

The logo for ARTICLE 19, featuring the text "ARTICLE 19" in white, bold, sans-serif font, centered within a red, stylized, angular shape that resembles a paper airplane or a folded banner.

ARTICLE 19

COMMENTS

TO THE TUNISIAN DRAFT DECREE RELATED TO FREEDOM OF THE PRESS AND COMMUNICATION

19 May 2011

Introduction

A Draft Decree Related to Freedom of the Press and Communication (“Draft Decree”) is currently being drafted by the Media Sub-Committee, operating under the Higher Commission for the Realization of the Objectives of the Revolution, Political Reform and Democracy Transition (“the Commission”).

ARTICLE 19 welcomes the Draft Decree as an important piece of legislation in the efforts of the Tunisian Interim Government to guarantee media freedom and to bring media regulations in line with international standards on freedom of expression. We also consider the Draft Decree as a part of ongoing reform to place regulation of media on a new, democratic basis. While the overall approach of the Draft Decree is well intended, ARTICLE 19 submits that it should be further improved in a number of aspects; and offers its comments on how specific provisions could be revised in the light of international standards.

ARTICLE 19 understands that the text of the Draft Decree is still a work in progress. To this end, we note that we analysed the Draft Decree in the version of 16 May 2011 that was provided to us in an unofficial English translation. ARTICLE 19 would be happy to provide more in-depth analysis of further versions of the Draft Decree as well as detail overview of international standards that govern respective areas.

International standards

The comments and recommendations of ARTICLE 19 are based on international standards on freedom of expression, in particular the standards set Article 19 of the International Covenant on Civil and Political Rights (“the ICCPR”) and related jurisprudence of the Human Rights Committee); Article 9 of the African Charter on Human and Peoples’ Rights¹ (“ACHPR), and the Declaration of Principles on Freedom of Expression in Africa (“African Declaration”) adopted by the African Commission on Human and Peoples’ Rights.²

These standards as well as comparative law and jurisprudence recognize that broadcast media cannot function without direct official regulation. At the same time, the international standards require a number of guarantees, including the independence of the broadcast regulator. For example, Principle VII (1) of the African Declaration requires:

Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.

Similarly, the three special mandates on freedom of expression – the UN Special Rapporteur on Freedom of Expression, the OAS Special Rapporteur on Freedom of Expression and the OSCE Special Representative on Freedom of the Media – noted in a Joint Declaration adopted in 2003:

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.³

Guaranteeing the independence of a regulator in practice involves a number of aspects. ARTICLE 19's publication *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*,⁴ a set of guidelines based on comparative constitutional law and best practice in countries around the world, considers the following important:

[The] institutional autonomy and independence of broadcast and/or telecommunications [regulatory bodies] should be guaranteed and protected by law, including in the following ways:

1. specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution;
2. by a clear legislative statement of overall broadcast policy, as well as of the powers and responsibilities of the regulatory body;
3. through the rules relating to membership;
4. by formal accountability to the public through a multi-party body; and
5. in funding arrangements.

Overall comments:

In general, ARTICLE 19 suggests that the Commission clarifies the following overall issues.

- **The title and the aim of the Draft Decree (Article 1 of the Draft Decree):** The title and the aim of the Decree is confusing and needs to be clarified. According to the title of the Draft Decree, the Decree is “related to freedom of the press and communication”; according to Article 1 – article that contains not text but only subheading – the decree aims at “guaranteeing freedom of the press and communication and regulating their practice”. However, these aims do not correspond with the rest of the Decree that almost exclusively deals with the functions, composition and mandate of the Higher Information and Communication Commission (“HICC”). ARTICLE 19 believes that the aim of the Decree should correspond with the rest of the provisions and we recommend amending Article 1 of the Draft Decree accordingly. Considering the text of the Draft Decree, ARTICLE 19 believes that the aim of the Decree should be “to establish a fully independent broadcast regulatory body.” It would also be useful to clarify whether this new body will to replace the existing body (or other institution) carrying these functions in all matters.
- **The scope of the Draft Decree:** The scope of the Draft Decree is also not clear. The terms “communication” and “media” seems to be used interchangeably. In some parts, the Draft Decree refers to “media” while in other parts, it seems to focus on electronic media only. For the purposes of the Decree, we submit that the drafters should distinguish between electronic and print media (as well as other media) and make clear that the Decree only relates to certain aspects of the media regulation (see our comments to definitions below). Further, the Decree also alludes to regulation of access to information which is a subject separate to broadcasting and media regulation. ARTICLE 19 finds this problematic since regulation of access to information in the regulation related to broadcasting is limiting: under international law, anyone has the right to freedom of information and this right is not restricted to media only. We note that these subject matters are usually regulated by separate laws. The existence of different laws makes it easier for both professionals and laypersons to understand and navigate through each area of regulation. Hence, we recommend narrowing the scope of the Decree accordingly.

- **Confused nature of the HICC:** In connection of the previous point on unclear scope of the Draft Decree, the nature and role of the HICC is similarly unclear. In parts, it seems that its functions would simultaneously apply to subject matters concerning all types of media; and in some cases only some of them (for example, some functions are only envisaged with respect to broadcasting activities).

ARTICLE 19 submits that with such broad functions over all media, the Decree would violate the right to freedom of expression as guaranteed by international standards. It is well-established under international law that self-regulation is the best form of media regulation. ARTICLE 19 understands that in Tunisia, there are already undertaken significant efforts by journalists, experts and media professionals to establish voluntary self-regulatory authority and ARTICLE 19 fully supports these efforts. Hence, we strongly urge the High Commission to abolish all plans to create any statutory body with broad regulatory powers over all media. Statutory bodies are always at risk of political interference and abuse; in our experience, they can function satisfactorily only in well-established democracies with a strong tradition of the rule of law. The *African Declaration* recognizes this and in Principle IX stipulates that “effective self-regulation is the best system for promoting high standards in the media.”

The exception applies only to broadcast media where regulation is accepted as necessary: it is necessary in order to avoid chaos in the radio spectrum. This rationale for regulation does not apply to the print media. We recommend that the Draft Decree clarifies this issue and abandons all aspects of the law that cover media in general and only limit the functions of the HICC to broadcast media (with the view of further comments and recommendations below).

We also note that the Draft Decree is entirely vague on whether the HICC shall also issue decisions on licences. Article 16 is entirely obscure in this sense and it appears that some of these functions might be reserved to another body. The licensing functions of the HICC also need to be clarified.

Recommendations:

- Revise the title of the Draft Decree to correspond with its provisions.
- Revise the aim of the Draft Decree to correspond with the rest of the Draft Law. The most appropriate aim of the Decree, in the view of the existing provisions, should be to establish a fully independent broadcast regulatory body. The Decree should also clarify whether this new body replaces the existing institution that has been carrying these functions in all matters so far.
- Clarify the scope of the Draft Decree to cover only broadcast media with the view of further comments below.
- Clarify the nature of the HICC and remove all the provisions that would give the HICC the functions of the statutory media council. Consider new title of the entity based on the clarified functions.

Definitions (Article 2 of the Draft Decree)

The Draft Decree contains a set of definitions to clarify the provisions of the law. However, ARTICLE 19 finds these definitions either problematic or insufficient.

For example, the definition of communication for the purposes of the law is broad and it is entirely unclear what purpose it serves. We also note that broadcasting laws usually include definition of broadcasting and then, individual types of broadcasting services and broadcasters (such as

context of limited resource constraints, which apply to the radio-frequency spectrum but not to the Internet.

Definition of communication might be useful in respect to clarify that it contains means of communication for use of people with disabilities. Even in this sense, the definition is insufficient. For example, ARTICLE 19 refers to the definition of communication in the International Convention on the Rights of People with Disabilities that defines communication as

Communication includes languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology

Definition of information is included twice and in each time, it is different. The definition of information should also be clarified in the light of the scope of the Draft Decree. As noted above, we propose this scope to include only broadcasting authority and regulate the access to information (as well as related definitions) in a separate piece of legislation.

At the same time, the Draft Decree omits many crucial definitions of terms contained in the Decree or terms that are typically defined for the purposes of clarity of broadcasting regulations.

Hence, ARTICLE 19 suggests more appropriate wording of some definitions, based on the definitions developed in other legislations that we have reviewed and supported. The definition of the National Broadcasting Agency needs to be reviewed in the light of the separate Tunisian legislation in this area (ARTICLE 19 did not have a chance to review that draft legislation yet).

Recommendations:

- Wording of the definitions in Article 2 should be revised. Consideration should be given to differentiating between public, commercial and community broadcasters. Internet providers, production companies and film/video operators should not be included in this definition of broadcasting so that it is clear and narrow.

- At minimum, the definitions should contain the explanation of the following terms.
“In this Decree, the following terms shall be interpreted as follows

Broadcasting means the dissemination of broadcast programming, including through terrestrial transmitters, cable, satellite or any other medium, for public consumption and for simultaneous reception, whether or not by subscription, through a radio and/or television broadcast receiver or other related electronic equipment, but does not include communications internal to a private organization or government body, such as closed circuit television or internal address systems, or Internet communications.

Broadcaster means an organisation that engages in broadcasting, such as a public service broadcaster, a commercial broadcaster or a community broadcaster;

Broadcasting frequency plan means a plan for the allocation of the broadcasting frequency spectrum among the various uses such as television and radio, national and local licenses, and public, commercial and community broadcasters;

Broadcasting frequency spectrum means that part of the electromagnetic wave spectrum which is part of the public domain and which may from time to time be assigned to be used for broadcasting uses, but does not include other frequencies, such as those used for telecommunications purposes;

Broadcasting service means a defined service which consists in the broadcasting of television or sound material to the public, sections of the public or subscribers to

Commercial broadcaster means a broadcasting organisation that is neither a public broadcaster nor a community broadcaster;

Community broadcaster means a broadcaster which is controlled by a non-profit entity and operates on a non-profit basis, carries programming serving a particular community including by reflecting the special interests and needs of that community, and is managed and operated primarily by members of that community;

Advertisement means any public announcement intended to promote the sale, purchase or rental of a product or service, to advance a cause or idea or to bring about some other effect desired by the advertiser, for which broadcasting time has been given up to the advertiser for remuneration or similar consideration;

National Broadcasting Agency means the Agency established under the Law [ARTICLE 19 notes that the reference to respective law needs to be added]; [needs to be clarified: to issue ... the functions to be added];

Licence means a licence issued by [the HICC: this issue needs to be clarified since it is not clear whether this function lies with the] for purposes of providing a broadcasting service to the public;

Licensee means an individual or organisation who has been granted a licence to provide a broadcasting service to the public;

Record shall include any recorded information, regardless of its form, source, date of creation, or official status, whether or not it was created by the body that holds it or whether or not it is classified."

General provisions (Articles 3 – 6 of the Draft Decree)

ARTICLE 19 welcomes the obvious intent of the general provisions of the Draft Decree as they clearly want to provide for protection of freedom of expression. However, we recommend the Commission to consider the following.

- As noted above, the **aim of the Draft Decree** (in Article 1) does not correspond with the rest of the text that deals exclusively with the role, functions, membership and other issues related to the HICC. Similar conclusions can be made about Articles 3 – 6 of the Draft Decree that seem to bear only very little relations to the rest of the text. In order to reconcile the text of the Draft Decree with its proclaimed aims, the opening articles of the Draft Decree should state that the aim is “to establish genuinely independent communication regulator.”
- ARTICLE 19 welcomes **declarations on the press and communication freedom** (in Article 3) and **the guarantee of the right to information and communication** (in Article 4). However, we believe that it is inappropriate to include a general proclamation of the right to freedom of expression in a law which is specifically designed to deal with the broadcast regulator. Such guarantees should be provided in the Tunisian Constitution and in the law on for on freedom of expression which will apply to all persons. Hence, we propose to revise the aim of the law. In case the drafters decide to maintain these provisions, we suggest revising them based on the recommendations below.
- The decision to provide for the protection of “**the right to communication**”, as guaranteed by Article 4 of the Draft Decree, is definitely positive. Similar to the previous point, we recommend the guarantee of this complex right⁵ should be provided in the Constitution. In this respect, we note that ARTICLE 19 has previously submitted that “the right to

ideas, the right to pluralism within and equitable access to the media, the right to practice and express one's culture, the right to participate in public decision-making processes, the right to access information from public bodies and supporting rights including the right to communicate anonymously and the right to respect for private life." This means that full implementation of the right to freedom of opinion and expression, including the right of equitable access to the media and the means of communication, must be fully recognized and protected.

- The restrictions on freedom of expression stipulated in Article 5 and Article 6 do not comply with the international standard in this area, as set up by Article 19 para 3 of the ICCPR. Noting that media freedom is not absolute we propose that the international law's test of the legality of the restrictions on freedom of expression to be included.
- It is possible that in Articles 5-6, the High Commission did not want to set up restrictions on freedom of expression but to establish main principles that should apply to broadcast regulation. This issue should be clearly specified and the wording of the respective articles should be revised accordingly. If this is the case, ARTICLE 19 points out that a number of principles that might apply to broadcast regulation are missing from Articles 5 – 6. Based on the progressive broadcasting regulation, ARTICLE 19 proposes to expand the list of the principles of broadcast regulation as per our suggestion.

Recommendations:

- The provisions of Article 1 of the Draft Decree should be revised in the light of the rest of the Decree and in the light of international principles on broadcast regulation. ARTICLE 19 proposes to consider the following aim of the Decree:
"The aim of this Decree is:
 - a) to make provision for the regulation of broadcasting with a view to promoting independent, pluralistic broadcasting in the public interest;*
 - b) to establish a legal entity to be known as the Higher Information and Communication Commission which shall function wholly independently of state, governmental and party political influences and free from political or other bias or interference;*
 - c) to define the powers, functions and duties of [insert the name of the institution];*
 - d) to provide for the exercise of powers relating to the administration, management, planning and use of the broadcasting services frequency bands the Higher Information and Communication Commission; and*
 - e) to provide for matters connected therewith."*
- In case the drafters wish to retain the broad guarantees of freedom of expression in the Draft Decree, ARTICLE 19 proposes to expand the wording of Articles 3 and 4 to include the following
 - "1. Freedom and independence of electronic, print and other media of all types are guaranteed.*
 - 2. The right to freedom of the media is understood to mean the right of every physical and legal person to receive and impart information through the media without prior hindrance by a public authority."*
- Limitations on freedom of expression should be subject to three-part test established by international law, as follows:
 - "1. The restriction shall be directly intended at fulfilment of one of the following legitimate purposes: respect for the rights and reputations of others, protection of national security, public order, or public health and morals*
 - 2. The restriction shall be necessary for the fulfilment of the legitimate purpose, which implies that a) it shall be in response to a pressing social need, b) it shall be proportionate to the legitimate aim, defined in paragraph 1, and c) it is the least restrictive to freedom of expression."*

“Broadcast regulation shall seek to promote the following principles:

- a) to uphold the constitution, as well as human rights, democracy and the rule of law;*
- b) to protect and promote freedom of expression;*
- c) to encourage creative national broadcasting, including by licensing all three types of broadcaster, namely public, private and community;*
- d) to promote a diverse range of quality broadcasting services which serve all language and cultural groups;*
- e) to enhance the public’s right to know through promoting pluralism and a wide variety of programming on matters of public interest;*
- f) to prevent monopolisation of ownership and promote fair competition in the broadcasting sector;*
- g) to promote accurate, informative and balanced programming;*
- h) to encourage the provision of quality educational programming;*
- i) to promote the widest possible geographic distribution of broadcasting services, including by licensing national and local broadcasters;*
- j) to develop and promote broadcasting reflecting national culture and identity;*
- k) to promote the appropriate use of new technology; and*
- l) to enhance the overall financial and competitive viability of broadcasting in the Republic of Tunisia.”*

Independence of the HICC (Article 7 of the Draft Decree)

The wording of Article 7 provides guarantee of the independence of the HICC. ARTICLE 19 believes that this independence could be further strengthened by:

- an explicit guarantee of the independence from political and commercial interests; and
- making it more clear that the guarantee of independence also implies a prohibition on interference with the HICC or its members by external parties.

Recommendations:

- The wording of Article 7 of the Draft Decree should be expanded through the following additions:

“The Commission shall enjoy operational and administrative autonomy and shall function without any political or commercial interference. The independence of the Commission shall be respected at all times and no person or entity shall seek to influence its members or staff of the Commission in the discharge of their duties or to interfere with its activities, except in the discharge of a specific authority or duty provided for by law.”

Appointment process (Article 8 of the Draft Decree)

ARTICLE 19 welcomes the obvious aim of the Draft Decree in Article 8 to compose the HICC of those individuals who represent a range of relevant expertise and society.

However, it appears – although the Draft Decree is obscure on this – that the President’s role in making appointments to the HICC is not merely ceremonial, but that he will be responsible for choosing the candidates based on proposals of other bodies (in addition to clearly selecting one candidate). This issue should be clarified and the role of the President in appointing the HICC members should be **merely formal and ceremonial**. Otherwise, the Draft Decree would be incompatible with the notion of independence from government.

In any case, the Draft Decree should also make clear that at instance of the President refusing to appoint members based on the proposal of listed bodies, he or she shall provide reasons for this

we note that at present, one member of the HICC is still selected directly by the President, two members are selected by the President of the Parliament and three members are selected by the judiciary. ARTICLE 19 notes that this model fails to take into account the possibility that, as at present, the President, the Parliament and judiciary might be dominated by one party, undermining any balance it seeks to ensure. Furthermore, the two sectors of society identified – journalists and corporations – appear to be rather arbitrary and are not reflective of society as a whole.

Consideration should be given to other possible approach here. For example, social sectors could be identified for all of the appointments, for example one each from the legal profession, from among engineers, from among media professionals and so on. Another approach would be for none of the members to be nominated or appointed by political figures and for appointments to be made instead by Parliament, a multiparty body, with a two-thirds majority vote after a process in accordance with principles of participation by the public in the nomination process, transparency and openness and the publication of the shortlist of candidates.

The process could also be required to be open and allow for public participation, for example, in the form of providing comments on a shortlist of candidates, which would further ensure democratic appointments.

We note that the Draft Decree is completely silent on the matters that would disqualify the candidates from an appointment to the HICC. ARTICLE 19 notes that it is important to prevent all individuals with strong political connections from being appointed as members. Hence, individuals who hold senior posts in political parties should be excluded. It is also necessary to exclude individuals who have significant interests in broadcasting, unless they divest themselves of such interests.

ARTICLE 19 also proposes to expand on the requirements for members of the HICC based on the recommendations below.

Recommendations:

- The wording of Article 8 of the Draft Decree should be expanded to include that independent members of the HICC should have some expertise, by virtue of their education or experience, in the areas of broadcasting, policy, law, technology, journalism and/or business and who shall be known for their high moral standards, integrity, impartiality and competence. They should be committed to fairness, freedom of expression, openness and accountability.
- The Draft Decree should also specify that all members of the HICC shall be independent and impartial in the exercise of their functions, shall represent the public interest and not the body that nominated them or any other particular interest, and shall, at all times, seek to promote broadcasting policy as set by the Draft Decree.
- The mechanism for appointment of members of the HICC should be reconsidered in the view of providing more protection for the independence, as recommended above.
- The President's role in appointing the members of the HICC should be purely ceremonial and should not involve the selection of candidates from a shortlist.
- The bodies with the power to nominate the members of the HICC should be obliged to publish the name of their proposed candidates and the public shall be given an opportunity to make representations concerning that candidate prior to appointment.

- The Draft Decree should stipulate that individuals with strong political connections, such as those holding senior posts in political parties, are excluded from the appointments to the HIC. ARTICLE 19 proposes to provide that no one shall be appointed as a member of the HICC if he or she is, or has been within the last two years, employed in the civil service or any other branch of government; or holds, or has held within the last two years, an elected position in the Parliament or in any local government, or holds an official office in, or is an employee of, a political party.
- The Draft Decree should also stipulate that those individuals who hold, directly or indirectly, significant financial interests in telecommunications or broadcasting cannot be appointed as members of the HICC, unless they divest themselves of such interests. Also, if by virtue of a will, gift or otherwise, a Member obtains such significant financial interest he or she shall, within a period of two months, either dispose of the interest or resign from his or her position as Member. In any case where this issue becomes applicable to a member, he or she shall not take part in any decision-making.

Termination or suspension of membership of the HICC and issues related to membership (Article 9 – 13 of the Draft Decree and Article 40)

ARTICLE 19 finds the list of grounds for termination or suspension of the membership in the HICC problematic for two reasons:

- The Draft Decree is entirely silent on who would have the power to remove a member if one of the grounds takes effect – it only makes some vague reference to “voted decision”. Normally the power to remove would vest in the party which made the appointment, in this case the President. As discussed above, we consider a role for the President in the appointment process to be inappropriate, and a power to remove Commissioners would be even more so as this would potentially expose the HICC to substantial political pressure.
- The grounds for removal are extremely vague and could be used in an arbitrary manner. For example, “losing the quality giving reasons to membership of the Commission” is entirely obscure. We assume that the drafters here aimed to remove commissioners who are not performing well; in which case more specific language should be used, such as “clear and demonstrated inability to perform the duties incumbent on him/her effectively”.

As a further safeguard against arbitrary dismissal, the Draft Decree should expressly provide that decisions to remove a Commissioner are subject to judicial review.

Further, ARTICLE 19 comments that the Draft Decree is extremely vague on the issues of disclosure of the conflict of interest. Provisions of Article 11 of the Draft Decree are insufficient in this respect. We recommend that the Draft Decree stipulates that members of the HICC who has, directly or indirectly, an interest in a matter under discussion by the HICC should disclose the fact and nature of his or her interest to the HICC. This disclosure shall be recorded in the minutes of the HICC. Although the commissioner in question may be counted for the purpose of forming a quorum of the HICC, he or she shall not take part in nor be present during any discussion, deliberation or decision of the HICC on the matter.

ARTICLE 19 is also concerned about the provisions of Article 40 that appears to surpass the provisions of Article 8 on the members’ appointment on some unspecified temporary basis. Article 40 should be eliminated.

Recommendations:

- The Draft Decree must clarify who has the power to remove a Commissioner if one of the grounds mentioned in Article 9 of the Draft Decree occurs. This power should not lie with the President.
- The grounds for removal should be specified in more precision.
- Safeguards should be provided for the process of dismissal and the decision to remove a commissioner should be a subject to judicial review.
- The Draft Decree should specify the provisions on the obligation of conflict of interest disclosure, as recommended above.
- Article 40 of the Draft Decree on temporary appointment should be deleted.

Powers of the HICC (Article 16 – 17)

As ARTICLE 19 pointed out above, the functions of the HICC are not clear and need to be specified. We also understand that together with the Draft Decree, there are other regulations currently drafted, such as the Decree on licensing of broadcasters by the National Authority to Reform Information and Communication (INRIC), that together will shape the future of radio and television in Tunisia. ARTICLE 19 stands ready to review these other pieces of legislation to assess whether the proposed frequency management scheme is consistent with the obligation to promote broadcasting freedom and diversity. Our comments to the functions of the HICC are thus, preliminary.

Mindful of the previous point and our overall recommendations, we make the following comments at this stage:

- The Draft Decree is vague on whether the HICC shall also issue decisions on licences. Article 16 only states that might “eventually deliver the licences”. The Draft Decree should make it clear that is entirely obscure in this sense and it appears that some of these functions might be reserved to another body. The licensing functions of the HICC need to be clarified.
- If the power of the HICC is to issue communications licenses and otherwise regulate communications, these powers and related obligations should be clarified with precision.
- In many countries, the broadcast regulator is given the general task of preparing a broadcasting frequency plan, which sets out the long-term plan regarding allocation of frequencies to broadcasters, including such things as which types of broadcasters should be allocated what proportion of the frequency spectrum and so on. This helps to ensure a planned rather than simply *ad hoc* approach to the allocation of frequencies. Hence, ARTICLE 19 recommends that among the responsibilities should be a development the Broadcasting Frequency to ensure orderly and optimal use of the broadcasting frequency spectrum.
- Similarly, in other countries, broadcast regulators are also tasked, in consultation with broadcasters, journalists and other interested stakeholders, to draw up, and from time to time review and amend, an Advertising Code, a Programme Code and a Technical Code for broadcasters. These codes should be published and widely disseminated and every licensee shall be provided with a copy of each code. ARTICLE 19 is ready to provide more information on content of these codes.

Recommendations:

- Powers of the HICC to issue licences should be clarified. Other powers and mandate should reviewed in the light of recommendations above

Although the Draft Decree notes in Article 22 that the HICC should have its own budget, that should “be decided by decree”, it does not mention any specifications as for the sources of funding.

ARTICLE 19 notes that under international law, independent funding has been recognised as being fundamental to the overall independence of broadcast regulators.⁶ Broadcast regulator should have independent sources of income to minimise its reliance on allocations (and therefore pressure) from political bodies.

There are various ways how to achieve this goal and ARTICLE 19 would be happy to provide the Commission with overview of how this issue is addressed in legislation of other countries.

Recommendations:

- The Draft Decree must set out the manner in which the HICC will be funded, which should be designed in such a way as to protect it against interference.

Disputes and sanctions (Article 25 – 33 of the Draft Decree)

Provisions of Articles 25 – 33 should be revised in their entirety since they do not correspond with the powers of the HICC. The provisions here further highlight the confused nature of the HICC as a statutory media council that ARTICLE 19 criticized above and that would constitute serious interference with international freedom of expression standards.

- The respective provisions in this section should relate to **powers of the HICC** to ensure that all licensees comply with the licensing requirements and codes noted above (Advertising Code, Programme Code and Technical Code) and, to this end, the HICC should only be allowed to monitor licensees and undertake an investigation where it believes there may have been a breach.
- The **proceedings** on these issues shall also comply with international standards in this area. ARTICLE 19 is willing to provide example of such regulation. For example, the Commission can consider including the following provisions.

“1. Where it conducts an investigation pursuant to [specify which provisions], the HICC shall provide the broadcaster with adequate written notice of any allegation of a breach and with a reasonable opportunity to make representations. In the case of a complaint, the HICC shall also provide the complainant with a reasonable opportunity to make representations.

2. The HICC shall, absent exceptional circumstances, come to a decision in relation to a complaint within two (2) months.

3. Where the HICC decides that a licensee is in breach of the Advertising or Programme Code, it shall publish its decision, including reasons for its decision, any sanction to be imposed pursuant to [specify which provisions] and notification of the broadcaster’s right to appeal from this decision. The HICC shall provide the broadcaster and, where relevant the complainant, with a copy of its decision.”

- The provisions of the Draft Decree on **sanctions** are confusing. ARTICLE 19 recommends clarifying this section and providing the list of sanctions with sufficient clarity. There are various ways how to accomplish this. For example, we offer the following option, based on how this issue has been addressed by other legislators.

“1. Where the HICC determines that a licensee is in breach of the Advertising Code, the Programme Code, the Technical Code and/or any other licence condition or provision of the Draft Decree, it may apply one or more of the following sanctions:

- a) issue an internal instruction to the licensee;*
- b) issue a public written warning to the broadcaster;*
- c) order the broadcaster to broadcast a statement, correction or retraction at a specified time and in a specified form; or*
- d) order the broadcaster to take such action or desist from taking such action as it deems necessary to rectify or prevent repetition of the breach.*

2. In cases of repeated breach of licence conditions, the HICC may order a licensee to pay a fine not exceeding 2% of the licensee’s total revenues for the previous year, provided that such fines shall be paid into the HICC Fund.

3. In cases of repeated and gross breach of licence conditions, the HICC may order the suspension of part or all of the Programme Schedule of a licensee, or terminate its licence.”

The legislation of other countries also provide that the broadcast regulators may order the termination of broadcasting activity that has been carried without licence or when the licence was transferred in contradiction to required standards, a fine and/or the confiscation of the equipment used in the illegal activity. Again, ARTICLE 19 is willing to provide more information on possible wording of respective provisions.

- The Draft Decree should allow for a possibility for **judicial review** of the decisions of the HICC. Although courts have the power to conduct certain forms of judicial review as a matter of general administrative law, it is important to provide directly for appeals in the legislation, so as to ensure that these are fully guaranteed.

Recommendations:

- Provisions on sanctions and disputes should be revised entirely. Broad powers of the HICC should be eliminated and should be limited to compliance with licensing requirements and codes.
- The sanctions permissible under the Draft Decree should be limited, as recommended above.
- The Draft Code should stipulate that any person aggrieved by a decision of the HICC under the Draft Decree has a right to appeal to the courts for a review of that decision.

Lack of the accountability of the HICC to the public

Provisions on transparency and accountability of the HICC are very brief and underdeveloped. In fact, they are limited to few provisions on the audit of the HICC’s spending.

ARTICLE 19 points out that the requirement to establish an independent regulator does not mean that the regulator is not accountable to the public. In fact, if the lines of accountability are unclear, a regulator is far more likely to be subject to political pressure and influence.

There are two aspects in ensuring accountability:

- The Draft Decree should provide a clear set of objectives that the regulator must take into account in all of its work. Here, we refer to our comments under Article 6 of the Draft Decree.
- The Draft Decree should also provide for an obligation to submit an annual report to the

- The Draft Decree should also specify the minimum content of the report and at minimum, it should contain audited accounts of the HICC so that the public can verify how the funds entrusted to the HICC have been used. A possible list of items to be included might be as follows (again, based on the progressive legislation elsewhere):
 - “a) a copy of the auditor’s report;*
 - b) a statement of financial performance and of cash flows;*
 - c) the budget for the coming financial year;*
 - d) a description of the activities of the HICC during the previous year;*
 - e) information relating to licensing, complaints and research;*
 - f) a description of any sanctions applied by the Authority and the decisions relating thereto;*
 - g) information relating to the Broadcasting Frequency Plan;*
 - h) an analysis of the extent to which it has met its objectives of the previous year;*
 - i) its objectives for the coming year; and*
 - j) any recommendations in the area of broadcasting.”*

Recommendations:

- The Draft Decree should provide for accountability and transparency of the HICC. At minimum, the HICC should be required to present its annual report to the Parliament or a specific Parliamentary committee. The annual report should be published and disseminated, including on the Internet.
- The Draft Decree should specify detail as to what should be included in the annual report; at minimum, this should include a statement of the HICC’s activities over the past year and its audited accounts.