

OPINION of the Promo-LEX Association on the disregard of public consultations on the organization of elections in the pandemic by the National Extraordinary Public Health Commission

Considering that the Central Electoral Commission proposed for public consultations the Instruction on preventing the spread of COVID-19 infection during the electoral period, approved by the National Extraordinary Public Health Commission (NEPHC), the Promo-LEX Association comes with the following findings:

- 1. The National Extraordinary Public Health Commission disregarded the process of public consultations, initiated by the Central Electoral Commission, thus violating the legal provisions.***

According to the information posted on the website of the CEC[\[1\]](#) on 06.08.2020, the CEC invited the stakeholders to submit, by August 15, 2020, comments and proposals for the Instruction on preventing the spread of COVID-19 infection during the electoral period. We remind the reader that according to the Law on Transparency in the Decision-making Process, *the timeframe for submitting recommendations on draft decisions is at of least 10 working days from the date of the announcement of the decision or from the date of the announcement of the public consultation.*

Starting from legal provisions, as well as in the spirit of

good faith, on August 14, 2020, Promo-LEX sent its technical recommendations to improve the Instruction.

On the other hand, the CEC asked the National Extraordinary Public Health Commission to provide an advisory opinion in accordance with its competence and, on 17.08.2020, the CEC already published the Instruction on preventing the spread of COVID-19 infection during the electoral period, which had been approved by the NEPHC on 12.08. 2020.

Finally, the Instruction was approved 4 days before the end of the public consultations, whereas the CEC informed the public about that fact immediately after the expiration of the term. In this way, the NEPHC disregarded the process of public consultations initiated by the CEC, as well as the opinions sent to the CEC by stakeholders, thus creating conditions for excluding stakeholders from the decision-making process.

- 1. The NEPHC has arrogated excessive powers by approving an Instruction whose implementation terms are statutory, mainly, outside the public health emergency period.***

Although the public health emergency was declared and **extended only until August 31, 2020**, ***the NEPHC assumed excessive responsibilities by approving the Instruction, which provided for the implementation of special measures outside the public health emergency period.*** In this context, we remind the reader that according to the Program for the organization and conduct of the presidential elections of November 1, 2020, most activities are to take place after August 31, 2020.

Mention should be made of the fact that all the specific rights and competences granted by **law** to the authority in charge of managing and surveilling public health (art. 58-62), are related exclusively to the period for which the state of emergency was established, in this case, 31.08.2020. The specific rights and competences also include creation of

special conditions for the activity, life and travel for natural and legal persons (art. 58 para. (5)).

To restore the rule of law, we consider it appropriate for the NEPHC to undertake the following actions:

12. to abrogate the NEPHC Decision no. 24 of 12.08.2020;
13. to examine, within its competence, the risks and issues identified by the stakeholders that submitted to the CEC comments and proposals, and
14. to endorse the draft Instruction within the limits of the powers granted to it by law.

In addition, the Instruction does not address only issues related to the prevention of COVID-19, it also deals with the free exercise of the right to elect and be elected. Therefore, we consider that the Instruction must be approved by the authority competent to organize and hold elections.

1. According to Promo-LEX, the provisions of the Instruction are likely to create confusion, and sometimes may even disrupt the election procedures.

Promo-LEX emphasizes that NEPHC seems to be the institution that is mostly concerned, can and should express its opinion on preventive measures in cases of potential danger of transmitting contagious diseases. The preventive measures established by the NEPHC must be clear, predictable and devoid of any interpretation. However, Promo-LEX emphasizes the following defective aspects of the approved Instruction:

– Conditioning of the right to vote by the availability of protective equipment (point 1.1.) Promo-LEX insists that the right to vote cannot be conditioned by the availability of protective equipment upon voters' arrival to the polling station. **We consider that entry into the polling station can be conditioned, only if electoral bodies or other public authorities provide voters, free of charge, with the protective equipment required by the NEPHC (especially the**

disadvantaged categories, who do not have the resources to purchase it). Consequently, the NEPHC, the Government and electoral bodies must ensure that the mandatory protective equipment requested must be made available free of charge to those voters who do not own it. Or, they must provide for alternative mechanisms to exercise the right to vote by those who do not own that equipment, such as voting at one's domicile or voting on additional lists within the polling station but outside its seat.

– **The list of mandatory protective equipment required for different electoral actors is not exhaustive (point 2.4. (only masks and gloves) and point 3.7. (masks, gloves, face shields, etc.)).** Considering the obligation imposed on the subjects involved in the electoral process, including under the sanction of prohibiting the access of the authorized persons to attend the electoral process, we recommend providing an equivocal and reasonable list of minimum protective equipment that each subject involved in the electoral process must have. It is also necessary to establish the periodicity of its change, considering that the subjects will permanently be in the polling station. If there is a list of equipment requested by the NEPHC, the Instruction must clearly state what the reaction of the electoral authority will be in the absence of any piece of equipment from the list, for example, the person has a mask and gloves, but does not have a face shield, or one has a face shield and gloves, but does not have a mask.

– **Providing explicit solutions to avoid situations, where the premises of the polling station can accommodate a limited number of observers / media representatives/ representatives with consultative vote, respecting the distance of one meter. Respectively, the evaluation of polling stations (PS) and ensuring that all PS meet the criteria necessary to prevent the spread of COVID- 19 on election day is mandatory.** In case it is identified that some headquarters of

the PS do not meet the necessary criteria, it is recommended to identify alternative seats and inform the public about the change of the seat of the polling stations.

– **Ensuring the right to vote for persons who are in self-isolation**, or those who, according to the epidemiological files, are in quarantine at their domicile, outside the radius of the polling station, to which they are assigned according to their domicile / residence.

– **Providing a list of requirements that electoral competitors must comply with when requesting from public authorities / institutions spaces for meetings with voters** (e.g. time limit for which the premises are granted, limit for the number of participants respecting the social distance, provision of protective equipment, etc.). The conditions to be met could be included in the decision / contract or provision issued by the public authority or institution, when permission is granted.

In conclusion,

– We condemn the fact that the NEPHC disregarded the legal provisions on the conduct of public consultations.

– We draw the attention of the NEPHC to the fact that it has exceeded its powers, given that the state of public health emergency has been declared only until August 31, 2020 and we emphasize the lack of clarity regarding its further extension and the period of such extension.

– We find that the provisions of the Instruction are, in some places, too broad and at the same time, do not cover many problematic aspects that may affect the quality of the electoral process.

At the same time, considering the need to restore the rule of law and taking into account the competences and area of responsibility of the public authorities concerned, **Promo-LEX recommends:**

the National Extraordinary Public Health Commission:

- providing clarity with regard to the probability and necessity of extending the period of public health emergency, so that there are no uncertainties about the measures applied for different stages of electoral process;
- abrogating the NEPHC Decision no. 24 of 12.08.2020;
- examining, within its competence, the risks and issues highlighted by the stakeholders, who submitted comments and proposals to the CEC;
- endorsing the draft Instruction within the limits of the powers granted to it by law.

the Central Electoral Commission:

- completing the process of public consultations;
 - examining the recommendations and submitting to the NEPHC the synthesis of their examination;
 - approving the instruction on preventing the spread of COVID-19 infection.
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[\[1\] Press release](#). The Central Electoral Commission is concerned with the organization and conduct of elections in the wake of the pandemic caused by COVID-19.