) spending limits are calculated on the basis of the number of electors in the area a group intends to campaign in. In Portugal the limit is linked to the national minimum wage (Financing of Political Parties, Law no 19/2003 of 20 June, Article 20).

Restrictions on donations from foreign actors are common. Some countries, including Ireland (Standards in Public Office Commission 2016), Spain (Organic Law 8/2007 of 4 July on the funding of political parties, Articles 4–7), Lithuania (No IX-2428, Articles 10 and 11), and Portugal (Law 19/2003, Article 16), also cap the amount any individual or body can donate. In Lithuania, this is linked to average incomes, and in Portugal to the national minimum wage.

Some democracies, such as Austria, Iceland, and the Netherlands, have little financial regulation of campaigners in referendums. Perhaps most surprisingly, given its frequent use of referendums, Switzerland has almost no such rules. This may advantage well-financed interest groups, leading some to refer to Swiss popular initiatives as 'purchased democracy' (Kobach, 1994: 107) – though others see such a claim as exaggerated (Serdült, 2010).

4.5.iii Media Balance

Most European democracies have some kind of balance rule for broadcast coverage of referendum campaigns. French broadcasters are required to apply the principles of 'equality and plurality' to referendum coverage (CSA 2005). Portuguese radio and television stations must give 'equal treatment' to all referendum participants (Law no. 14-A/98 of 3 April 1997 (rev. 2016) articles 57). Ireland has had strict balance requirements since a court case (*Coughlan v. Broadcasting Complaints Commission*) in 2000. In the UK, broadcasters must show 'due impartiality', with 'special impartiality requirements' for 'matters of political or industrial controversy; and matters relating to public policy' (Communications Act 2003, s.320). In practice this is taken to require balance between the sides,

though broadcasters are keen to say that they do not apply a rule of 'stop-clock' balance. Provisions such as these fit with Venice Commission guidelines (2007: section I.2.2.e–f).

By contrast, there are generally no requirements for balance in print or online media. This reflects the principle of free expression. European media regulation thus seeks to combine two goals: the broadcast media are carved out as a space for balanced, impartial reporting to ensure people can hear the debate in the round; in other media, priority is given to people's ability to express their views on one or other side. This framework is based on the assumptions that broadcast and other media are clearly distinct and that the former constitute a major source of news and important location of national conversation. The rise of the internet, however, is rendering these assumptions outmoded: different media are converging, and broadcast is losing its dominance. This raises serious questions about whether current arrangements remain fit for purpose, and whether they can continue adequately to enable integrated political debate. This leads on to the questions about information that are the subject of the next section.

4.6 Conduct of the Campaign (II): Information available to voters

Freedom of opinion formation requires that people be able to access the information they want from sources they trust during the course of a referendum campaign. Multiple elections and referendums have raised concerns about that. The most prominent example is the UK's Brexit referendum, where misinformation was spread by both sides (see Renwick, Palese, and Sargeant 2018: 546), but serious criticisms have been made in many other countries too.

The question of how to promote quality information and limit misinformation is very difficult. Here we examine four approaches, starting with the most basic: ensuring that who is saying what to whom is transparent.

4.6.i Transparency of who is saying what to whom

In contrast to the United States, where the Supreme Court has ruled that anonymous campaign materials are protected by the First Amendment right to free speech (*United States v. Alvarez*, 2012), European democracies often uphold the principle that campaigning should be publicly accountable. That is evident in the rules of campaign spending discussed above. It also often applies to campaign materials: in the UK, for example, all printed campaign materials must include an 'imprint' stating who has produced them (Political Parties, Elections and Referendums Act 2000, section 143).

The transparency principle has come under challenge in recent years, however, from the rise of the internet. In many democracies, campaign regulation has not been updated to respond to the new challenges posed by online campaigning. For example, one issue in the UK is that imprint requirements do not apply online – a gap that could easily be addressed (e.g., Independent Commission on Referendums 2018: 181). Another related concern is the rise of microtargeted 'dark ads': Google, Facebook, Twitter, and other online platforms allow users to post advertisements that are visible only to the specific people to whom they are targeted; and online usage data allow such targeting to be increasingly sophisticated. As a result, campaigners could target misleading messages at particular sectors of the electorate who may be particularly susceptible to them, without this ever becoming apparent to the wider community.

The large internet companies began to respond to concerns over this in 2018 by creating open, searchable repositories of political advertising (Renwick and Palese 2019: 54). But this has in turn generated its own concerns over the power of these multinational companies to decide what

information voters can see (e.g., House of Commons DCMS Committee 2019: 61; Parliamentary Assembly of the Council of Europe 2019: 20). This was thus an area at the time of writing where law-makers lagged behind developments but were working to catch up.

4.6.ii Confronting misinformation

The transparency approach merely ensures that campaign materials are visible. But what happens if misinformation is found? Should we rely on the market of ideas to expose this fact and rectify it, or is more direct intervention needed. Concerns that traditional journalism has not always been effective in identifying misinformation have fed the growth of independent 'fact-checking' in recent years. But in some jurisdictions state actors are also involved. In Ireland, the Referendum Commissions, whose function is to promote understanding of the issues in each referendum, have sometimes intervened during campaigns to correct misleading information. In France, legislation was passed in 2018 empowering judges to intervene against false information during election campaigns (Loi n° 2018-1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l'information 2018).

Most democracies have been very cautious about moving in this direction, and with good reason. There are concerns, first, about free speech and, second, about whether such interventions are in any case effective. It would be possible to take legal action only against manifestly false claims, but many misleading statements would not meet this threshold. And an anti-establishment campaign could be helped rather than harmed by state intervention against its arguments.

4.6.iii Provision of information

More may be achieved, therefore, by seeking to ensure that quality neutral information is available to voters, so they are not reliant solely on information from campaigners. That might be thought a responsibility of public service broadcasters, but in some countries these are captured by partisan interests and in others they often limit their reporting to 'she said/he said' balance, with little analysis of whether claims are reasonable (Hanretty 2011; Cushion and Lewis 2017).

Several models for neutral information provision do exist. In Denmark and the Netherlands, public funding is available for independent neutral information campaign groups as well as for groups on either side of the debate. In several countries, including France, Spain, and Switzerland, the government itself provides information, which must fulfil certain requirements for neutrality, objectivity, or balance. This model is, however, problematic: governments generally have a position in referendums, so cannot be expected to provide genuinely neutral information. Some saw the French government's campaign for the 2005 referendum as biased towards a 'Yes' vote (Richard and Pabst 2013), and there have also been concerns in Switzerland.

The best model may therefore be the creation of an independent public body charged with information provision. In Ireland, a Referendum Commission is established for each referendum. It is chaired by a senior judge and also includes four senior public officials whose regular responsibilities demand them to maintain strict neutrality. It is responsible for disseminating explanations of the referendum proposal, promoting awareness of the vote, and encouraging participation (Referendum Act 2001). The most extensive public information campaigns for referendums have been conducted outside Europe, in New Zealand, where they have been run either by the Electoral Commission or by an ad-hoc body established for the purpose.

Such interventions can succeed only if it is possible to create a genuinely independent and neutral public body and if there is public trust in the work of such a body. One or both of these conditions is lacking in many countries. This has contributed to the development of a fourth approach to information in recent years.

4.6.iv Citizen engagement

Though people's trust in politicians, journalists, and state authorities is generally low, their confidence in their fellow citizens is often higher. This is one among several reasons for the growth in recent years in attempts to include citizens in generating quality information. In several American states – most notably, Oregon – a panel of randomly selected citizens is convened in the early stages of the campaign period to examine a ballot proposition over several days. The members hear from campaigners and experts and deliberate among themselves, before producing a statement that is included in the information pack sent to all voters. This indicates what campaign claims members found more or less convincing and sets out how they see the issues (Gastil et al. 2015).

Though no European country has yet institutionalised such a procedure, the UK's Independent Commission on Referendums (2018: 177–8) recommended that it should be trialled. It could be used not only to set out the panel's perceptions but also to identify questions that people want campaigners to answer.

As discussed above in the section on procedures preceding the decision to call a referendum, mechanisms for deliberative citizen engagement are also now being used at much earlier stages of referendum processes, especially in Ireland.

4.7 Enforcement

Referendum rules clearly need to be backed up by enforcement mechanisms. Two basic types exist: first, sanctions imposed on those found to have breached the rules; second, provisions allowing a referendum to be re-run in serious cases. The former type is uncontroversial: the only questions that arise relate to the level of sanctions and how they might be determined. The annulment of referendum results, by contrast, may have wider implications and therefore be more contentious: there is a danger that it may be seen by many as undue judicial interference in the democratic process. In practice, annulments are very rare. In 2018, the Slovenian Supreme Court declared a 2017 referendum on a proposed new railway line invalid because the government had used public funds to support its favoured outcome; this led to the prime minister's resignation and early elections (Surk 2018).

4.8 Conclusion

Understanding referendum rules is vital for understanding referendums. By determining when and how referendums can be called and what the results mean, the rules shape who can use the referendum instrument, for what purposes, and with what effect. By framing the conduct of referendum campaigns, the rules influence the degree to which the outcome constitutes a balanced reflection of informed and considered public opinion.

Some aspects of referendums are generally well regulated in European countries: most countries, for example, have clear constitutional rules on the franchise and on the status of referendum results. Other aspects deserve further attention. These particularly relate to preparation for referendums and

the conduct of referendum campaigns. The process of deciding the options that are put to voters can be as important as the final referendum vote itself; but too little thought has generally been given to how this can best be done. Mechanisms for ensuring a balanced campaign are often lax, and only limited attention has been given to ensuring that voters can access reliable information. Referendum rules – and election rules more broadly – have typically not yet adjusted to the digital age.

At the time of writing, the Venice Commission had begun a process of updating its referendum guidelines (Parliamentary Assembly of the Council of Europe 2019). To ensure the future integrity of referendum processes, individual countries need to attend to their rules too.

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