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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**AND**

**THE OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS**  
**(OSCE/ODIHR)**

**JOINT OPINION**

**ON THE AMENDMENTS  
TO THE ELECTORAL CODE  
OF THE REPUBLIC OF BELARUS  
as of 17 December 2009**

**adopted by the Council for Democratic Elections  
at its 33<sup>rd</sup> meeting  
(Venice, 3 June 2010)**

**and by the Venice Commission  
at its 83<sup>rd</sup> Plenary Session  
(Venice, 4 June 2010)**

**on the basis of comments by**

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## A. Introduction

1. The present report follows a request addressed to the Venice Commission by the Political Affairs Committee of the Parliamentary Assembly of the Council of Europe on 18 March 2010. It provides an assessment of these amendments, which were submitted for information in Russian language to the OSCE/ODIHR in January 2010 by representatives of the Ministry of Foreign Affairs of the Republic of Belarus. The OSCE/ODIHR and Venice Commission experts have made their assessment based on an unofficial English translation of the Russian original.

2. This opinion is based upon:

- The code of the Republic of Belarus as of 6 October 2006 (CDL-EL(2009)001);
- The Law on Amendments to some Laws of the Republic of Belarus Regulating the Conduct of Elections and Referendums and on the Declaration of the Law of the Republic of Belarus “On the Central Commission of the Republic of Belarus for Elections and Conduct of Republican Referendums” null and void<sup>1</sup>, dated 17 December 2009 (CDL-EL(2010)018);
- The Constitution of the Republic of Belarus;
- The Joint Opinion by the Venice Commission and OSCE/ODIHR on the Electoral Legislation of the Republic of Belarus, adopted by the Council for Democratic Elections at its 18th meeting (Venice, 12 October 2006) and the Venice Commission at its 68th plenary session (Venice, 13-14 October 2006) (CDL-AD(2006)028);
- The OSCE/ODIHR Election Observation Mission Final Report on Parliamentary Elections in Belarus, 28 September 2008 (Warsaw, 28 November 2008);
- The OSCE/ODIHR Election Observation Mission Final Report on the Presidential Election in the Republic of Belarus, 19 March 2006 (Warsaw, 7 June 2006)
- The Code of Good Practice in Electoral Matters, drafted by the Venice Commission (CDL-AD(2002)023rev);
- The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950);
- The Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (29 June 1990).
- The International Covenant on Civil and Political Rights (ICCPR) (adopted by the United Nations General Assembly on 16 December 1966) and the general comments to it by the United Nations Human Rights Committee.

3. This opinion was adopted by the Council for Democratic Elections at its 33<sup>rd</sup> meeting (Venice, 3 June 2010) and by the Venice Commission at its 83<sup>rd</sup> Plenary Session (Venice, 4 June 2010).

## B. Background to the Amendments

4. On 4 January 2010 substantial amendments were introduced to the Electoral Code of the Republic of Belarus<sup>2</sup> (“the Code”). These Amendments are focused, overall, on issues discussed between the Organization for Security and Co-operation in Europe’s Office for Democratic Institutions and Human Rights (OSCE/ODIHR) and the Belarusian authorities in follow-up to the recommendations contained in the OSCE/ODIHR Election Observation Mission Final Report on the 2008 parliamentary elections in the Republic of Belarus. Such discussions were conducted between representatives of OSCE/ODIHR and representatives of the National Centre for Legislation and Legal Research of Belarus, in February 2009 and in April 2010 respectively, i.e. both before and after the adoption of the Amendments in January 2010.

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<sup>1</sup> This law was repealed by the amendments which were introduced into the Electoral Code of the Republic of Belarus in January 2010.

<sup>2</sup> CDL\_EL(2006) Revised Electoral Code of Belarus (Extracts), available at [www.venice.coe.int/docs/2006/CDL-EL\(2006\)028-e.asp](http://www.venice.coe.int/docs/2006/CDL-EL(2006)028-e.asp).

5. The discussions focused on seven points, based on Final Report Recommendations which were considered of particular importance: 1) Freedom of and resources for campaigning 2) Composition and appointment of election commissions 3) Candidate registration 4) The integrity of the five-day early voting period 4) A more responsive complaint and appeals system 5) The vote count procedures and the extent to which they can be observed 7) The transformation of the National State Television and Radio Company into an independent public broadcaster (this point only took a marginal place in the discussions as it was agreed that it was not directly a matter of electoral legislation). Other recommendations, from past final reports or the joint opinions, were not discussed other than to the extent they coincided with, or bore relevance to, the seven points listed above. The draft amendments prepared by the National Centre for Legislation and Legal Research following the February 2009 discussions were not shared with the OSCE/ODIHR for commentary before adoption.

6. The most recent presidential election in Belarus was held on 19 March 2006 and the most recent elections for the Chamber of Representatives of the National Assembly (the parliament) were held on 28 September 2008. The next presidential election is due in 2011 and the next elections for the parliament in 2012.

7. International observers expressed serious concerns with regard to the conduct of recent elections in Belarus. The OSCE/ODIHR Final Report on the 2008 parliamentary elections<sup>3</sup> (the 2008 Report) identified a number of fundamental concerns both about the election legislation and its implementation. Many of these echoed concerns identified in the 2006 Joint Opinion<sup>4</sup> of the Venice Commission and the OSCE/ODIHR (the 2006 Joint Opinion) and in the OSCE/ODIHR Final Report on the 2006 presidential election<sup>5</sup> (the 2006 Report).

8. Specific flaws in Belarus's election legislation were outlined in the 2006 Joint Opinion, which identified key areas where improvements were needed, including the following:

- (i) election commissions must be composed in a balanced way, protected from strong executive influence and operate transparently;
- (ii) obstacles to candidacy must be removed and the rights of candidates must be ensured;
- (iii) early voting and voting using mobile ballot boxes must be properly regulated and transparent;
- (iv) the limited role of international and domestic observers gives ground for serious concern about the transparency of the work of the election administration;
- (v) clear provisions on appeals are required in respect of decisions by election commissions.

9. Limited amendments were made to the Electoral Code in October 2006. However, on balance these were a regressive step and addressed none of the concerns mentioned above.<sup>6</sup>

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<sup>3</sup> Belarus, Parliamentary Elections, 28 September 2008, OSCE/ODIHR Election Observation Mission Final Report, available at [www.osce.org/documents/odihr/2006/06/19393\\_en.pdf](http://www.osce.org/documents/odihr/2006/06/19393_en.pdf).

<sup>4</sup> CDL-AD(2006)028 [Joint Opinion on the Electoral Legislation of the Republic of Belarus by the Venice Commission and OSCE/ODIHR adopted by the Council for Democratic Elections at its 18th meeting \(Venice, 12 October 2006\) and the Venice Commission at its 68th plenary session \(Venice, 13-14 October 2006\)](#), available at [www.venice.coe.int/docs/2006/CDL-AD\(2006\)028-e.asp](http://www.venice.coe.int/docs/2006/CDL-AD(2006)028-e.asp).

<sup>5</sup> Republic of Belarus, Presidential Elections, 19 March 2006, OSCE/ODIHR Election Observation Mission Final Report, available at [www.osce.org/documents/odihr/2006/06/19393\\_en.pdf](http://www.osce.org/documents/odihr/2006/06/19393_en.pdf).

<sup>6</sup> The 2008 Report, p. 26, stated that: "The October 2006 amendments brought minor technical clarifications of the law. In other instances, however, the law was amended to its detriment. [...] Also, it appeared that certain previously criticized practices and interpretations of the law have now been codified by the amendments."

10. The present Joint Opinion makes reference to key recommendations made in the 2006 and 2008 Reports, as well as the 2006 Joint Opinion. All recommendations which are contained in these Reports and the Joint Opinion, but which are not commented on in the present Opinion, remain valid. The present opinion does not address all problems mentioned in those previous documents.

11. Moreover, the conformity of the institution of recall with European standards could also be addressed, in the light of the recent study of the Venice Commission on the imperative mandate and similar practices.<sup>7</sup>

### **C. Executive Summary**

12. The Amendments provide a mixed response to the concerns of the OSCE/ODIHR and the Venice Commission. The Amendments represent a step towards removing some flaws in Belarus' election legislation, although they are unlikely to resolve the underlying concern that the legislative framework for elections in Belarus continues to fall short of providing a basis for genuinely democratic elections.

13. The following key observations should be made at the outset:

- (i) The Amendments include significant improvements which warrant acknowledgement.
- (ii) No legislation can guarantee elections in line with OSCE and Council of Europe commitments and other international standards, however good it may be. The quality of future elections in Belarus will depend not only on the quality of the legislation but also on its good faith implementation.<sup>8</sup>
- (iii) Any positive impact of the Amendments to date risks being undermined by the process by which votes are currently counted and results are processed, which was not amended despite the OSCE/ODIHR and Venice Commission recommendations in this regard.
- (iv) In this context, a number of important recommendations offered by the 2006 Report, the 2006 Joint Opinion and the 2008 Report remain valid.
- (v) The Venice Commission and the OSCE/ODIHR encourage the authorities of Belarus to continue with the electoral reform at the latest immediately after the next elections for national office.

14. Some of the amendments represent significant improvements, including:

- (i) Political parties are no longer required to have a registered party office in each constituency in which they wish to nominate a candidate for deputy.
- (ii) Candidates and parties no longer need permission to organise campaign meetings and other events held in public places. Local authorities must make a designated place available on request, subject to specified notification requirements.
- (iii) Decisions relating to the appointment of members of election commissions other than the Central Commission of the Republic of Belarus for Elections and Conduct of Republican Referenda CEC may be appealed to a court at the appropriate level.

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CDL-AD(2009)027 Report on the Imperative Mandate and Similar Practices adopted by the Council for Democratic Elections at its 28<sup>th</sup> meeting (Venice, 14 March 2009) and by the Venice Commission at its 79<sup>th</sup> Plenary Session (Venice, 12-13 June 2009, available at [http://www.venice.coe.int/docs/2009/CDL-AD\(2009\)027-e.asp](http://www.venice.coe.int/docs/2009/CDL-AD(2009)027-e.asp)).

<sup>8</sup> The 2006 Joint Opinion, Paragraph 87 states that "[...] Good faith implementation of the electoral legislation and the will to hold genuinely democratic and competitive vote remain crucial for the elections to be in conformity with the standards of the European electoral heritage including the OSCE Commitments[...]"

- (iv) The Code now expressly provides for debates between candidates as part of the TV and radio time made available by the state broadcaster.
- (v) A voting protocol must be completed at the end of each day during the 5-day early voting.
- (vi) Appeals against decisions of the CEC to the Supreme Court are now expressly envisaged.

15. Other amendments, whilst introducing a measure of positive changes, would need to be further elaborated in order to ensure proper implementation:

- (i) At least a third of the members of election commissions below the level of the CEC must be drawn from political parties and other public associations with no more than a third of the other members being state employees. However, a formula could be introduced to secure the prospects of political parties enjoying equal access to such commissions. Such a formula could, for example, be based on proportionality or on the drawing of lots.
- (ii) Applications for nomination of candidates may only be refused in respect of errors in their declarations of income and property if such errors are substantial. However, without precise rules that provide for the circumstances under which errors will be considered “substantial”, such decisions remain arbitrary.
- (iii) Candidates may now establish their own campaign funds. However, the limits on donations to campaign funds are very low. Therefore, the power to revoke a candidate’s registration on the basis of excessive spending must be clearly regulated and a prompt and effective appeal mechanism must be made available, in order to uphold the right to be elected.
- (iv) The Code now establishes categories of complaints which must be considered by the CEC on a collegial basis. This includes all complaints relating to decisions by lower level commissions. Nevertheless, other categories of complaints remain for which decision making on a collegial basis is not required.

16. The Amendments have not addressed some key recommendations and underlying concerns, including:

- (i) The right to vote has not been granted to persons in preventive custody and those sentenced for less serious crimes.<sup>9</sup>
- (ii) The role of the executive and in particular the President of Belarus in the appointment of the CEC remains excessive.<sup>10</sup>
- (iii) There are still no rules governing the process by which members of election commissions below the CEC level are appointed by the corresponding local authorities.

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<sup>9</sup> The 2006 Joint Opinion; Paragraph 15 states that Article 4.1 of the Code “[...] deprives persons in preventive custody from the right to vote, which is contrary to the principle of presumption of innocence [...]”; Paragraph 16 states that “[...] Denial of suffrage should only be possible when a person has been convicted of committing a crime of such serious nature that forfeiture of suffrage rights is indeed proportionate to the crime committed [...]”. Also, the European Court of Human Rights has held that a blanket restriction on the voting rights of prisoners “irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances” is a violation of Article 3 of Protocol 1 of the European Convention on Human Rights. (*Hirst v. United Kingdom* (No. 2), Application no. 74025/01, 6 October 2005.)

<sup>10</sup> *Ibid.*, Paragraph 11 states that: “[...] The Electoral Code does not reflect the political pluralism required by the OSCE commitments as it grants substantial, unchecked and monopolistic control of all election processes to the executive branch of government [...]”.

- (iv) There have been no amendments to ensure that precinct commission members count the ballot papers in a transparent and properly observable manner.
- (v) There have been no substantive amendments to ensure that election observers are given direct and effective opportunities to monitor the voting and counting process and the tabulation of results.
- (vi) There is no adequate provision to ensure that observers and representatives of the mass media can obtain certified copies of minutes and other relevant documents, and all results protocols.
- (vii) There have been no amendments to mandate the CEC and lower level election commissions to publish detailed preliminary and final results of the vote, by polling stations, without undue delay.<sup>11</sup>

#### **D. Composition of the Central Election Commission (CEC)**

17. Elections in Belarus are administered by a hierarchy of election commissions comprising the CEC and various levels of subordinate commissions down to precinct election commissions. The hierarchy of subordinate commissions varies according to the type of election. The composition of the CEC was hitherto addressed in a separate Law (Law on the Central Commission of the Republic of Belarus for Elections and the Conduct of Republican Referendums) with other levels of election commissions being dealt with in the Code. The Law adopted on 4 January 2010 repeals the Law on the CEC and adds new provisions to the Code dealing with the CEC's composition and powers, so that all these issues are now dealt with in the Code. This change is welcome.

18. The basic rules as to who appoints members of the election commissions are unchanged under the Amendments. Of the 12 members of the CEC, 6 are appointed by the President and 6 by the upper chamber of parliament (the Council of the Republic). Subordinate commissions continue to be appointed by the corresponding regional, city and local authorities. Therefore, the concerns and recommendations expressed in the 2006 Joint Opinion remain valid.<sup>12</sup>

19. There are a few internationally recognized good practices regarding the composition of the CEC.<sup>13</sup> In a political environment where there is a deficit of public confidence in the election process, it is considered that inclusion in the CEC of full fledged representatives nominated by key political stakeholders would augment transparency and could boost public confidence.<sup>14</sup>

20. Existing international standards<sup>15</sup> require the CEC to perform its duties in a professional and politically impartial manner, independent from other branches of State power. In this context, the unconditional authority of the executive - and in particular the President - with regard to the appointment of senior election officials without any consultations with political stakeholders seems excessive.

21. At the CEC level, political parties may appoint representatives but they have no voting rights. In previous elections the President issued decrees envisaging the appointment of such

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<sup>11</sup> Both the 2006 and the 2008 Reports.

<sup>12</sup> CDL-AD(2006)028.

<sup>13</sup> See the Venice Commission's "Code of Good Practice in Electoral Matters" (CDL-AD(2002)023rev), paragraph II.3.1 "Organization of Elections by an Impartial Body", available at [www.venice.coe.int/docs/2002/CDL-AD\(2002\)023rev-e.pdf](http://www.venice.coe.int/docs/2002/CDL-AD(2002)023rev-e.pdf).

<sup>14</sup> Paragraph 12 of the 2006 Joint Opinion states that: "[...] voters must fully trust the electoral administration [...]". In the above context, party representatives are not considered to be politicians, rather these should be experts – lawyers, mathematicians, sociologists, logisticians, etc - that enjoy the trust of respective political parties in their professional capacities despite their possible political views.

<sup>15</sup> Ibid; please see also Paragraph 20 of UNHRC General Comment 25 to the UN International Covenant of Civil and Political Rights, available at [www.jcs.act.gov.au/prd/rights/documents/report/appendix5.pdf](http://www.jcs.act.gov.au/prd/rights/documents/report/appendix5.pdf).

advisory members of the CEC. This has now been formalised within the Code (in a new art. 33<sup>1</sup>). However, this falls short of addressing the concerns expressed by the 2008 Report, which noted that although opposition representatives actively took part in the debate in all CEC sessions, they had no discernible impact on the decision making process. Moreover, although the Code continues to stipulate that election commissions are independent from state bodies (art. 11, part 3), the prospects that the commissions will be able to exercise meaningful independence are limited by the degree of control exercised by the President over the membership of the CEC.

22. Given that CEC decisions are taken by a majority of the total membership (art. 32<sup>1</sup>, part 5) and that the President appoints half the members, all it takes is one pro-presidential nominee from the Council of the Republic to give the President effective control over decision-making at the CEC. It is also notable that whilst there is a clear expectation that representatives of political parties will play a significant role in all subordinate election commissions with full voting rights (art. 34, parts 1 and 2), there is no such mechanism in respect of the CEC. Thus, serious concerns remain about the lack of genuine political pluralism in the appointment and operation of the CEC.

#### **E. Responses to recommendations by the OSCE/ODIHR and the Venice Commission addressed in the amendments**

**Recommendation:**<sup>16</sup> *Election commissions could be constituted on the basis of nominations by political parties to ensure an inclusive and diverse balance of interests, and in such a manner as to provide a functional separation from state bodies. Simultaneous service within the state administration should be proscribed.*

23. The criteria for selecting election commission members should be clear and publicized beforehand. There are still no rules governing the process by which members of election commissions below the CEC level are appointed by the corresponding local authorities. Whilst the rules on how political parties and others may nominate commission members have been somewhat simplified, this leaves open the question of whether nominees will be appointed. This is a major flaw in the legislation, particularly given the lack of representation of opposition political parties in election commissions in the most recent parliamentary elections. This omission also wholly undermines the new rule allowing judicial challenges against decisions on the appointment of members of election commissions other than the CEC. If there are no legal criteria on the appointment of commission members and there is nothing to prevent the authorities from declining to appoint opposition party representatives, then the practical scope for judicial challenges is limited.

24. The Amendments include various changes which may be intended to address these recommendations. First, the bodies appointing all the election commissions below the level of the CEC must as a rule form at least one third of the membership from representatives of political parties and other public associations (art. 34, part 2). This is a positive but limited improvement and it is not clear how it will work in practice. There is nothing to prevent the bodies forming election commissions from ignoring nominations from one political party provided that nominees from other political parties and some other public associations comprise at least one third of the total membership. Moreover, with most subordinate commissions having about 10 members, this only secures 3-4 places for party representatives plus representatives of other public associations. In these circumstances, some parties, even those enjoying a significant following, may well find that their attempts to secure membership of election commissions are blocked. This is a particular concern given previous experience. According to the 2008 Report, of the 136 nominees proposed by opposition parties to district election commissions, only 28 per cent were accepted. The figure was much worse in the precinct commissions, where only 3 per cent of the 1,515 nominees from opposition parties were accepted. The new "one third" rule provides no mechanism to ensure that this will be any different in future elections, a concern that is underlined by the fact that not one of the 57

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<sup>16</sup> The 2008 Report, p. 24; please see also the 2006 Joint Opinion, Paragraphs 30-41.



opposition party candidates was elected in 2008. Accordingly, this amendment does not provide a mechanism for ensuring that opposition parties play an effective role in election commissions.

25. There are no obvious or necessarily correct criteria for the selection of election commission members. This is something which the Parliament of Belarus must decide for itself. Requiring members to have certain educational or even legal qualifications is a feature of some election systems, but may be impractical as a rule for commissions at all levels. Another option would be to allocate membership on a proportionality basis between political parties and civil society organisations. Alternatively, members could be selected by lot. This has the attraction of being transparent and creates equal prospects of selection irrespective of the source of nomination. Selection by lot obviously means that members are not selected by aptitude, qualifications or experience. If members are to be selected using criteria such as education or legal qualifications, then these criteria should be clearly stated in the legislation so that selection decisions can be objectively justified and, if necessary, challenged.

26. A second change imposes a limit on the number of state employees who may constitute the membership of an election commission below the level of the CEC. The limit is set at one third (art. 34, part 4). Moreover, certain state employees, including the heads of local executive and administrative bodies, are now prohibited from serving on election commissions altogether (art. 34, part 3). The 2008 Report expressed serious concerns about the influence of state bodies over election commissions and recommended that there should be no simultaneous service on election commissions and within state administration. Obviously this amendment does not go that far, but the one third limit is positive in principle. It leaves open, however, the question of how much influence any state employees appointed to election commissions will enjoy in practice and how genuinely independent the remaining members will be.

27. Neither of the above changes addresses the concern that there are no clear, transparent or published rules governing the mechanism by which regional and local authorities appoint members of election commissions at various levels. The nomination process is reasonably clear in the Code. However, given the limited number of places available in the election commissions, the mere fact that a nomination has been made, for instance by a political party or by a group of citizens supporting a particular candidate, is no guarantee that the nominee will be appointed. The absence of any rules on how nominations are considered continues to be a significant omission from the Code.

**Recommendation:**<sup>17</sup> *Consideration should be given to allowing all registered political parties to nominate candidates in each constituency, regardless of their registration at the regional level, provided that the candidate and party satisfy other legitimate requirements.*

28. An organisation may only be formally registered as a political party if it has local offices ("organisational structures") in most of Belarus (i.e. in Minsk and in the majority of the regions of Belarus: see art. 10, part 3 of the Law on Political Parties). Notwithstanding this requirement for broad regional representation, for the 2008 parliamentary elections, political parties were only permitted to nominate candidates for deputy if they had an organisational structure in the constituency in question (art. 62, part 1 of the Code). Moreover, the constituency's organisational structure had to have been in place for at least six months before the elections were called. This meant that even if a party had an organisational structure within a particular region of Belarus, it would not be permitted to nominate a candidate for a constituency within that region unless it also had an organisational structure within that specific constituency. The 2008 Report took the view that this constituted excessive regulation of the internal workings of political parties and created unwarranted obstacles to candidacy. The issue does not arise in presidential elections because, surprisingly, political parties are not entitled to nominate candidates for such elections at all.

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<sup>17</sup> The 2008 Report, p. 24; please see also the 2006 Joint Opinion, Paragraph 28.

29. The concern expressed by OSCE/ODIHR and the Venice Commission in respect of parliamentary elections has been fully addressed in the Amendments. A political party may now nominate candidates for any constituency, irrespective of whether the party has an organisational structure within the constituency in question (new art. 62, part 1).

**Recommendation:**<sup>18</sup> *The Code should be amended to remove undue barriers to candidate registration and allow for making corrections to registration documents submitted.*

#### Non-registration of candidates due to inaccuracies in registration documents

30. Prior to the amendment, the Code provided that if the biographic data or information or the content of candidates' income and property declarations "do not correspond to reality", this was a ground for outright refusal of an application to be registered as a candidate. The 2008 Report expressed the concern that applications may be refused on what may, in reality, be trivial grounds, where there are only minor inaccuracies in the information provided.

31. This concern has been addressed in the new art. 68, part 7 of the Code. This provides that registration of candidates will be refused only if the inaccuracies are substantial (*imeiushchie sushchestvennyi kharakter*). What constitutes a substantial inaccuracy is to be addressed in a document issued by the CEC. This is obviously a positive step. However, by delegating the task of defining what constitutes a substantial inaccuracy, this amendment fails to resolve the issue it was intended to address. A proper assessment of this response will therefore only become possible once the CEC has issued the guidance anticipated in the amendment.

#### Opportunities to correct errors in registration documents

32. The 2008 Report suggested that candidates should be permitted to correct inaccuracies in their declarations of income and property. There has been no direct response to this recommendation. The only change in this area is that documents submitted for registration of initiative groups may be amended after submission (Article 61 2<sup>nd</sup> part of last sentence). However, amendments can only be made prior to consideration by the district or territorial commission, which means again that applications may be subject to outright rejection on the basis of relatively minor inaccuracies without an opportunity to correct the flaw.

33. The need for an opportunity to correct minor inaccuracies in candidates' declarations of income and property is obviously reduced if nominations will only be rejected due to substantial inaccuracies. Again, however, the extent to which this will be regulated in practice remains to be seen, pending clarification by the CEC.

**Recommendation:**<sup>19</sup> *The Code should "[...] establish a framework that allows candidates to conduct a campaign free from state control, with access to sufficient resources to conduct a meaningful campaign. At the same time, the Code should lift limitations on the right of individual voters and political parties to campaign for or against candidates [...]"*

34. Prior to these latest Amendments to the Code, all funds for campaigning were channelled through state bodies (art. 48). The state dispensed funds to candidates on an equal basis. Citizens and political parties were not permitted to provide material assistance to preparations for an election except to make contributions to general state funds. The view of the 2008 Report was that these controls imposed such stringent restrictions that they impeded effective election campaigning.

35. This position has been substantially changed by new provisions of art. 48 of the Code and the insertion of a new article 48<sup>1</sup>. Under the latter article, candidates are now allowed to set up their own campaign funds. These funds can be used for specified activities such as paying for air-time and print space in the mass media, renting premises and printing campaign materials.

<sup>18</sup> The 2008 Report, p. 23; please see also the 2006 Joint Opinion, Paragraph 29.

<sup>19</sup> The 2008 Report, p. 24; please see also the 2006 Joint Opinion, Paragraphs 60 ff.

As in many other countries, contributions are not permitted by foreign citizens and organisations, anonymous donors, state and various other entities. The provisions include a rule requiring the return of unspent funds on a proportionate basis to donors (art. 48<sup>1</sup>, part 17). This could prove exceedingly cumbersome.

36. Article 48<sup>1</sup>, part 2, 3) allows for voluntary contributions of legal entities. It should be made clear that public or publicly owned legal entities are not included.

37. Candidates must submit two financial reports in respect of their campaign funds, the first 10-15 days before the election and the second within 5 days after the election (art. 48<sup>1</sup>, part 14). This is a welcome amendment that increases the transparency of campaign financing.

38. There are stringent limits on contributions to campaign funds by both individuals and legal entities. Individual persons may contribute no more than 10 “basic units” to a presidential campaign fund. A basic unit is BR 35,000, so this is a limit of BR 350,000 or approximately 90 EUR. The individual contribution limit for a deputy’s campaign fund is half that amount. The limits for legal entities are not much higher (the equivalent of 270 EUR and 90 EUR for natural and legal persons respectively). In addition, although there is no maximum level of the amount contributed to campaign funds, the amount spent by candidates from their funds is limited to BR 105mio. (EUR 27,200) for presidential candidates and BR 35mio. (EUR 9,100) for candidates for deputy. Moreover, if the CEC or a DEC deems that this limit has been exceeded, it may revoke without warning the candidate’s registration, with the effect of eliminating the candidate from the election altogether (see art. 49, part 6 as amended).

39. Broadly speaking, the introduction of autonomous campaign funds, separate from (and additional to) state funds, is a welcome improvement. It remains to be seen whether the limits on individual contributions and on a candidate’s total expenditure from the campaign fund are realistic and whether they afford sufficient scope for effective campaign activities. Obviously much will depend on the cost at which facilities are made available and, crucially, whether incumbent candidates are allowed to benefit in practice from free favourable media coverage in the mass media.

40. The election commissions’ new power to revoke a candidate’s registration on the basis of excessive campaign spending raises separate and significant risks. This is a draconian power and it is difficult to see how an election commission would know that the spending limit had been exceeded in the course of an election campaign other than on the basis of the candidate’s first financial report. The provision allowing deregistration of a candidate due to excessive campaign spending should best be abolished, but if it is to remain in the Code, it should at least be explicitly stated that the only ground for reaching such a conclusion would be the data contained in the first financial report. Obviously it is also imperative that any decision to revoke a candidate’s registration is amenable to prompt and effective appeal.

**Recommendation:**<sup>20</sup> *Candidates’ free campaign slots could be broadcast immediately before or after the main evening news, enhancing voters’ opportunity to learn about the candidates. A format, such as debates or candidate interviews, that can draw the interest of a larger audience, could be considered.*

41. This recommendation is obviously linked to the preceding one. Debates between candidates were not previously prohibited. The Code now expressly stipulates that the free air time made available for candidates must include time reserved for debates, by agreement between candidates (art. 46, part 9). The mechanisms for such agreement will need to be clearly articulated. The recommendation as to when free campaign slots should be broadcast is probably not best addressed within the Code.

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<sup>20</sup> The 2008 Report, p. 25; please see also the 2006 Joint Opinion, Paragraph 62.

42. In a positive development, Article 46 now also confirms that candidates' right to publish their manifestos in state-owned and financed mass media (presumably printed media) is exercisable free of charge.

**Recommendation:**<sup>21</sup> *The Law on Mass Events could be amended to comply with international standards on freedom of assembly, allowing for the effective exercise of this right during the election campaign. In particular, citizens should only be obliged to inform the relevant authorities on the holding of such an event, rather than having to seek permission in advance.*

43. The Law on Mass Events previously required the organisers of election meetings to obtain prior permission from the authorities. The 2008 Report took the view that a regime based on obtaining permission was open to abuse by the authorities and that such a rule raised concerns under the Copenhagen Document, which holds that "Everyone will have the right of peaceful assembly and demonstration. Any restrictions which may be placed on the exercise of these rights will be prescribed by law and consistent with international standards" (para. 9.2).

44. The recommendation has been addressed in amendments both to the Law on Mass Events and the Code. Article 3 of the Law lists certain exceptional types of public events which are not subject to the general rules established in the Law relating to the organisation of public events. Two additions have now been made to this list:

- (i) "picketing" for the collection of signatures to nominate candidates for President or for deputy, provided that such activity occurs in a place where such activities have not been prohibited by local executive and administrative bodies; and
- (ii) gatherings organised by candidates for President or deputy as provided for by art. 45<sup>1</sup> of the Code (campaign meetings).

45. The first of these activities is subject to a restriction as to where it may take place, but this is not in principle objectionable, not least as any such prohibition should obviously apply equally to all candidates.

46. As to the second of these activities (campaign gatherings and meetings), the applicable rules are now to be found in the Code rather than the Law on Mass Events. Under art. 45 of the Code, local authorities were required to designate premises for holding meeting of candidates with electors. This requirement has now been extended to include pre-election meetings organised by electors (art. 45, part 7). Such premises must be provided free of charge on written application. In the absence of any specific stipulations in the Code as to accessibility to such premises, or the degree to which they should be centrally located, only implementation will show to what extent these *a priori* positive changes will in practice allow the effective exercise of the right of assembly in a pre-election campaign context. In addition, candidates may rent premises for meetings with electors using their campaign funds (see above).

47. As for outdoor mass campaigning events, these must be held in accordance with the new art. 45<sup>1</sup> (see art. 45, part 9). They may only take place in places designated by the local authorities (art. 45<sup>1</sup>, part 1). The candidate or his/her proxy must lodge a notification (not an application) at least two days in advance, including certain information about the event and the applicant. This does not include an estimate of how many persons are likely to attend. If the application is not submitted by the candidate or his proxy, the event will be deemed to be one which is not organised by the candidate and will therefore be subject to the usual permission procedure under the Law on Mass Events (art. 45, part 10). If another candidate has already requested the use of the place in question for a campaign event, the local authority must offer an alternative venue.

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<sup>21</sup> The 2008 Report, p. 23; please see also the 2006 Joint Opinion, Paragraph 64.

48. Mass campaign events may only be stopped if the notification requirements in art. 45<sup>1</sup> have not been met or if a danger to the life and (presumably “or”) health of citizens arises. In principle, no objection could be raised to such an approach, but it has to be seen how the provision is applied. Moreover, the last sentence of Article 45<sup>1.3</sup>, according to which “candidates and their proxies shall be obliged to provide assistance in maintaining public order” raises concern, since it could imply that they may be held responsible for any disorder during such a mass event, and have to provide the means for maintaining public order. This sentence should be deleted.

49. In summary, a permission-based procedure has been replaced with a notification-based procedure, as recommended by the 2008 Report. Implementation of the new rules will require careful scrutiny to ensure that notifications are treated equally, that objections based on concerns regarding the life and health of citizens are well-founded and that any refusal can be scrutinised by way of prompt and effective appeal.

**Recommendation.**<sup>22</sup> *Steps could be taken to introduce further guarantees for the integrity of the five-day early voting period.*

50. The Code allows voting to begin up to five days early (art. 53). This is meant for those who are unable to attend the polling station on election day. However, voters are not required to give a reason for early voting or to provide evidence as to their inability to vote on polling day, and in 2008 over a quarter of all voters voted early. Although granting wide possibilities to attend early voting is in principle compatible with international standards on democratic elections, the process for early voting is problematic if it lacks oversight, regulation and clear procedures.

51. The rules on early voting under the Code are brief. They envisage very little oversight of the process, with only two members of the PEC required to be present when such voting takes place. Prior to these Amendments, there were no provisions to protect the integrity of election materials during the early voting period. In 2008 the CEC sought to address the issue of ballot security by ordering that the ballot boxes used for early voting should be sealed at the end of each day.

52. The revised version of the Code, and in particular of Article 53, addresses this issue. First, the rule that ballot boxes are sealed overnight is now written into the Code. Of the two PEC members responsible for sealing the ballot box and re-opening it the next day, one must be the chairperson or deputy chairperson. Second, the Code now confirms that observers including foreign observers and representatives of the mass media are entitled to be present when the boxes used for early voting are opened and sealed. Previously, this was not specifically stated in the Code, although it was implicit in art. 13, part 4. Third, at the end of each day of early voting, a protocol must be prepared tracing the use of ballot papers during the early voting period. These protocols must be put on public display at the polling station (art. 53, parts 4 and 5). Later provisions of the Code have been amended to confirm that the results protocols must identify separately the number of electors who took part in early voting (arts 55, 79, 82).

53. These changes represent a considerable improvement in respect of regulating early voting. The high number of voters using early voting raises an obvious question whether early voting was only being used by those who were genuinely unable to vote on polling day. If the current period of early voting is to be retained, it is essential that further detailed provisions are made to address the security of the ballot specifically during this period. For instance, it is presently envisaged that there will be a lunchtime break on early voting days. Rules are required governing the security of the election materials during this break. Consideration might be given to placing all the voting materials in a secured room which is sealed at the end of each early voting session, with observers being permitted to monitor the placing and breaking of the seal when each subsequent session begins. Given the importance of the integrity of the early voting process and the sheer volume of voters taking advantage of early voting, it is important that

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<sup>22</sup> The 2008 Report, p. 25; please see also the 2006 Joint Opinion, Paragraph 49.

such matters are regulated in further amendments to the Code, rather than in CEC directions to the precinct election commissions.

**Recommendation:**<sup>23</sup> *Each voter's mark on each ballot could be announced out loud and shown to observers so that each person present at the count may see the voter's mark.*

54. This recommendation links directly to the serious limitations faced by observers generally in monitoring the counting of ballots and processing of results. According to the 2008 Report, counting procedures were bad or very bad in 48 per cent of precincts observed. Part of this problem was that votes were counted silently rather than aloud and observers were unable to see the voter's mark, so there was no way of telling whether the ballots were being counted accurately. Given the generally poor standard of counting procedures observed in the 2008 elections, it is particularly disappointing that this has not been addressed at all in the Amendments.

55. Abandoning the silent vote count in favour of the practice of announcing the content of each vote would make the vote count more transparent, increase confidence in it and permit observation of the vote count.

56. It should be emphasised that the problem here is not merely an issue of implementation. It is clear from previous experience that the Code should be amended to include clear and detailed rules on how the votes are counted and how the results are tabulated. As an interim measure, these matters could be addressed in a decree adopted by the CEC, in accordance with art. 33, part 1, points 3 and 5 of the Code. These provide that the CEC shall clarify election legislation for the purpose of its uniform implementation, direct the activities of lower election commissions and provide them with methodological support.

**Recommendation:**<sup>24</sup> *The right of observers to attend all meetings of commissions at all levels, to observe election activities at any time, and to obtain copies of protocols, tabulations, minutes and other documents at all levels, should be guaranteed more clearly by the Electoral Code [...].*

57. The Code already confers various rights on observers which, judging from the 2006 and 2008 Reports, have not proved adequate. These include the right to be present "in the course of the conduct of elections" (*"pri provedenii vyborov"*) in accordance with a procedure to be established by the CEC (art. 13, part 3). They may attend meetings of the "respective" commissions. They also have the right to be present at voting premises from the sealing of the ballot boxes to the final processing of the results and to monitor the issuing of ballot papers and the conduct of voting.

58. The Amendments bring only minor changes to these provisions. For instance, political parties are now entitled to send representatives rather than members to observe the election process (Article 13 part three). Observers are now also permitted to issue appeals to election commissions or prosecutor's office (Article 13 part four new par. 12).

59. The regulation of observer access to the work of election commissions is too important to be left to a procedure established by the CEC. What is meant by an observer's entitlement to attend meetings of "respective" commissions is also unclear and should be defined in the Code. Moreover, given the serious problems identified by the 2008 Report, it is regrettable that the Code still fails to stipulate that observers must be given direct and effective visual access to the key aspects of the voting and counting procedures and not only be allowed to observe voters fill in the ballots during voting hours.

**Recommendation:**<sup>25</sup> *Each PEC should be obliged to provide an official and legally binding copy of the PEC's results protocol immediately to any accredited observer requesting such a copy.*

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<sup>23</sup> The 2006 Report, p. 25.

<sup>24</sup> The 2008 Report, p. 23, please see also the 2006 Joint Opinion, Paragraphs 55, 56.

60. The rules on access to protocols and other documentation also continue to be inadequate. Although observers are permitted to familiarise themselves with protocols of precinct commissions and, it would appear, superior commissions, they are only entitled to a copy of the precinct protocol. Even this is only made available to the observers who are able to obtain copies “from their own efforts and resources” and crucially, the Code still fails to stipulate that such copies must be certified by the issuing commission (Article 13 part four). These obvious limitations are undesirable as they obstruct observers and prevent them from obtaining copies of protocols at all levels so that they can track results and ensure that details have been correctly entered. Not only are certified protocols needed to allow observers to track results and verify their correctness at different levels of the election administration, but they are also necessary as proof, should it become necessary to challenge the results of the tabulation procedures in court. The current state of affairs in this regard is bound to undermine confidence in the entire electoral process. Moreover, there are still no provisions permitting observers to obtain copies of minutes and other documents produced by election commissions. This continues to reduce the transparency of the electoral process.

61. In summary, the amendments in this area do not provide a substantial response to the concerns expressed in the 2006 and 2008 Reports.

**Recommendation<sup>26</sup>:** *The CEC should publish all election results, broken down by polling station. This would increase public accountability, since elections are held at the behest of the public.*

62. This recommendation has not been addressed by the Amendments. Introducing such an obligation, together with the timely provision of certified copies of all election commission protocols to observers, would render meaningful the new legal provisions related to possible appeals to the Supreme Court on election results. In turn, this would enhance transparency and has the potential to increase public confidence in the electoral process.

**Recommendation<sup>27</sup>:** *The Electoral Code should provide for a complaints and appeals mechanism that allows an effective means of redress for both candidates and individual voters.*

63. The Amendments include various provisions relating to appeals against election-related decisions to election commissions and the courts. These are important given the concerns of the 2008 Report in respect of lack of access to redress for candidates and observers.

64. The CEC should decide on complaints collegially, ensure that all complaints are properly addressed before the final election results are announced. There should be a right of appeal against all decisions of the CEC to the Supreme Court.

65. The first amendment concerns the CEC. The 2008 Report noted the lack of collegiate consideration of complaints about conduct of the elections, with most being determined by the CEC chairperson alone or by the CEC staff. This raised obvious concerns about the power of the CEC chairperson or the staff to make such decisions and the lack of transparency in such a process. The Code now provides that all complaints arising from decisions taken by subordinate commissions must be considered by the CEC on a collegiate basis (art. 33, part 3). This is a positive step, but only a first one.

66. As regards judicial remedies in respect of the CEC, the Code now provides that its decisions may be appealed to the Supreme Court “in instances provided by legislation” (art. 33, part 5). This does not, in itself, create any new avenues of appeal to the Supreme Court. Appeals against CEC decisions may only be brought where specifically envisaged in legislation, which in practice seems to mean those instances envisaged in the Code. These include

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<sup>25</sup> The 2008 Report, p. 26.

<sup>26</sup> The 2008 Report, p. 26.

<sup>27</sup> The 2008 Report, p. 23; the 2006 Report, p. 29-30, the 2006 Joint Opinion, Paragraphs 70-72 and 86.

decisions refusing to register a nominated candidate for President (art. 61) or deputy (art. 65). Although there have been some modifications to these provisions, they do not substantially extend the jurisdiction of the Supreme Court to consider election disputes.

67. A further amendment in the Code is to be found in the new art. 34, part 6. This provides that decisions of the bodies responsible for appointing election commissions other than the CEC may be appealed to a court at the appropriate level (the regional court in respect of a regional election commission and so on). This directly addresses the observation of the 2008 Report that courts had refused to consider such complaints because there was no corresponding provision in the Code. This is undoubtedly a positive step, but its practical value is limited, primarily because as noted above, there are no rules to be found in the Code or elsewhere as to how local authorities exercise their discretion in the selection of election commission members.

68. A new art. 49<sup>1</sup> has been introduced into the Code specifically to address the procedure and timeframe for challenging failures to comply with election law by election commissions and other state bodies. Complainants must be permitted to familiarise themselves with the materials related to their appeal. Where they are complaining to an election commission, they must be informed of the time and date of the session at which their appeal will be considered so that they can attend the session. A decision must be taken within three days or, if received on election day, immediately. These are valuable amendments to the Code.

69. Article 49<sup>1</sup> includes a provision that superior commissions shall have the right “where necessary” to consider complaints on matters falling within the competence of inferior commissions (part 5). This is an important rule but clarification is needed of what is meant by “where necessary”. Complainants should have the right to seek redress from a superior commission, whether or not the superior commission believes that such intervention is necessary, and absent such redress should be entitled to seek a judicial remedy.

70. Moreover, numerous provisions in the Code permit complaints against decisions of election commissions to a court but exclude the possibility of an appeal against the court’s decision (see for instance arts 21, 34, 36, 63, 64). The desirability of an appeal process is particularly clear given that the court in question may be a district court, i.e. a court at the very lowest level in the judicial hierarchy. Although there is obviously a need for finality in election proceedings, that need can be reconciled with the need for an effective appeal process by the imposition of suitably short timelines for complainants to file appeals and for the courts to make decisions on them. Consideration should therefore be given to extending the scope of such judicial challenges to include at least one level of appeal.

71. Finally, Article 79 of the Code provides that “[...] Decision on recognizing the elections invalid shall be taken by the Central Commission. [...] The decision of the Central Commission may be appealed against in the Supreme Court of the Republic of Belarus [...]”. This approach has been upheld and extended by the Amendments, Paragraphs 37 and 43. However, it would appear that the Code does not envisage possible appeals against a CEC decision on the final election results,<sup>28</sup> thus limiting venues for legal protection of candidates aggrieved by the official final results. Consideration could be given to reviewing the above mentioned legal provisions with the view to (a) oblige the CEC to announce the final election results with a CEC decision, (b) to allow possible aggrieved candidates to file appeals to the Supreme Court against such decision on the basis of sound evidence.

72. In order to enhance the understanding of the Code by election stakeholders, consideration could be given to developing a new chapter dedicated exclusively to complaints and appeals. Such a chapter could be the venue for a systematic and understandable presentation of all mechanisms for legal redress in a hierarchical and clear system.

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<sup>28</sup> The 2006 Report, p. 30.