



Organization for Security and Co-operation in Europe
Office of the Representative on Freedom of the Media

**COMMENTARY ON RECENT DOCUMENTS OF THE
REPUBLIC OF BELARUS REGARDING USE OF THE
NATIONAL SEGMENT OF THE INTERNET**

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Having analyzed the documents of the executive power bodies adopted in execution of Decree of the President of the Republic of Belarus No. 60 "On Measures to Improve the Use of the National Segment of the Internet" of 1 February 2010: Decree of the President of the Republic of Belarus No. 129 "On Approval of the Provisions on the Procedure for Interaction between Telecommunications Operators and Criminal Investigation Agencies" in the context of the Constitution and current legislation of the Republic of Belarus, as well as of international regulations on freedom of information and the Internet, the Office of the OSCE Representative on Freedom of the Media has come to the following conclusion.

BRIEF SUMMARY OF THE COMMENTARY AND RECOMMENDATIONS

This commentary analyzes several documents adopted in the wake of Decree of the President of the Republic of Belarus No. 60 of 1 February 2010 and designed to improve use of the national segment of the Internet.

State licensing of information networks and resources of the national segment of the Internet is envisaged. In accordance with Decree No. 60 and subsequent resolutions of the Council of Ministers of the Republic of Belarus, providers of Internet services shall identify the subscriber units of Internet service users, keep an account of and store information on such units and the Internet services rendered, and submit this information to law enforcement and other government agencies.

In particular, the Council of Ministers has required that users of Internet services in cafes and clubs identify themselves by presenting an ID or any other document allowing unequivocal confirmation of the user's identity. These establishments must keep an account of and store personal data of all visitors; keep a record of the time when Internet services began and ended; and keep an electronic log of all the domain names or IP addresses of the Internet resources the user contacted.

It is also envisaged that Internet providers keep a record of data on the users of telecommunications services and the telecommunications services they were provided, and submit this data to the criminal investigation agencies.

The adoption of the abovementioned documents makes anonymous receipt and dissemination of information illegal and impossible. The adoption of these documents has closed the last loopholes for this. It appears that this restriction prevents compliance with the provisions of the law "On the Media" regarding the confidentiality of information sources in that it makes information on a journalist's Internet correspondents and Internet sources available without the consent of the journalist and the source of confidential information. The regulations introduced on mandatory identification of subscriber units and users of Internet services lead to unsubstantiated restrictions of a citizen's right to receive and disseminate information.

Making it incumbent on the providers of services to keep such logs at their own expense, register domains in the .by zone, and provide remote access services within the framework of investigative activities cannot but reduce the potential of the Internet for the economic and technological development of Belarus and have a negative effect on the country's image.

Decree No. 60 elaborated, and the resolutions of the Council of Ministers of the Republic of Belarus regulate, the mechanism for restricting access to information at the request of an Internet service user regarding information that is aimed at spreading pornography, promulgating violence and brutality, or any other acts prohibited by law. It is envisaged that access to illegal

information from government bodies and cultural and educational organizations shall automatically be closed.

This process is being carried out on the basis of decisions of the heads of the Committee of State Control, the Prosecutor General's Office, the Operations and Analysis Centre of the President of the Republic of Belarus (OAC), and all national-level bodies of state administration. The problem with this regulation is also that types of harmful and illegal information are defined very ambiguously in the Belarus legislation. They are not formulated with sufficient precision and do not allow citizens to regulate their behaviour and foresee the possible consequences of a particular situation. There is clearly insufficient opportunity to appeal any illegal decisions by "authorized" agencies.

It is also necessary to recall the need for supervision by judicial or other independent bodies of the procedure for applying prohibitions, as well as restrictions on the scope and time such prohibitions, authorities, or procedures are in effect.

The documents under review contain several provisions aimed at enhancing freedom of information on the Internet and making information on state bodies and other government organizations more accessible on the Internet.

In particular, state bodies and government organizations must post information about their activity on Internet websites, which will make it more available to citizens (including journalists). Access to it is unrestricted and free of charge, and textual information should be posted on the website in a format that makes it possible to search for and copy fragments of text.

There is doubt about the legitimacy of complete prohibition on posting information on the websites of state bodies and other government organizations containing facts that constitute state secrets or other information and/or correspondingly restricted data protected in accordance with national legislation. It is presumed that information contained in a particular document on the activity of a state body to which access is restricted by law does not mean complete prohibition of its dissemination. Such documents should be furnished provided that the part constituting a secret is removed.

It would also be expedient to envisage that state bodies must inform not only about their own activity, but also share with the public information that has been acquired or created as a result of this activity.

So the merits of Decree No. 60 and the documents adopted after it are ambiguous and outweighed by shortcomings that restrict freedom of expression and freedom of the media on the Internet.

Recommendations:

- *Take into account the existing international instruments for fighting crime on the Internet.*
- *Forego mandatory identification of users of subscriber units and users of Internet services.*
- *Clarify the meaning of and procedure for introducing restrictions and prohibitions on disseminating illegal information, clarify responsibility for unsubstantiated prohibitions.*
- *Entrust the judicial bodies, instead of the executive power bodies, with determining what information is harmful.*
- *Envisage the obligation of state bodies to post information on the Internet not only about their own activity, but also share with the public information that has been acquired and created as a result of this activity.*
- *Envisage the obligation to post documents on the Internet after secret or other information that the law prohibits from being disclosed is removed from them.*
- *Envisage the possibility of disclosing information in the event that public interest prevails.*

CONTENTS

INTRODUCTION	6
I. INTERNATIONAL STANDARDS RELATING TO FREEDOM OF EXPRESSION, INCLUDING ON THE INTERNET	8
1.1. Recognition of the Importance of Freedom of Expression and of Information	8
1.2. Obligations of the OSCE Participating States with Respect to Freedom of the Media and the Internet	10
1.3. Permissible Restrictions on Freedom of Expression, including on the Internet.....	13
1.4. Regulating the Work of Media and the Internet	14
II. ANALYSIS OF DOCUMENTS ON THE USE OF THE NATIONAL SEGMENT OF THE INTERNET	16
2.1. Scope and Basic Provisions of Decree No. 60	16
2.2. Development of the Provisions of Decree No. 60 in Subsequent Documents	17
2.3. Analysis of Questions Arousing Concern in the Documents Adopted After Decree No. 60.	18
2.3.1. Identification of Internet Users.....	18
2.3.2. Restrictions on the Dissemination of Harmful Information	20
2.3.3. Regulations for Posting Information	22

INTRODUCTION

At the request of the OSCE Office of the Representative on Freedom of the Media, this commentary was prepared by Andrei Richter, Doctor of Philology. Dr. Richter is the director of the Media Law and Policy Institute (Moscow) and the head of the Chair of History and Legal Regulation of Domestic Media at the Department of Journalism of Lomonosov Moscow State University. He is a member of the International Commission of Jurists (ICJ) and of the International Council of the International Association for Media and Communication Research (IAMCR).

This commentary contains an analysis of the following documents adopted in execution of Decree of the President of the Republic of Belarus No. 60 "On Measures to Improve the Use of the National Segment of the Internet" of 1 February 2010 (hereinafter referred to as Decree No. 60):

1. Resolution of the Council of Ministers of the Republic of Belarus No. 644 of 29 April 2010 "On Certain Matters of Improving the Use of the National Segment of the World Wide Web" (hereinafter referred to as Resolution No. 644).
2. Resolution of the Council of Ministers of the Republic of Belarus No. 645 of 29 April 2010 "On Certain Matters Concerning the Internet Sites of State Bodies and Government Organizations and Deeming Resolution of the Council of Ministers of the Republic of Belarus No. 192 of 11 February 2006 Invalid" (hereinafter referred to as Resolution No. 645).
3. Resolution of the Council of Ministers of the Republic of Belarus No. 646 of 29 April 2010 "On Making Amendments and Addenda to the Regulations for Providing Telecommunications Services" (hereinafter referred to as Resolution No. 646).
4. Resolution of the Council of Ministers of the Republic of Belarus No. 647 of 29 April 2010 "On Making Amendments and Addenda to Resolution of the Council of Ministers of the Republic of Belarus No. 175 of 10 February 2007" (hereinafter referred to as Resolution No. 647).
5. Resolution of the Council of Ministers of the Republic of Belarus No. 649 of 29 April 2010 "On Registration of the Internet Stores in the Trade Register of the Republic of Belarus, Monitoring Their Operation, and Making Amendments and Addenda to Certain Resolutions of the Council of Ministers of the Republic of Belarus" (hereinafter referred to as Resolution No. 649).
6. Resolution of the Operations and Analysis Centre of the President of the Republic of Belarus and the Ministry of Communications and Informatization of the Republic of Belarus No. 4/11 of 29 June 2010 "On Approving the Provisions on the Procedure for Restricting Access of the Users of Internet Services to Information Prohibited from Dissemination by the Law" (hereinafter referred to as Resolution No. 4/11).

This commentary also contains an analysis of the provisions of Decree of the President of the Republic of Belarus No. 129 of 3 March 2010 "On Approval of the Provisions on the Procedure for Interaction between the Telecommunications Operators and Criminal Investigation Agencies " (and, correspondingly, the provisions themselves) (hereinafter referred to as Decree No. 129).

An analysis was also carried out of the regulations of Resolution of the Council of Ministers of the Republic of Belarus No. 1001 of 2 July 2010 "On Approval of the List of Administrative Procedures Performed by the Ministry of Communications and Informatization and Its Subordinate Government Organizations with respect to Legal Entities and Private Businessmen, Making Amendments and Addenda to Certain Resolutions of the Council of Ministers of the Republic of Belarus and Deeming Several Resolutions and Certain Provisions of Resolutions of the Government of the Republic of Belarus Invalid" (hereinafter referred to as Resolution No. 1001).

This commentary aims at ensuring compliance of the aforesaid documents with international standards relating to the right to freedom of expression and freedom of the media.

Section I of this commentary takes a look at the international obligations of the Republic of Belarus with respect to human rights and sets forth the international standards relating to the right to freedom of expression and of information, including on the Internet. These standards are envisaged in international law, e.g., in the International Covenant on Civil and Political Rights and in various OSCE agreements, to which the Republic of Belarus is a party; and are also commensurable with constitutional law on issues of freedom of expression and of information.

Section 2 contains an analysis of the aforesaid documents regarding use of the national segment of the Internet, with due account of the abovementioned standards.

This commentary is also based on the instructions of the OSCE Parliamentary Assembly set forth in 2009 in the Resolution on Freedom of Expression on the Internet. In Paragraph 12, the Parliamentary Assembly:

"Requests that the OSCE Representative on Freedom of the Media monitor the policies and practices of participating States regarding the free flow of information and ideas relating to political, religious or ideological opinion or belief on the Internet, including Internet censorship, blocking and surveillance."¹

¹ Resolution of the Eighteenth Annual Session. Vilnius, 29 June-3 July 2009. See the full English text at http://www.eerstekamer.nl/id/vibsmzeghdnh/document_extern/090629_vilnius_declaration/f=/vibsmzzpmwnr.pdf.

I. INTERNATIONAL STANDARDS RELATING TO FREEDOM OF EXPRESSION, INCLUDING ON THE INTERNET

1.1. Recognition of the Importance of Freedom of Expression and of Information

Freedom of expression has long been recognized as one of the fundamental human rights. It is of paramount importance to the functioning of democracy, is a necessary condition for the exercise of other rights, and is in and of itself an indispensable component of human dignity.

The Republic of Belarus is a full-fledged member of the international community and a participant in the United Nations and the Organization for Security and Co-operation in Europe (OSCE). It has therefore assumed the same obligations as all the other participating States.

The Universal Declaration of Human Rights (UDHR), the basic instrument on human rights adopted by the General Assembly of the United Nations in 1948, protects the right to the free expression of one's convictions in the following wording of Article 19:

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."²

The International Covenant on Civil and Political Rights (ICCPR),³ a UN treaty of binding judicial force and ratified by the Republic of Belarus, also guarantees the right to freedom of expression, as can be seen from the text of its Article 19:

- "1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

With respect to documents adopted by the United Nations, mention should be made of Resolution 59 (I), adopted by the UN General Assembly at its very first session in 1946. In reference to freedom of information in the broadest sense of the concept, the resolution states:

"Freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated."⁴

Freedom of expression is of fundamental importance in and of itself, and as the foundation for exercising all other human rights. Full-fledged democracy is only possible in societies that permit and guarantee the free flow of information and ideas. Freedom of expression is also of

² Resolution 217A(III) of the General Assembly of the United Nations, adopted 10 December 1948. A/64, pp. 39-42. See the full English text at <http://www.un.org/en/documents/udhr/>.

³ International Covenant on Civil and Political Rights. Adopted by Resolution 2200 A (XXI) of the General Assembly 16 December 1966. Entered into force 23 March 1976. See the full official English text on the UN website at: <http://www2.ohchr.org/english/law/ccpr.htm>.

⁴ United Nations 65th Plenary Session. 14 December 1946. The official English text can be found on the UN website at: [http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/RES/59\(I\)&Lang=R&Area=RESOLUTION](http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/RES/59(I)&Lang=R&Area=RESOLUTION).

paramount importance in identifying and exposing violations of this and other human rights and in dealing with such violations.

Freedom of information, which is inseparably linked to freedom of expression, is a universal human right. Along with the abovementioned standards, this issue is also addressed by the UN Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998); Articles 6, 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Convention of the Council of Europe for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981 (ETS No.108). Attention should also be paid to the following indirect-action documents: the Declaration on the Freedom of Expression and Information adopted on 29 April 1982; as well as the recommendations of the Council of Europe Committee of Ministers to the participating states: No. R (81) 19 on the Access to Information Held by Public Authorities, No. R (91) 10 on the Communication to Third Parties of Personal Data Held by Public Bodies, No. R (97) 18 concerning the Protection of Personal Data Collected and Processed for Statistical Purposes, No. R (2000) 13 on a European Policy on Access to Archives, and No. Rec (2002) 2 concerning Access to Official Documents.

A unique international agreement, the Council of Europe Convention on Access to Official Documents,⁵ has recently assumed a special place in this matter. It states that exercise of the right to access to official documents:

- (i) provides a source of information for the public;
- (ii) helps the public to form an opinion on the state of society and on public authorities;
- (iii) fosters the integrity, efficiency, effectiveness and accountability of public authorities, so helping affirm their legitimacy.

The Convention considers that "all official documents are in principle public and can be withheld subject only to the protection of other rights and legitimate interests." In turn, "official documents" means "all information recorded in any form, drawn up or received and held by public authorities."

The European Court of Human Rights created to monitor the Convention for the Protection of Human Rights and Fundamental Freedoms has consistently emphasized the "pre-eminent role of the press in a State governed by the rule of law."⁶ It has noted in particular that

"Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society."⁷

⁵ Adopted by the Committee of Ministers on 27 November 2008 at the 1042bis meeting of the Ministers' Deputies. See full text of the Convention at: <https://wcd.coe.int/ViewDoc.jsp?id=1377737&Site=CM>.

⁶ *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63. See the official text of this judgement at the ECHR website: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Thorgeirson%20%7C%20v.%20%7C%20Iceland&sessionid=47499501&skin=hudoc-en>

⁷ *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43. See the official text of this judgement at the ECHR website:

In turn, the ECHR transoceanic analogue, the Inter-American Court of Human Rights believes: "It is the media that make the exercise of freedom of expression a reality."⁸

In the same context, it is worth noting that Part 1, Article 8 of the Constitution of the Republic of Belarus reads:

"The Republic of Belarus shall recognize the supremacy of the universally acknowledged principles of international law and ensure that its laws comply with such principles."

In turn, Part 3, Article 21 of the RB Constitution envisages that:

"The State shall guarantee the rights and liberties of the citizens of Belarus that are enshrined in the Constitution and the laws, and specified in the state's international obligations."

Finally, Articles 33 and 34 of the Constitution of the Republic of Belarus protect the right to freedom of expression and information as follows:

"Article 33. Everyone shall be guaranteed freedom of thoughts and beliefs and their free expression.

"No one shall be forced to express their beliefs or to deny them.

"No monopolization of the mass media by the State, public associations or individual citizens and no censorship shall be permitted.

"Article 34. Citizens of the Republic of Belarus shall be guaranteed the right to receive, store and disseminate complete, reliable and timely information of the activities of state bodies and public associations, on political, economic, cultural and international affairs, and on the state of the environment.

"State bodies, public associations and officials shall afford citizens of the Republic of Belarus an opportunity to familiarize themselves with material that affects their rights and legitimate interests.

"The use of information may be restricted by legislation with the purpose to safeguard the honour, dignity, personal and family life of the citizens and the full implementation of their rights."

1.2. Obligations of the OSCE Participating States with Respect to Freedom of the Media and the Internet

The right to freely express one's opinions is inseparably bound to the right of freedom of the media. Freedom of the media is guaranteed by various documents of the Organization for Security and Co-operation in Europe (OSCE), to which the Republic of Belarus has given its assent.

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Castells%20%7C%20v.%20%7C%20Spain%2C&sessionId=47499840&skin=hudoc-en>.

⁸ Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 34.

The Organization for Security and Co-operation in Europe is the world's largest regional security organization and comprises 56 states of Europe, Asia, and North America. Founded on the basis of the Final Act of the Conference on Security and Co-operation in Europe (1975), the Organization has assumed the tasks of identifying the potential for the outbreak of conflicts, and of their preventing, settling, and dealing with their aftermaths. The protection of human rights, the development of democratic institutions, and the monitoring of elections are among the Organization's main means for guaranteeing security and performing its basic tasks.

The Final Act of the Conference on Security and Co-operation in Europe (CSCE) in Helsinki⁹ states: "[T]he participating States will act in conformity with the purposes and principles of the... Universal Declaration of Human Rights." The provisions agreed by the participating States in the Helsinki Final Act of 1975 recognize "the importance of the dissemination of information from the other participating States" and "make it their aim to facilitate the freer and wider dissemination of information of all kinds" and "encourage co-operation in the field of information and the exchange of information with other countries."

The Final Act of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE¹⁰ states that:

"the participating States will respect human rights and fundamental freedoms, including freedom of thought, conscience and religion for all and will not discriminate solely on the grounds of race, colour, sex, language and religion. They will encourage and promote civil, political, economic, social, cultural and other rights and freedoms, recognizing them to be of paramount importance for human dignity and for the free and full development of every individual."

In Paragraph 9.1 of the same document, the OSCE participating States reaffirm that:

"everyone will have the right to freedom of expression including the right to communication. This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards."¹¹

The OSCE Charter for European Security (1999) states:

"We reaffirm the importance of independent media and the free flow of information as well as the public's access to information. We commit ourselves to take all necessary steps to ensure the basic conditions for free and independent media and unimpeded transborder and intra-State flow of information, which we consider to be an essential component of any democratic, free and open society."¹²

⁹ Final Act of the Conference on Security and Cooperation in Europe, Helsinki, 1 August 1975. See the full official text at http://www.osce.org/documents/mcs/1975/08/4044_en.pdf and in extracts concerning freedom of expression at http://www.medialaw.ru/laws/other_laws/european/zakl_akt.htm.

¹⁰ Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 1990. See in particular Paragraph 9.1 and 10.1 at http://www.osce.org/publications/rfm/2008/03/30426_1084_en.pdf. The full official text is available at http://www.osce.org/documents/odhr/2006/06/19392_en.pdf.

¹¹ See the official text at http://www.osce.org/from/item_11_30426.html.

¹² See Paragraph 26 of the Charter for European Security, adopted at the OSCE Istanbul Summit, November 1999. The full official text is available at http://www.osce.org/documents/mcs/1999/11/4050_en.pdf.

Finally, at the Moscow Meeting of the Conference on the Human Dimension of the CSCE held in October 1991, the participating States unanimously agreed that they:

"... reaffirm the right to freedom of expression, including the right to communication and the right of the media to collect, report and disseminate information, news and opinions. Any restriction in the exercise of this right will be prescribed by law and in accordance with international standards. They further recognize that independent media are essential to a free and open society and accountable systems of government and are of particular importance in safeguarding human rights and fundamental freedoms."

The document of the Moscow Meeting also states that the CSCE participating States

"... consider that the print and broadcast media in their territory should enjoy unrestricted access to foreign news and information services. The public will enjoy similar freedom to receive and impart information and ideas without interference by public authority regardless of frontiers, including through foreign publications and foreign broadcasts. Any restriction in the exercise of this right will be prescribed by law and in accordance with international standards."¹³

For the purposes of regulating the documents of the Republic of Belarus in this commentary, it is important to be particularly mindful of the fact that in Paragraph 35 of the Concluding Document on Co-operation in Humanitarian and Other Fields of the Vienna Meeting 1986 of the CSCE, the participating States will also

"take every opportunity offered by modern means of communication, including cable and satellites, to increase the freer and wider dissemination of information of all kinds."¹⁴

Also important in this respect is Decision No. 633 of the OSCE Permanent Council on Promoting Tolerance and Media Freedom on the Internet approved by the Ministerial Council of the OSCE participating States at the meeting in Sofia (2004), in which the Permanent Council

"Reaffirming the importance of fully respecting the right to the freedoms of opinion and expression, which include the freedom to seek, receive and impart information, which are vital to democracy and in fact are strengthened by the Internet,

Decides that:

1. Participating States should take action to ensure that the Internet remains an open and public forum for freedom of opinion and expression, as enshrined in the Universal Declaration of Human Rights."¹⁵

The OSCE has been concerned for several years now about the situation regarding freedom of information and ideas on the Internet in some of its participating States. In Paragraph 11 of its Resolution on Freedom of Expression on the Internet, the OSCE Parliamentary Assembly

¹³ Paragraphs 26 and 26.1, Final Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE. See the official text at the OSCE website: http://www.osce.org/fom/item_11_30426.html. The obligation to impose restrictions on the freedom of mass communications within the law and in accordance with international standards was also reaffirmed by all the OSCE participating states in Paragraph 6.1 of the Final Document of the Symposium on the Cultural Legacy of CSCE Participating States (July 1991). See *ibid*.

¹⁴ See the full English text at: <http://www.fas.org/nuke/control/osce/text/VIENN89E.htm>.

¹⁵ Appendix to Decision No. 12/04. See the full English text on the OSCE website at http://www.osce.org/documents/mcs/2004/12/3915_en.pdf.

"Calls on participating States to communicate to repressive States, including participating States, their concerns about government actions aimed at censoring, blocking or surveilling the free flow of information and ideas relating to political, religious or ideological opinion or belief on the Internet."¹⁶

1.3. Permissible Restrictions on Freedom of Expression, including on the Internet

The right to freedom of expression, including on the Internet, is inarguably not absolute: in a few specific instances, it may be subject to restrictions. Due to the fundamental nature of this right, however, any restrictions must be precise and clearly defined according to the principles of a state governed by rule of law. In addition, restrictions must serve legitimate purposes and be necessary to the well-being of a democratic society¹⁷.

The limits to which legal restrictions on freedom of expression are permissible are set forth in Paragraph 3 of Article 19 of the ICCPR cited above:

"The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (order public), or of public health or morals."

It is worth noting that the matter does not concern the *need* or *duty* of states to establish appropriate restrictions on this freedom but only of the *admissibility* or *possibility* of doing so while continuing to observe certain conditions. This regulation is interpreted as establishing a threefold criterion demanding that any restrictions (1) be prescribed by law, (2) serve a legitimate purpose, and (3) are necessary for the well-being of a democratic society.¹⁸ This international standard also implies that vague and unclearly formulated restrictions, or restrictions that may be interpreted as enabling the state to exercise sweeping powers, are incompatible with the right to freedom of expression.

If the state interferes with the right to freedom of the media, such interference must serve one of the purposes enumerated in Article 19 (Paragraph 3). The list is succinct, and interference not associated with one or another of the specified aims is consequently a violation of the covenant's Article 19. In addition, the interference must be "necessary" to achieve one of the aims. The word "necessary" has a special meaning in this context. It signifies that there must be a "pressing social need" for such interference¹⁹; that the reasons for it adduced by the state must be "relevant and sufficient," and that the state must show that the interference was proportionate to the aims

¹⁶ Resolution of the Eighteenth Annual Session. Vilnius, 29 June-3 July 2009. See the full English text at http://www.eerstekamer.nl/id/vibsmzqghdnh/document_extern/090629_vilnius_declaration/f=/vibsmzqpmwnr.pdf.

¹⁷ See Section II.26 of the Report from the Seminar of Experts on Democratic Institutions to the CSCE Council (Oslo, November 1991). The official text can be found at <http://www2.ohchr.org/english/law/ccpr.htm>.

¹⁸ See, e.g., Paragraph 6.8 of the UN Committee on Human Rights judgment in the case *Rafael Marques de Morais v. Angola*, Communication No. 1128/2002, 18 April 2005: <http://humanrights.law.monash.edu.au/undocs/1128-2002.html>.

¹⁹ See, e.g., *Hrico v. Slovakia*, 27 July 2004, Application No. 41498/99, para. 40 at the ECHR website: <http://www.echr.coe.int/eng/Press/2004/July/ChamberJudgmentHricovSlovakia200704.htm>.

pursued. As the UN Committee on Human Rights has declared, "the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect."²⁰ The European Court of Human Rights also makes similar demands of the concept "necessary".

With respect to the Internet, the European Convention on Cybercrime adopted in Budapest on 23 November 2001 emphasizes the need to be

"Mindful of the need to ensure a proper balance between the interests of law enforcement and respect for fundamental human rights as enshrined in the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, the 1966 United Nations International Covenant on Civil and Political Rights and other applicable international human rights treaties, which reaffirm the right of everyone to hold opinions without interference, as well as the right to freedom of expression, including the freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, and the rights concerning the respect for privacy."²¹

In this respect, it is worth noting that Part 1 of Article 23 of the Constitution of the Republic of Belarus reads:

"Restriction of personal rights and liberties shall be permitted only in the instances specified in law, in the interest of national security, public order, the protection of the morals and health of the population as well as rights and liberties of other persons."

The Republic of Belarus Constitution, in the same way as international acts, points to the *admissibility* and possibility of restricting personal rights and freedoms in certain conditions. This regulation essentially demands that any restrictions are: 1) prescribed by law, and 2) pursue legal aims set forth in the Republic of Belarus Constitution.

1.4. Regulating the Work of Media and the Internet

To protect their constitutional rights to freedom of expression, it is vital that the media have the opportunity to carry out their work independently of government control. This ensures their functioning as a public watchdog and the people's access to a broad range of opinions, especially on issues of public interest. The primary aim of regulating the work of media in a democratic society ought therefore to be facilitation of the development of independent and pluralistic media, thus guaranteeing the public's right to receive information from a wide variety of sources.

Article 2 of the ICCPR assigns participating States the duty of adopting "such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant". This means that participating States are required not only to refrain from violating these rights but also to take positive measures to guarantee that such rights are respected, including the right to freedom of expression. The states are *de facto* obliged to create conditions in which a variety of media can develop, thus ensuring the public's right to information.

²⁰ See the Judgment in the case *Rafael Marques de Morais v. Angola*, note 31, para. 6.8.

²¹ Participating states of the Council of Europe as well as the U.S., Japan, RSA, and Canada participated in drawing up the Convention. The Convention came into force on 1 July 2004, as of today it has been signed by 46 states and ratified by 26 of them (Belarus is not one of them). See the full English text at <http://conventions.coe.int/Treaty/EN/Treaties/html/185.htm>.

Thus it is generally accepted today that any state authorities which exercise formal regulatory powers in the field of the media or telecommunications (including the Internet) should be fully independent of the government and protected from interference by political and business circles. Otherwise regulation of the media could easily become a target of abuse for political or commercial purposes. The Joint Declaration presented in December 2003 by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression notes:

"All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party."²²

The licensing requirement for media was especially condemned in a resolution on the "Persecution of the Press in the Republic of Belarus," adopted by the Parliamentary Assembly of the Council of Europe (PACE) in 2004. Moreover, this was the first mention in such a high-ranking document of the fact that Article 10 of the European Convention on Human Rights *in principle* does not permit such licensing of media. The Council of Europe saw this as a violation of "the fundamental principle of the separation of powers between the executive and the judiciary and ... contrary to Article 10 of the European Convention on Human Rights," and called for the corresponding articles of the Law on the Media to be revised.²³

The Parliamentary Assembly of the Council of Europe recognizes the need for a number of principles relating to freedom of the media to be observed in every democratic society. A list of these principles can be found in PACE Resolution No. 1636 (2008), "Indicators for Media in a Democracy."²⁴ This list helps in objectively analyzing the state of the environment for the media in a particular country with respect to the observation of media freedom, and in identifying problem issues and potential weaknesses. This allows the states to discuss matters at the European level with respect to possible actions for resolving such issues. The Parliamentary Assembly proposed in its resolution that national parliaments regularly conduct objective and comparative analyses in order to reveal shortcomings in legislation and media policy, and to take the measures needed to correct them. In the context of the amendments being analysed, the following principle from this list is worth noting:

"8.17. the state must not restrict access to foreign print media or electronic media including the Internet..."

Based on the above provisions, commentary and recommendations on the key provisions of the documents adopted in the Republic of Belarus with respect to the use of the national segment of the Internet will follow.

²² See: http://www.osce.org/documents/html/pdftohtml/27439_en.pdf.html.

²³ See: Parliamentary Assembly of the Council of Europe. Resolution 1372 (2004). Persecution of the press in the Republic of Belarus. The full English text is available on the official Council of Europe website at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta04/ERES1372.htm>.

²⁴ The full English text of the Resolution is available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08/ERES1636.htm>.

II. ANALYSIS OF DOCUMENTS ON THE USE OF THE NATIONAL SEGMENT OF THE INTERNET

2.1. Scope and Basic Provisions of Decree No. 60

The President of the Republic of Belarus shall issue decrees and orders on the basis of and in accordance with the Constitution which are mandatory in the territory of the Republic of Belarus (Art. 85). The government is responsible for their implementation (Art. 107). Whereby Article 137 envisages: "The Constitution shall have the supreme legal force. Laws, decrees, edicts and other instruments of state bodies shall be promulgated on the basis of, and in accordance with the Constitution of the Republic of Belarus. Where there is a discrepancy between a law, decree or edict and the Constitution, the Constitution shall apply."

Decree No. 60 of the President of the Republic of Belarus "On Measures to Improve the Use of the National Segment of the Internet" is aimed at protecting the interests of citizens, society, and the state in the information sphere, raising the quality and reducing the cost of Internet services, and ensuring further development of the national segment of the Internet. The Decree contains 16 paragraphs and was signed by President of the Republic of Belarus Alexander Lukashenko on 1 February 2010. The Decree came into effect on 1 July 2010. Its detailed legal analysis was presented by the Office of the OSCE Representative on Freedom of the Media in February 2010.

This analysis by the Office of the OSCE Representative on Freedom of the Media states that Decree No. 60 contains several demands that call for information about state bodies and other government organizations to be made more available. For this purpose, it was made incumbent upon state bodies and other government organizations, as well as business associations in which the state has a prevalent share in the authorized funds thereof, to place information about their activity on the official websites of said bodies and organizations and ensure the efficient functioning and systematic updating of the said websites.

The Decree envisages that Internet service providers shall carry out state licensing of information networks, systems, and resources of the national segment of the Internet located in the territory of the Republic of Belarus by applying to the Ministry of Communications and Informatization of the Republic of Belarus or its authorized organization.

"In order to ensure the security of citizens and the state," after 1 July 2010 Internet service providers must identify the subscriber units of Internet service users, keep an account of, and store information on such units and the Internet services rendered.

The Decree is the first to regulate the mechanism for limiting access to information at the request of the Internet service user. For example, at the request of an Internet service user, the provider is obligated to limit access of the subscriber unit belonging to this user to information aimed at disseminating pornography and/or at promulgating violence, brutality, or any other acts prohibited by law.

As can be seen, Decree No. 60 applies to matters relating to the procurement and dissemination of information on the Internet, which will inevitably have an impact on the activity of journalists in Belarus and on freedom of the media.

2.2. Development of the Provisions of Decree No. 60 in Subsequent Documents

The Decree of the President of the Republic of Belarus "On Measures to Improve the Use of the National Segment of the Internet" is aimed, as it stipulates, at protecting the interests of citizens, society, and the state in the information sphere, and ensuring further development of the national segment of the Internet.

This document contains several requirements that call for making information about state bodies and other government organizations more available on the Internet. Decree No. 60 contains several provisions aimed at protecting author's rights on the Internet. It envisages state licensing of the information networks and resources of the national segment of the Internet on the territory of Belarus for which providers of Internet services must apply. It should be noted as a positive aspect of Resolution No. 644 adopted in execution of Decree No.60 that Internet sites are licensed free of charge for an unlimited period and in a relatively short time – 15 days.

It was feared that Resolution No. 644 would call for mandatory state licensing of all email boxes in the .by domain. However, since Resolution No. 1001, adopted later, does not envisage any such administrative procedures, it can be presumed that the government decided to forgo introduction of this practice.

It was also feared that Decree No. 60 would awaken the regulation of Article 11 of the Republic of Belarus Law "On the Media", which has been "dormant" since February 2009, in compliance with which all Internet media must undergo mandatory licensing, while "the state licensing procedure for media disseminated via the global Internet shall be determined by the Council of Ministers of the Republic of Belarus." This regulation has already been criticized in a memorandum issued by the Office of the OSCE Representative on Freedom of the Media in 2008.²⁵ However, the subsequent documents give reason to believe that Decree No. 60 and the documents of the Council of Ministers of the Republic of Belarus adopted in accordance with it refer to other licensing, not to licensing of an Internet resource as a form of media (in compliance with the regulations of the law "On the Media"), but rather to licensing as an information resource (in compliance with the regulations of Article 24 of the Law of the Republic of Belarus of 10 November 2008 "On Information, Informatization and the Protection of Information").

According to Decree No. 60 and the subsequent resolutions of the Council of Ministers of the Republic of Belarus, the providers of Internet services must identify the subscriber units of Internet service users, keep an account of and store data on such units and the Internet services rendered, and make these data available to the law-enforcement agencies and other government bodies upon request.

Decree No. 60 has elaborated, and the resolutions of the Council of Ministers of the Republic of Belarus regulate, the mechanism for limiting access to information at the request of the Internet service user that is aimed at disseminating pornography and/or promulgating violence, brutality, or any other acts prohibited by law.

Decree No. 60 and Resolution No. 645 envisage several provisions that enhance the freedom of information on the Internet. In particular, once again (after adoption of the Law of the Republic

²⁵ See full English text of the Comments on the Draft Law of the Republic of Belarus "On the Mass Media" on the website of the OSCE Representative on Freedom of the Media at http://www.osce.org/documents/rfm/2008/06/31899_en.pdf.

of Belarus "On Information, Informatization and the Protection of Information") state bodies and other government organizations are required to post information about their activity on Internet websites. The providers of Internet services may not be held responsible for the contents of information posted on the Internet.

However, the merits of Decree No. 60 and the documents subsequently adopted are ambiguous and are outweighed by shortcomings that restrict freedom of expression and freedom of the media on the Internet.

The following provisions of Decree No. 60 have aroused and continue to arouse particular concern:

- The demand for mandatory identification of the users of subscriber units and the users of Internet services.
- The inexplicitly defined restrictions and prohibitions on disseminating illegal information and the procedure for implementing them.
- The unclear responsibility of the provider of information on the Internet in the event the instructions of a relevant authority to eliminate detected violations or its demands to suspend Internet service provision are not fulfilled.
- The absence of any obligation on the part of state authorities to place on the Internet not only information about their own activity, but also to share information that has been acquired or created as a result of this activity.
- The obligation that information reports and/or media articles disseminated via the Internet must have hyperlinks to the original source of the information or to the media agency that previously placed it.

2.3. Analysis of Questions Arousing Concern in the Documents Adopted After Decree No. 60.

2.3.1. Identification of Internet Users

Decree No. 60 obligates the owners and administrators of Internet clubs and Internet cafes to identify their users, as well as keep an account of and store the personal data of such Internet service users. The same identification regulation also applies to the technical units of an Internet service user required for hooking up to the telecommunication line in order to access the Internet (paragraph 6).

Whereas at present, a distance or public contract on rendering hosting services or access to the Internet can be entered, when the law comes into force, the client will have to come to the provider's office in person in order to enter a contract and "go through the identification procedure." This may be easy to do in Minsk or in other large regional centres, but it will be much more difficult in a small village. The Decree essentially prohibits access to the Internet without a password, issue and use of prepaid cards, and acquiring a hosting through the Internet.

Resolution No. 647 of the Council of Ministers of the Republic of Belarus requires identification of the users of Internet services in cafes and clubs, which must now be carried out by showing some form of ID or using other means that allow unequivocal confirmation of the user's identity. In particular, foreigners will have to show their so-called "guest card," issued during registration

at their place of temporary residence upon arrival in the Republic of Belarus. The above-mentioned establishments are required to keep an account of and store the personal data of all visitors; keep a record of the time Internet services began and ended; and keep an electronic log of all the domain names or IP addresses of the Internet resources the user contacted.

According to Decree No. 60 and Resolution No. 647, these data must be stored for one year and made available to investigation agencies, public prosecution and preliminary inquiry agencies, State Regulation Committee bodies, tax agencies, and courts as set forth by the law upon request.

Decree No. 129 and Resolution No. 646 also envisage keeping an account of and furnishing the investigation agencies with information on the users of telecommunication services and on telecommunication services rendered (although, admittedly, this refers to "general information" on telecommunication services).

The adoption of the abovementioned documents makes anonymous receipt and dissemination of information illegal and impossible. Adoption of these documents has closed the last loopholes for this.

It appears that this limitation makes it impossible for media journalists to perform the obligations imposed on them by Law of the Republic of Belarus "On the Media" of 17 July 2008 No. 427-Z. This law refers to obligations to keep information and its sources confidential, apart from cases envisaged by Para. 2 of Article 39 of the said law (Para. 4.5 of Art. 34). In turn, Para. 2 of Article 39 says that the source of information and data on the physical or legal entity providing the information shall only be disclosed at the request of a criminal prosecution agency or court and only with respect to preliminary investigation or legal proceedings. Journalists can no longer guarantee the confidentiality of their sources if the latter contact them via the Internet – now these sources can be traced by the State Regulation Committee bodies and tax agencies, for example, during an audit.

So it can be seen that Decree No. 60 and Resolutions No. 647 and No. 646 prevent execution of the regulations of the law "On the Confidentiality of Information Sources" by making information on a journalist's Internet correspondents and Internet sources available without the consent of either the journalist or the source of the confidential information.

Meanwhile, privacy of the information source is one of the fundamental principles of journalism and consists of the following. An asset of public freedom is the fact that citizens may freely inform journalists about socially significant problems and events, as well as discuss, including anonymously, such events in the media, even if the information furnished contains facts about improper acts and behaviour of the informers themselves. In this way, public debate in the media has greater social value than directly exposing and convicting tax evaders or squanderers of state property. The existence of this regulation in the law "On the Media" protects the citizen who, while disclosing information, does not fear for his personal safety and wellbeing. Its repeal will lead to a decline in investigative journalism in Belarus and, consequently, to violation of the information rights and freedoms of all citizens.

So the regulations introduced with respect to mandatory identification of subscriber units and the users of Internet services are leading to unsubstantiated limitation of a citizen's right, which is guaranteed by the Constitution of the Republic of Belarus and international agreements, to receive and impart information.

Moreover, it appears that making it incumbent on the providers of services to keep detailed visitors' logs at their own expense, register domains in the .by zone, and provide remote access

services within the System for Operative Investigative Activities (SORM) envisaged by Decree No. 129 and Resolution No. 647 will:

- make Internet services more expensive for the population;
- lead to the closure of several Internet resources, the owners of which cannot or do not wish to undergo state licensing;
- limit use of the most promising vector of technological development in this sphere today – broadband, including free Internet, particularly in public places;
- become another way of intimidating users.

All of this cannot fail to reduce the potential of the Internet for the economic and technological development of Belarus and have a negative effect on the country's image.

Recommendation:

- Mandatory identification of the users of subscriber units and the users of Internet services should be foregone.

2.3.2. Restrictions on the Dissemination of Harmful Information

Paragraph 8 of Decree No. 60 sets forth a regulation in compliance with which Internet service providers, at the request of Internet service users, shall restrict access of these users to information aimed at:

- carrying out extremist activity;
- illicit circulation of weapons, ammunition, detonators, explosives, radioactive, contaminating, aggressive, poisonous, and toxic substances, drugs, psychotropic substances, and their precursors;
- assisting illegal migration and human trafficking;
- spreading pornography;
- promulgating violence, brutality, and any other acts prohibited by law.

Accordingly, at the request of individual Internet users, providers must close access to such resources for such users (but not for all other Internet users). The Decree also envisages that access shall be automatically closed to illegal information from government authorities and cultural and educational organizations (for example, universities, schools and clubs).

Resolution No. 4/11 regulates the procedure for restricting access. It stipulates that Internet service providers shall limit access on the basis of a limited access list duly compiled by the Republic of Belarus State Telecommunications Inspectorate of the Ministry of Communications and Informatisation. This process is carried out on the basis of decisions of the heads of the State Regulation Committee, the Prosecutor General's Office, the Operating and Analytical Centre under the President of the Republic of Belarus (OAC), and all republic-level state administration

bodies. The decisions are adopted by the heads of these bodies within the limits of their competence.

Moreover, Para. 4 of the Provision approved by Resolution No. 4/11 mentions a certain limited access list compiled by the Internet service provider independently. The procedure for compiling such a list is not specified. It is doubtful that the Internet providers themselves are sufficiently qualified or able to do this.

The problem with this regulation is that the definitions of harmful and illegal information set forth in the Belarus legislation are very ambiguous. They are not formulated with sufficient precision and do not permit a citizen to regulate his/her behaviour and to foresee the possible consequences of a particular situation. For example, there is a restriction in Decree No. 60 and Resolution No. 4/11 on "promulgating [any] other acts prohibited by the law." Such definitions give the authorities extremely broad powers to act at their own discretion. It would be expedient to shift the responsibility for making decisions on what information is considered harmful for users from the state authorities, institutions, and cultural and educational organizations to the judicial bodies. There is clearly insufficient opportunity to appeal illegal decisions by "authorised" bodies.

In any case, the need to observe human rights must also be remembered here, the conditions and guarantees of which should include, among other things, supervision by judicial and other independent agencies; substantiation of prohibitions; and limitations on the scope and time-limits of such prohibitions, authorizations or procedures. The "reference" to the regulation of the legal act for substantiating the prohibition envisaged in Resolution No. 4/11 is clearly insufficient.

Nor is it clear precisely what the same Resolution envisages when it states that the authorized state agency shall be responsible for the lawfulness and substantiation of the decision it makes to include Internet resources on the limited access list. As far as it is known, in accordance with Para. 14 of Decree No. 60, a law of the Republic of Belarus aimed at enhancing responsibility for violating the law in the sphere of Internet use should be drawn up by the end of 2010. It is expected that this law will be aimed not only at dealing with violations of limiting dissemination of information on the Internet, but also at dealing with unsubstantiated and illegal limitations on the freedom of information on the Internet.

In this respect, it is recommended that attention be paid to the provisions of the European Convention on Cybercrime and the Supplementary Protocol to the Convention on Cybercrime with respect to criminalization of racist and xenophobic acts committed via computer systems, as well as to important international instruments to combat crimes on the Internet.²⁶

²⁶ See texts of these acts at http://medialaw.ru/laws/other_laws/european/index.htm.

Recommendations:

- Clarify the meaning and procedure for introducing limitations and prohibitions on the dissemination of illegal information, specify responsibility for unjustified prohibitions.
- Entrust the judicial bodies, rather than the executive power bodies, with determining what information shall be considered harmful.
- Take into account the existing international instruments to combat crime on the Internet.

2.3.3. Regulations for Posting Information

In keeping with the regulations of Article 22 of the Law of the Republic of Belarus "On Information, Informatization and the Protection of Information", Decree No. 60 (Para. 1) and Resolution No. 645 contain several provisions which require that republic-level state administration bodies, local executive and regulatory authorities, other state bodies and government organizations, as well as business associations, with respect to which the Republic of Belarus or an administrative-territorial unit holding shares (stakes) in their authorized funds may determine the decisions made by these business associations, post information on the Internet, which will make it more available to the public (including journalists). The above-mentioned documents make it incumbent on these organizations to post information about their activity on the official websites of the said bodies and organizations and ensure the efficient operation and systematic updating of the said websites.

In keeping with the regulations of the same article of the law "On Information, Informatization and the Protection of Information" and Decree No. 60, access to information on the Internet websites of state bodies and government organizations shall be unrestricted and free of charge (Para. 3 of Resolution No. 645). This is certainly a positive aspect that promotes greater access to the above-mentioned information. Another positive aspect is that textual information should be posted on websites in a format that makes it possible to search for and copy fragments of text.

Paragraph 4 of the Provision approved by Resolution No. 645 prohibits information from being posted on the websites of state bodies and other government organizations containing facts that constitute state secrets or other information and/or correspondingly restricted data protected in accordance with national legislation. It is presumed that the legislation of the Republic of Belarus is referring to the fact that information contained in a particular document on the activity of a state body to which access is restricted by law (see, for example, Article 37 of the Republic of Belarus Law "On the Media") does not mean complete prohibition of its dissemination (see, for example, Article 38 of the Republic of Belarus Law "On the Media"). Such documents should be made available provided that the part constituting a secret is removed.

It would also be expedient to envisage an exception from this limitation in accordance with other considerations indicated in the Council of Europe Convention on Access to Official Documents (Article 3):

"Access to information contained in an official document may be refused if its disclosure would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure."²⁷

The minimum list of information to be posted on the websites of state bodies and government organizations coincides in Decree No. 60 and Resolution No. 645, any additional information shall be determined either by the President of the Republic of Belarus, or by the Council of Ministers of the Republic of Belarus, or by a decision of the head of a state body or government organization. The matter essentially concerns furnishing information that applies only to the activity of these state bodies.

It is worth recalling in this respect that the Constitution of the Republic of Belarus (Article 34) not only guarantees the citizens of the Republic of Belarus "the right to receive, store and disseminate complete, reliable and timely information on the activities of state bodies and public associations," but also "on political, economic, cultural and international life, and on the state of the environment."

Presidential decrees, as follows from Article 137 of the Constitution of the Republic of Belarus, shall be promulgated not only on the basis of, but also in accordance with the Constitution of the Republic of Belarus. Consequently, it would be expedient for Decree No. 60 and the resolutions of the Council of Ministers of the Republic of Belarus adopted on its basis to envisage that state bodies be required to provide information not only about their own activity, but also share information that has been acquired or created as a result of this activity with the public.

Recommendations:

- * Require state bodies to provide information on the Internet not only about their own activity, but also share information that has been acquired or created as a result of this activity with the public.
- * Envisage the obligation of posting documents after secret or other information prohibited from disclosure by law has been removed from them.
- * Envisage the possibility of disclosing information in the event of an overriding public interest.

²⁷ See full text of the Convention at: <https://wcd.coe.int/ViewDoc.jsp?id=1377737&Site=CM>