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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

UKRAINE

**DRAFT LAW “ON IMPROVING THE PROCEDURE FOR
ESTABLISHING THE IMPOSSIBILITY OF HOLDING NATIONAL AND
LOCAL ELECTIONS, ALL-UKRAINIAN AND LOCAL REFERENDA IN
CERTAIN TERRITORIES AND POLLING STATIONS”**

AND EXPLANATORY NOTE

**Proposals to change some legal acts of Ukraine
regulating certain aspects of preparation and conduct of elections and referenda**

Electoral Code of Ukraine	
Article 20. Election process	Article 20. Election process
Absent (par. 7)	In the event when the National Security and Defense Council approves a decision put into effect by the Decree of the President of Ukraine on the impossibility to provide the preparation and conduct, under the law, of national and local elections within certain Oblasts, districts, territorial hromadas, and their parts, on which territory Oblast or district civil-military administrations have been established, the Central Election Commission shall pass decisions for each individual polling station, to set the rules to complete election procedures on the relevant territories that were launched within the respective election process.
Article 205. Powers of the Central Election Commission on the organization and conduct of local elections	Article 205. Powers of the Central Election Commission on the organization and conduct of local elections
1. Central Election Commission, in addition to powers provided by the Law of Ukraine "On Central Election Commission": 7) in case of establishing the impossibility to ensure preparation and conduct of local elections on certain territories, under the provisions of this Code, it shall pass the decision on the impossibility to hold elections to the respective local self-government bodies;	1. Central Election Commission, in addition to powers provided by the Law of Ukraine "On Central Election Commission": Delete
Law of Ukraine "On National Security and Defense Council of Ukraine"	
Article 4. Competence of the National Security and Defense Council	Article 4. Competence of the National Security and Defense Council

According to the functions set by the Constitution of Ukraine and this Law, the National Security and Defense Council of Ukraine shall: 1) develop and consider at its sessions the issues that, according to the Constitution and the laws of Ukraine, to the National Security Strategy of Ukraine, to the Military Doctrine of Ukraine, belong to the sphere of national security and defense, and shall submit the proposals to the President of Ukraine, and shall make the decisions on the following: Absent	According to the functions set by the Constitution of Ukraine and this Law, the National Security and Defense Council of Ukraine shall: 1) develop and consider at its sessions the issues that, according to the Constitution and the laws of Ukraine, to the National Security Strategy of Ukraine, to the Military Doctrine of Ukraine, belong to the sphere of national security and defense, and shall submit the proposals to the President of Ukraine, and shall make the decisions on the following: shall make decisions, individually for each polling station, on the impossibility of ensuring the preparation and conduct, under the law, of the national and local elections, of the all-Ukrainian or local referenda within certain Oblasts, districts, territorial hromadas, and their parts, on which territories the Oblast or district civil-military administrations have been established.
Absent	9) shall set assessment criteria to be followed by authorities that operate in the field of national security and defense, and in the field of security situation on the possibility or impossibility of ensuring the preparation and conduct, under the law, of national or local elections, of the all-Ukrainian or local referenda within certain Oblasts, districts, territorial hromadas, and their parts, on which territories Oblasts or district civil-administrations have been established, and shall

	also determine the list of authorities to administer such assessment under the established criteria.
Law of Ukraine "On Central Election Commission"	
Article 17. General Powers of the Commission The Commission shall:	Article 17. General Powers of the Commission The Commission shall:
Absent	12 ⁶) where required, it shall resort to the National Security and Defense Council of Ukraine on the possibility to ensure the preparation and conduct of national or local elections, of the all-Ukrainian or local referenda, within certain Oblasts, districts, territorial hromadas, and their parts, on which territories Oblast or district civil-military administrations have been established, for each polling station, individually;
Absent	12 ⁷) in the event when the National Security and Defense Council makes a decision brought into effect by the Decree of the President of Ukraine on the impossibility to ensure the preparation and conduct, under the law, of elections or referenda within certain Oblasts, districts, territorial hromadas, and their parts, on which territories Oblast or district civil-military administrations have been established, for each polling station, individually, it shall make a decision to set the rules to complete the procedures launched within the respective electoral process or the process of the national referendum.
Law of Ukraine "On Civil-Military Administrations"	
Article 3. Organization of civil-military administrations	Article 3. Organization of civil-military administrations

2. Civil-military administrations of settlements shall be established on the territory of territorial hromadas, where village, township, or city councils and/or their executive bodies fail to exercise the functions assigned to them by the Constitution and the laws of Ukraine, also because they have been self-dissolved or self-withdrawn from executing their powers, or because they do not de facto execute them, and also in case the <i>Central Election Commission makes a decision on the impossibility to have elections</i> to the respective local self-government bodies. The naming of civil-military administrations of settlements usually shall be derivative from the names of settlements determined as administrative centers of the respective territorial hromadas, in a form of an adjective.	2. Civil-military administrations of settlements shall be established on the territory of territorial hromadas, where village, township, or city councils and/or their executive bodies fail to exercise the functions assigned to them by the Constitution and the laws of Ukraine, also because they have been self-dissolved or self-withdrawn from executing their powers, or because they do not de facto execute them, and also in case the National Security and Defense Council makes a decision, brought into effect by the Decree of the President of Ukraine, on the impossibility to ensure the preparation and conduct of elections to the respective local self-government bodies. The naming of civil-military administrations of settlements usually shall be derivative from the names of settlements determined as administrative centers of the respective territorial hromadas, in a form of an adjective.
Article 4. Powers of civil-military administrations	Article 4. Powers of civil-military administrations
3. District and Oblast civil-military administrations, along with executing their powers of local state administrations on the respective territory, shall also exercise the powers on: 1) exercising the powers, under the law, to organize the conduct of all-Ukrainian referenda and elections to public authorities and local self-government bodies within the respective administrative-territorial units; <i>providing opinions to the Central Election Commission on the possibility to organize and prepare, under the law, the conduct of the relevant elections in certain territories;</i>	3. District and Oblast civil-military administrations, along with executing their powers of local state administrations on the respective territory, shall also exercise the powers on: 1) exercising the powers, under the law, to organize within the respective administrative-territorial unit of the all-Ukrainian referenda and elections of the President of Ukraine, people's deputies of Ukraine, deputies to local councils and of village, township, city mayors; providing to the National Security and Defense Council, according to the criteria they set, the information on the possibility or impossibility of ensuring the preparation and conduct of national or local election, of the all-Ukrainian or local referenda within certain Oblasts, districts,

	territorial hromadas, and their parts, in individual polling stations.
Article 7. Final and Transitional Provisions	Article 7. Final and Transitional Provisions
2. In case of creating civil-military administrations of settlements in the territories of territorial hromadas approved by the Cabinet of Ministers of Ukraine (hereinafter – the newly created civil-military administrations), where, upon the decision of the Central Election Commission , the first elections of deputies to village, township, and city councils, and the heads of the respective villages, townships, and cities have not taken place, the assumption of powers by civil-military administrations and the termination of powers by village, township, and city heads elected by the territorial hromadas which territories became part of territories of the respective established territorial hromadas (hereinafter – the dissolved territorial hromadas) and by their executive authorities, reorganization of such village, township, and city councils, their executive authorities as legal entities, and the termination of powers of civil-military administrations of settlements which territories became part of the territories of the respective established territorial hromadas (hereinafter – civil-military administrations under termination), and the reorganization of such civil-military administrations as legal entities shall be exercised with account for the following provisions:	2. In case of creating civil-military administrations of settlements in the territories of territorial hromadas approved by the Cabinet of Ministers of Ukraine (hereinafter – the newly created civil-military administrations), where, upon the decision of the National Security and Defense Council, brought into effect by the Decree of the President of Ukraine, it is impossible to ensure the preparation and conduct of the respective local elections , the first elections of deputies to village, township, and city councils, and the heads of the respective villages, townships, and cities have not taken place, the assumption of powers by civil-military administrations and the termination of powers by village, township, and city heads elected by the territorial hromadas which territories became part of territories of the respective established territorial hromadas (hereinafter – the dissolved territorial hromadas) and by their executive authorities, reorganization of such village, township, and city councils, their executive authorities as legal entities, and the termination of powers of civil-military administrations of settlements which territories became part of the territories of the respective established territorial hromadas (hereinafter – civil-military administrations under termination), and the reorganization of such civil-military administrations as legal entities shall be exercised with account for the following provisions:

Law of Ukraine "On All-Ukrainian Referendum"

Article 22. The Process of the All-Ukrainian Referendum	Article 22. The Process of the All-Ukrainian Referendum
1. The process of the all-Ukrainian referendum shall start on the next day following the day of publication of the respective Decree of the President of Ukraine or the resolution of the Verkhovna Rada of Ukraine. 2. The process of the all-Ukrainian referendum shall finish fifteen days after the day of official announcement by the Central Election Commission of the results of the all-Ukrainian referendum. 3. The process of the all-Ukrainian referendum shall terminate in the event when the Constitutional Court of Ukraine recognizes the resolution of the Verkhovna Rada of Ukraine or the Decree of the President of Ukraine on scheduling (declaration) of the all-Ukrainian referendum as such that do not comply with the Constitution of Ukraine (are unconstitutional). After the Constitutional Court of Ukraine passes the respective decision, the Central Election Commission shall approve a decision setting the rules to complete the all-Ukrainian referendum launched within the respective referendum process. 4. The process of the all-Ukrainian referendum on the question of losing effect by a law of Ukraine or its separate provisions, shall terminate in case the law of Ukraine enters into force on losing effect by the Law of Ukraine or all of its separate provisions put forward to the all-Ukrainian referendum. In this case, the decision on termination of the process of the all-Ukrainian referendum shall be made by the Central Election Commission within the next day upon entering into force of the law of Ukraine on losing effect by the Law of Ukraine or all its separate provisions put to the all-Ukrainian referendum.	1. The process of the all-Ukrainian referendum shall start on the next day following the day of publication of the respective Decree of the President of Ukraine or the resolution of the Verkhovna Rada of Ukraine. 2. The process of the all-Ukrainian referendum shall finish fifteen days after the day of official announcement by the Central Election Commission of the results of the all-Ukrainian referendum. 3. The process of the all-Ukrainian referendum shall terminate in the event when the Constitutional Court of Ukraine recognizes the resolution of the Verkhovna Rada of Ukraine or the Decree of the President of Ukraine on scheduling (declaration) of the all-Ukrainian referendum as such that do not comply with the Constitution of Ukraine (are unconstitutional). After the Constitutional Court of Ukraine passes the respective decision, the Central Election Commission shall approve a decision setting the rules to complete the all-Ukrainian referendum launched within the respective referendum process. 4. The process of the all-Ukrainian referendum on the question of losing effect by a law of Ukraine or its separate provisions, shall terminate in case the law of Ukraine enters into force on losing effect by the Law of Ukraine or all of its separate provisions put forward to the all-Ukrainian referendum. In this case, the decision on termination of the process of the all-Ukrainian referendum shall be made by the Central Election Commission within the next day upon entering into force of the law of Ukraine on losing effect by the Law of Ukraine or all its separate provisions put to the all-Ukrainian referendum.

<p>Provisions of paragraph one of this part shall not be applicable if the law of Ukraine on losing effect by the law of Ukraine or all its separate provisions put to the all-Ukrainian referendum has come into force on the day preceding the election day, on the election day, or on the day following the election day in the all-Ukrainian referendum.</p> <p>The part is absent.</p>	<p>Provisions of paragraph one of this part shall not be applicable if the law of Ukraine on losing effect by the law of Ukraine or all its separate provisions put to the all-Ukrainian referendum has come into force on the day preceding the election day, on the election day, or on the day following the election day in the all-Ukrainian referendum.</p> <p>5. Upon making a decision by the National Security and Defense Council of Ukraine, brought into effect by the Decree of the President of Ukraine, about the impossibility of ensuring the preparation and conduct, under the law, of the all-Ukrainian referendum within certain Oblasts, districts, territorial hromadas, their parts, on which territories Oblast or district civil-military administrations have been established, for each polling station, individually, the Central Election Commission shall pass a decision to set the rules to complete the procedures of the all-Ukrainian referendum on the respective territories launched within the respective referendum process.</p>
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EXPLANATORY NOTE

to the Draft Law of Ukraine

“On Improving The Procedure For Establishing The Impossibility Of Holding National And Local Elections, All-Ukrainian And Local Referenda In Certain Territories And Polling Stations”

1. Purpose

Draft Law “On Improving The Procedure For Establishing The Impossibility Of Holding National And Local Elections, All-Ukrainian And Local Referenda In Certain Territories And Polling Stations” has been designed to provide a comprehensive and objective procedure for analyzing the security situation when deciding on the impossibility of holding national and local elections in certain territories or in individual polling stations, which would makes it impossible to have the unjustified restrictions on the voting rights of citizens and the right of territorial communities to local self-government.

2. The Rationale For the Legal Act

The need to adopt the act comes from the lack of transparent procedure and criteria for assessing the security situation in certain areas during the preparation and adoption of decisions on the impossibility of national and local elections, from insufficient guarantees for interagency cooperation and prevention of conflicts of interest. In particular, this problem manifested itself in the first local elections in 2020 and during the scheduling of local elections in 2021. The problem also appeared during the national and local elections in 2014-2019.

On the eve of the first local elections in 2020, the CEC decided it impossible to hold the first local elections in 10 territorial communities of Donetsk Oblast and in 8 communities of Luhansk Oblast. This decision was made on the basis of the conclusions of the Donetsk and Luhansk regional civil-military administrations. The decision on the impossibility of holding local elections concerned 475,855 voters, whose voting addresses are located within 10 hromadas of Donetsk region and 8 hromadas of Luhansk region. The largest communities on this list include Lysychansk City Hromada (almost 91,000voters), Severodonetsk City Hromada (84,612), Toretsk City Hromada (50,351),Volnovakha City Hromada (29,716), and Maryinka City Hromada (26,865), Avdiyivka City Hromada (25,751), Vuhledar City Hromada (22,000), Popasna City Hromada (21,000), and Stanychno-Luhanska village council (20,686).

Voting in these hromadas did not take place on October 25, 2020. However, since the CEC received a negative opinion from the Donetsk and Luhansk regional civil-military administrations, local elections were not appointed in 2021, either.

Following the 2021 local elections, the European Parliament, the OSCE /ODIHR, and other international governmental and non-governmental organizations drew Ukraine's attention to the need to respect the voting rights of citizens of 18 Donetsk and Luhansk hromadas where elections did not take place, and to ensure transparent, objective and politically impartial procedures for assessing and taking into account security challenges during elections. In recent years, Ukraine has demonstrated its readiness to implement into the legislation the recommendations of reputable international election observation and expert organizations. The adoption of this draft law and, accordingly, the improvement of procedures for establishing the impossibility of elections in individual communities will demonstrate the government's proactive position in taking into account the recommendations of reputable international organizations and will strengthen its positive image among partner countries.

The current legislation on establishing the impossibility of holding elections in certain territories has the following shortcomings, which negatively affect the ensuring of voting rights for citizens:

- ***The non-collegiate and closed nature of the CMA's activities in producing opinions on the impossibility of holding elections, which concerns the rights of citizens guaranteed by the Constitution of Ukraine.***

The current legislation does not provide for procedures of interagency cooperation and collaborative preparation of decisions on the impossibility of holding elections. There are no fixed mandatory mechanisms for public discussion and involvement of experts in this decision-making. The appropriate conclusion depends on the CMA and its leadership who have a potential conflict of interest about the functioning of local governments and resource management of local communities. The non-collaborative preparation of conclusions and the non-transparency of the process negatively affect the voters' trust levels for government decisions that directly affect their constitutional rights. In particular, the law does not oblige the CMA to inform citizens or consult with local communities about the feasibility of holding elections. At the same time, the CEC does not have the authority or practical capacity to verify the CMA's conclusions about public safety.

In order to increase the public legitimacy of security decisions, it is necessary to introduce the principles of collegiality and interagency cooperation in the process of their production, as well as to upgrade the level of responsible bodies from regional to national.

- ***The legislation and the process of its implementation do not contain clear criteria and/or requirements for a reasonable decision not to hold elections in a specific period of time.***

During 2015-2019, the authorities occasionally justified their decisions by the territorial remoteness of communities from the contact line. But this territorial criterion was applied differently and, obviously, with distortions. Examples of unequal application of the territorial criterion can be found in the decision on the 2020 local elections (e.g., Severodonetsk and Rubizhne (Luhansk Oblast) that actually make an urban agglomeration together). The lack of basic requirements and criteria for the CMA conclusions has been repeatedly demonstrated by referring to the "difficult socio-political situation" as a reason not to have the vote. The lack of clear criteria for drawing conclusions about the impossibility of organizing elections is exacerbated by the fact that the electoral process is in fact considered separately from other areas of functioning of territorial communities.

If the security situation has significantly deteriorated compared to previous periods, this cannot be manifested solely in the electoral process. The universality of measures to ensure the security of citizens in various spheres of public life is a safeguard against potential political abuses of election procedures. The issues about local elections should be considered in conjunction with the situation in other areas (mass and entertainment events, party activities, national elections, protests, security guarantees at enterprises, the functioning of educational institutions, etc.). At present, there is an uninterrupted operation of educational and municipal institutions, of public administration bodies, there is no ban on mass events, including cultural or educational. However, they run in parallel with the restrictions on election commissions when they are unable to function and ensure the expression of will by voters in the same settlements. In addition, an important criteria for assessing the possibility of holding elections may be prior experience of administering the vote in the relevant territories. The successful conduct of national and local elections should be seen as an argument in favor of holding future elections (in the absence of objective information on the escalation of security challenges). Instead, the aggravation of security situation should be assessed according to certain measurable criteria (a scale) that are understandable to the public.

The process and procedures of preparing the decision on the impossibility to hold local elections in 18 hromadas of Donetsk and Luhansk Oblasts in 2020 provoked serious remarks from international organizations and Ukraine's foreign partners. European Parliament, in its resolution on the implementation of the EU -Ukraine Association Agreement (2019/2202(INI), highlights the fact that Ukrainian civil society has criticized the government's decision not to hold elections in 18 local communities in the government-controlled areas of Donetsk and Luhansk oblasts, without having a clear justification for this decision from the civil-military administration. The resolution emphasizes that this decision effectively deprived 475,000 voters living in these communities of the right to vote.

Upon observation of the 2020 local elections, reputable international observation missions expressed concern about the restriction of the constitutional rights of ab. 500,000 citizens of Ukraine. The main assessments came from the lack of clear

and transparent criteria for this decision-making, as well as from the lack of analysis of the security situation since the 2019 national elections. At the same time, key recommendations suggested setting clear criteria, requirements, and the methodology for decisions disabling the vote in individual communities, strengthening the openness of the process, and broadening the involvement of experts and the public. In particular, the Final Report of the OSCE / ODIHR Limited Election Observation Mission 2020 stated that the legal framework for decisions not to hold elections in government-controlled communities, including those where national campaigns had recently taken place, did not provide any sufficient guarantees for suffrage of citizens. At the same time, the process of implementation of such decisions, according to international observers, lacked transparency, which affected public trust.

The OSCE / ODIHR EOM noted that the CMA's findings, promulgated upon the CEC'S initiative, did not include any criteria or methodologies for assessing the security situation and its dynamics since the 2019 national elections. The decision not to hold local elections in 18 communities deprived about half a million Ukrainian citizens of their constitutional rights, undermining the inclusiveness of the electoral process. In their report, ENEMO recommended that clear, transparent, and realistic criteria be used to assess the possibility or impossibility of holding elections in these communities. The Final Report of the International Mission of the World Congress of Ukrainians for Local Election.

Observation 2020 holds a position about the conflict of interest with local communities in matters of budget management with the CMAs in charge of decisions not to hold the elections. The need to define clear objective criteria for the CMAs to determine the possibilities for future elections in the communities of Donetsk and Luhansk Oblasts has been raised in the Final Issue of the National Election Observation Mission 2020 of the National Democratic Institute (NDI). Thus, the draft law “On Improving the Procedure for Establishing the Impossibility of Holding National and Local Elections, All-Ukrainian and Local Referenda in Certain Territories and Polling Stations” aims to strengthen guarantees for citizens' voting rights and objectively take into account security challenges for the election process.

3. Key Provisions of the Draft Law

The draft law of Ukraine proposes to amend the Electoral Code, the Laws of Ukraine “On the National Security and Defense Council of Ukraine,” “On the Central Election Commission,” “On Civil-Military Administrations,” and “On the All-Ukrainian Referendum.”

Key provisions of the draft law:

- The competence of the National Security and Defense Council of Ukraine should include the establishment of assessment criteria by national security and defense authorities for the security situation regarding the possibility of ensuring the preparation and holding of national and local elections, and all-Ukrainian or local referenda within separate oblasts, districts, territorial hromadas, and their parts, on which territory the oblast or district civil-military administrations have been created. In addition, the National Security and Defense Council of Ukraine will determine the list of bodies that will assess the security situation according to the established criteria.
- The draft law stipulates that the National Security and Defense Council of Ukraine should decide on the (im)possibility to ensure the preparation and conduct of national or local elections, and all-Ukrainian or local referenda, in accordance with the law, within individual oblasts, districts, territorial hromadas, and their parts, on which territories Oblast or district civil-military administrations have been created, for each polling station individually. The relevant decision of the National Security and Defense Council shall be put into effect by the Decree of the President of Ukraine.
- Amendments to the Law of Ukraine “On the Central Election Commission” stipulate that the CEC, if necessary, shall appeal to the National Security and Defense Council on the possibility to ensure the preparation and conduct of national or local elections, and all-Ukrainian or local referenda. If the National Security and Defense Council decides not to hold elections or a referendum, enacted by a decree of the President of Ukraine, the CEC will determine the procedure for completing the already initiated election procedures or referendum process.
- In accordance with the proposed amendments to the Law of Ukraine “On Civil-Military Administrations,” the CMA shall undertake to submit to the National Security and Defense Council information on the possibility or impossibility of ensuring the preparation and holding of national or local elections according to the criteria it set. Thus, the provisions of the proposed draft law establish:
 - To upgrade the level of the body responsible for assessing the security situation for the organization and conduct of elections (from the CMA to the National Security and Defense Council), which will reduce the risks of unreasonable decisions or their adoption in a conflict of interest.
 - To create legal conditions for the introduction of full-fledged criteria for assessing the security situation in the context of the preparation and conduct of elections, which will be established by the National Security and Defense Council and will become mandatory for the national security and defense authorities.
 - To settle the technicalities of interdepartmental interaction and the issue of termination of election and referendum procedures in case of impossibility to organize and hold the elections.

4. Legal Aspects

Regulatory legal acts regulating relations in this area shall be the Electoral Code, the laws of Ukraine “On the National Security and Defense Council of Ukraine,” “On the Central Election Commission,” “On the All-Ukrainian Referendum,” and “On Civil-Military Administrations.”

5. Financial Feasibility

Adoption and implementation of the draft law's provisions will not entail any additional expenditures from the State Budget of Ukraine or local budgets.

6. Forecast of Outcomes

Implementation of the Law will increase the transparency and validity of decisions on the impossibility of organizing and conducting national and local elections in certain territories. It will introduce a system of objective assessment of security situation for the organizations and conduct of elections, reduce the risks of politically-biased decisions not to hold elections or decisions taken amidst the conflict of interest about community resource management.