

ARTICLE 19

Tunisia: Draft Law on the Audio-Visual Commission

December 2017

Legal analysis

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Introduction

In this legal analysis, ARTICLE 19 reviews the Draft Law on the Audio-Visual Commission of Tunisia (Draft Law) for its compliance with international freedom of expression standards.¹ The analysis focuses on the key provisions of the Draft Law.²

The Draft Law is a part of an ongoing process of harmonisation of Tunisian legislation with the 2014 Constitution. It aims to replace the existing legislation in this area, namely Legislative Decree No. 116-2011, which established the previous broadcasting regulator, the Independent Audio-Visual Communication Authority (HAICA). It is envisaged that HAICA will be replaced by the new Audio-Visual Communication Commission (the Commission).

The Draft Law and the reforms of the broadcasting legislation have already been subject to criticism by civil society. Civil society organisations, including ARTICLE 19, have expressed concerns that the broadcasting regulatory reforms do not offer any comprehensive vision for the reform of the current regulatory system, and are dispersed in several laws, rather than in one comprehensive piece of legislation. Concerns have also been raised that the Draft Law is being introduced without meaningful prior consultations with all stakeholders in the media sector and civil society.

ARTICLE 19 is uniquely placed to offer comments on the current Draft Law, given our extensive experience on the subject. Previously, in 2011, we analysed several drafts of the previous legislation on broadcasting regulation, including the Decree on the Freedom of Audio-Visual Communication and the Creation of an Independent Higher Authority for Audio-Visual Communication of Tunisia. ARTICLE 19 Tunisia has been also working extensively with HAICA over the last several years on many relevant issues in the media sector.

We believe that when replacing the current legislation on the broadcasting regulator, the Tunisian Government must comprehensively evaluate the benefits and the shortcomings of the current system, and its compliance with international freedom of expression standards. Crucially, the government must ensure that any new proposal for a broadcast regulator strengthens, rather than weakens, compliance with these standards. As such, we regret that the current version of the Draft Law lacks sufficient safeguards for the protection of freedom of expression and lacks sufficient guarantees for the independence, including financial, of the Commission.

The legislation establishing a broadcasting regulator is crucial for ensuring freedom of media and its important role in securing public information and in facilitating a forum for public debate and fair elections. ARTICLE 19 hopes that the Tunisian Government will seriously consider the recommendations in this analysis and will ensure that the final draft of the Law fully complies with international freedom of expression standards. We stand ready to provide further assistance in this process.

¹ The analysis is based on an unofficial translation from Arabic to English. ARTICLE 19 takes no responsibility for the accuracy of the translation or for comments made on the basis of any inaccuracies in the translation.

² The fact that ARTICLE 19 does not comment on all provisions of the Draft Law does not constitute the endorsement of the relevant provisions.

Applicable international standards

International standards on broadcasting regulatory bodies

The right to freedom of expression is protected by Article 19 of the Universal Declaration of Human Rights (UDHR),³ and given legal force through Article 19 of the International Covenant on Civil and Political Rights (ICCPR).⁴ The right to freedom of expression is further guaranteed in regional treaties, including the African Charter on Human and Peoples' Rights,⁵ and other regional treaties.⁶

While the right to freedom of expression is fundamental, it is not absolute. A State may, exceptionally, limit the right under Article 19 (3) of the ICCPR,⁷ provided that the limitation is:

- Provided for by law; any law or regulation must be formulated with sufficient precision to enable individuals to regulate their conduct accordingly.
- In pursuit of a legitimate aim, listed exhaustively as: respect of the rights or reputations of others; or the protection of national security or of public order (*ordre public*), or of public health or morals;
- Necessary in a democratic society, requiring the State to demonstrate in a specific and individualised fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.

Thus, any limitation imposed by the State on the right to freedom of expression, including limiting “hate speech”, must conform to the strict requirements of this three-part test. Further, Article 20(2) of the ICCPR provides that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence must be prohibited by law.

The guarantee of freedom of expression applies with particular force to the media, including the broadcast media and public service broadcasters, due to “the pre-eminent role of the press in a State governed by the rule of law”⁸ and the vital role of the media as a “public watchdog” in a democracy.⁹

³ As a result of its adoption in a resolution of the UN General Assembly, the UDHR is not strictly binding on States. However, many of its provisions are regarded as having acquired legal force as customary international law since its adoption in 1948; see *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd circuit).

⁴ International Covenant on Civil and Political Rights, 16 December 1966, UN Doc. A/6316 (1966), Article 19.

⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), 4 November 1950, ETS 5, Article 10 and American Convention on Human Rights (American Convention), 12 November 1969, OAS Treaty Series No. 36, Article 13.

⁶ African (Banjul) Charter on Human and Peoples' Rights, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev.5, Article 9.

⁷ Article 19, paragraph 3 of the ICCPR states: “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 (*ordre public*), or of public health or morals.

⁸ *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, 14 EHRR 843, para. 63

⁹ *Ibid.*

The need to ensure the independence of broadcasting regulatory bodies and their protection against political or commercial interference was specifically stressed in the 2003 Joint Declaration of the UN Special Rapporteur on Freedom of Expression, the OAS Special Rapporteur on Freedom of Expression and the OSCE Representative on Freedom of the Media. The Joint Declaration specifically stipulates that:

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.¹⁰

From a comparative perspective, it is worth mentioning the standards developed by the Council of Europe; the key recommendation in this regard is the Council of Europe's Recommendation (2000) 23 on the independence and functions of regulatory authorities for the broadcasting sector¹¹ and its Explanatory Memorandum;¹² and the Declaration of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector.¹³ Although the Recommendation and the Declaration are not binding on Tunisia, we believe that the standard setting by regional human rights bodies, as well as non-binding standard-setting documents, such as authoritative international declarations and statements, illustrate the manner in which international and constitutional guarantees of freedom of expression have been interpreted globally. As such, they are authoritative evidence of generally accepted understandings of the scope and nature of all international guarantees of freedom of expression. They also provide strong guidance regarding the interpretation of the guarantees of freedom of expression found in the Tunisia Constitution.

¹⁰ 2003 Joint Declaration on regulation of the media, restrictions on journalists and investigating corruption; available at <http://bit.ly/1HQCrsZ>.

¹¹ Council of Europe, Committee of Ministers, Recommendation (2000) 23 of the Committee of Ministers to the member states on the independence and functions of regulatory authorities for the broadcasting sector, adopted by the Committee of Ministers on 20 December 2000, at the 735th meeting of the Ministers' Deputies; available at <http://bit.ly/2yZYP9a>. Recommendation (2000)23 specifically provides:

3. The rules governing regulatory authorities for the broadcasting sector, especially their membership, are a key element of their independence. Therefore, they should be defined so as to protect them against any interference, in particular by political forces or economic interests.
4. For this purpose, specific rules should be defined as regards incompatibilities in order to avoid that:
 - regulatory authorities are under the influence of political power;
 - members of regulatory authorities exercise functions or hold interests in enterprises or other organisations in the media or related sectors, which might lead to a conflict of interest in connection with membership of the regulatory authority.
5. Furthermore, rules should guarantee that the members of these authorities:
 - are appointed in a democratic and transparent manner;
 - may not receive any mandate or take any instructions from any person or body;
 - do not make any statement or undertake any action which may prejudice the independence of their functions and do not take any advantage of them.
6. Finally, precise rules should be defined as regards the possibility to dismiss members of regulatory authorities so as to avoid that dismissal be used as a means of political pressure.
7. In particular, dismissal should only be possible in case of non-respect of the rules of incompatibility with which they must comply or incapacity to exercise their functions duly noted, without prejudice to the possibility for the person concerned to appeal to the courts against the dismissal. Furthermore, dismissal on the grounds of an offence connected or not with their functions should only be possible in serious instances clearly defined by law, subject to a final sentence by a court.

¹² Explanatory Memorandum to Recommendation (2000) 23 of the Committee of Ministers to member states on the independence and functions of regulatory authorities for the broadcasting sector; available at <http://bit.ly/2D6mKHh>.

¹³ Declaration of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector, adopted by the Committee of Ministers on 26 March 2008 at the 1022nd meeting of the Ministers' Deputies; available at <http://bit.ly/2D8MTpd>.

Both documents stress that regulatory authorities must be protected from all forms of political and economic interference; the underlying principle being the fact that the independence of regulatory agencies is inextricably linked with the independence of broadcasters and of the media as such. The documents further emphasise that broadcasting regulators must be equipped with expert knowledge in order to fulfil their functions properly.

Other standards relevant to the media, including the independence of broadcasting regulators, were adopted under the auspices of UNESCO. The Declaration of Sofia provides a number of declaratory principles on media regulation, including the following,

If supervisory regulatory broadcasting authorities are established, they must be fully independent of government.¹⁴

While not possessing legal binding force, this Declaration sets out important principles and has been endorsed by UNESCO's General Conference, lending it considerable political weight.

Additional guidance in this area is provided in the *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation* (Access to Airwaves Principles),¹⁵ developed by ARTICLE 19 and international experts. These Principles were developed on the basis of international practice, comparative constitutional law and best practices in countries around the world. Although this document is not binding on Tunisia, they provide good evidence of generally accepted understandings of the nature and scope of the right to freedom of expression and its relationship with broadcast regulation. The Access to Airwaves Principles set out the following principles for the broadcast regulatory bodies:

Principle 10: Independence

All public bodies which exercise powers in the areas of broadcast and/or telecommunications regulation, including bodies which receive complaints from the public, should be protected against interference, particularly of a political or commercial nature. The legal status of these bodies should be clearly defined in law. Their institutional autonomy and independence should be guaranteed and protected by law, including in the following ways:

- specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution;
- by a clear legislative statement of overall broadcast policy, as well as of the powers and responsibilities of the regulatory body;
- through the rules relating to membership;
- by formal accountability to the public through a multi-party body; and
- in funding arrangements.¹⁶

The Access to Airwaves Principles further stipulate that safeguards for the independence of regulatory bodies also include:¹⁷

- an explicit provision in the legislation that regulatory bodies are independent and the interference with their activities and members is prohibited;
- a clear stipulation in the law of the policy objectives underpinning broadcast regulation;
- setting out status and mandate of the members of the regulatory bodies including the manner of nomination and appointment of the members;

¹⁴ UNESCO, Sofia Declaration on Promoting Independent and Pluralistic Media, Resolution 35 adopted by the UNESCO General Conference in 1997.

¹⁵ ARTICLE 19, Access to Airwaves, London March 2002; available at <http://bit.ly/2BfOg85>.

¹⁶ *Ibid.*, Principles 10.

¹⁷ *Ibid.*, Principle 11-17.

- rules of incompatibility;
- terms of office;
- the manner of termination of office;
- payment and reimbursement of the members;
- a clear formulation of the remit and responsibility of regulatory bodies;
- detailed rules of accountability of regulatory bodies;
- a guarantee that all decisions of regulatory bodies affecting individuals are subject to judicial review;
- regulation of a funding scheme which ensures adequate funding in view of the mandate of the regulatory bodies.

The Draft Law is examined for the compliance with these principles in the next section.

Analysis of the Draft Law

Guarantees of freedom of expression

ARTICLE 19 appreciates that the Draft Law recognises the role of the broadcasting regulator in promoting the rule of law and freedom of expression. Namely:

- Article 5 stipulates that the Commission shall protect freedom of expression and information, strive for the development of a pluralistic, diverse and balanced audio-visual media landscape, reinforcing the values of human rights. It should also ensure the independence of public media institutions from all forms of interference, ensure the neutrality of media products, and the fair distribution of audio-visual communication services and the diversity of views and opinions;
- Article 6 stipulates that regulatory decisions should uphold the right to freedom of expression and information.

The aforementioned provisions can be commended. The safeguards for freedom of expression do however suffer from some weaknesses and could be strengthened in the following ways:

- The Draft Law could specify the meaning of the right to freedom of expression in the sector. In this regard, we refer to the Access to Airwaves Principles, which specify that:

“The right to freedom of expression includes both the right of broadcasters to be free of State, political or commercial interference and the right of the public to maximum diversity of information and ideas in broadcasting;¹⁸

- The Draft Law should further define the principles it establishes. It is impossible to say what is meant by the principle of “neutrality of media products,” for example. In particular, the Draft Law should explicitly guarantee the following important principles and ensure that they become the explicit duties of the Commission:
 - *Pluralism and diversity*: The Draft Law should establish that any broadcast policy aims at securing pluralism – i.e. a variety of different types of media (public, private and community) with different owners – and diversity – i.e. a variety of different voices being given access to the media and a variety of different viewpoints being heard;
 - *Editorial independence*: The Draft Law should establish that editorial policies and specific editorial decisions are made by broadcasters, as opposed to the government, regulatory bodies or commercial entities;
 - *Universal access*: The State and the Commission should be responsible for promoting universal and affordable access to the means of communication and reception of broadcasting services and for taking measures to ensure the maximum geographical reach of broadcasting.
 - *Non-discrimination of private, public and community broadcasters*: Access to state resources, including through the placement of public advertising, should always be provided in a fair and non-discriminatory manner. State officials should not

¹⁸ *Op.cit.*

discriminate between private, public and community broadcasters when providing information to the media.

- Protection of the right to freedom of expression should also be provided by incorporating the international, three-part test for the legality of restrictions on the right to freedom of expression, as established by Article 19 (3) of the ICCPR;
- Finally, the Draft Law should explicitly prohibit prior censorship either by the government or by the broadcast regulator and establish sanctions for attempting to carry out prior censorship or interfere with editorial independence.

Article 3 of the Draft Law further states that the Commission should strive for “rejection of all forms of violence, discrimination, hatred and extremism.” We encourage the amendment of this provision to retain the language of Article 19 and Article 20 (2) of the ICCPR, and avoid vague terms that are not finely tailored to meet the treaty requirements, including the requirement of legality and legal certainty.

Recommendations:

- The role of the Commission in the protection of human rights and rule of law should be strengthened by more specific wording in Article 5 and 6. Respecting and protecting editorial independence, guaranteeing universal access and protecting against discrimination should be defined as explicit duties of the Commission.
- The references to the right to freedom of expression and permissible restrictions on the exercise of that right should follow the wording of relevant provisions of the ICCPR.

Independence of the Commission

One of the most essential requirements under international standards relevant to broadcast media is that regulatory bodies should be independent, both from the government and the sector they regulate. The independence of the regulatory authority is a necessary pre-condition for the effectiveness of democratic regulation of the broadcast and telecommunications sector.¹⁹ This requirement is expressed in the Declaration of Principles on Freedom of Expression in Africa²⁰ as well as in other international standards.²¹

¹⁹ ARTICLE 19, *Access to Airwaves*, *op. cit.* Principle 10 states that “All public bodies which exercise powers in the areas of broadcast and/or telecommunications regulation, including bodies which receive complaints from the public, should be protected against interference, particularly of a political or commercial nature. The legal status of these bodies should be clearly defined in law. Their institutional autonomy and independence should be guaranteed and protected by law, including in the following ways:

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

²⁰ FOE African Declaration, *op.cit.* Principle VII(1) states “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.”

²¹ For example, the need for independence of broadcasting regulatory bodies and their protection against political or commercial interference was specifically stressed in the 2003 Joint Declaration of the UN Special Rapporteur on Freedom of Expression, the OAS Special Rapporteur on Freedom of Expression and the OSCE Representative on Freedom of the Media; 2003 Joint Declaration on regulation of the media, restrictions on journalists and

The Draft Law refers to the independence of the Commission in several instances, in particular:

- Article 1: The Commission is “an independent constitutional authority”;
- Article 4: The Commission shall perform its tasks with “full independence and neutrality”;
- Article 18: The Commission is composed of “independent and neutral members;” and
- Article 47: The members of the Commission’s Council “shall not, in the execution of their duties, request or receive guidelines or instructions from their nominating organisations or other entities.”

ARTICLE 19 finds these provisions to be positive step, however, they do not provide elaboration on the guarantees of independence. We believe that the Draft Law should specifically guarantee the functional independence of the Commission. Specifically, it should provide that functional independence means independence in financial, operational and administrative matters and that there should be no interference by either the government or other entities in individual cases as well as in the policy and regulations overall. Further, it would be useful to proclaim the independence of the Commission from not only political interference, but also from interference by other powerful interests in society, including the media outlets it regulates.

Comments on specific aspects regarding the independence of members of the Commission are provided below, in the section on the composition of the Commission.

One of the key elements in ensuring the independence of a regulatory authority is its financial autonomy. Unfortunately, the Draft Law contains no provisions related to the funding of the Commission. We observe that in order to ensure the independence of the Commission, the Draft Law should guarantee a sufficient level of funding and the foreseeability thereof. Where the existence of a number of sources of income may contribute to the Commission reducing its dependence on allocations from the national budget, the Draft Law should specify that any grant or generally any source of income received by the Commission should not threaten its independence.

Recommendation:

- The functional independence of the Commission should be explicitly guaranteed. The Draft Law should stipulate that independence means independence in financial, operational and administrative matters and there should be no interference by the government or other entities in individual cases as well as in the policy and regulations overall;
- The Draft Law should guarantee the principle that the Commission should receive a sufficient and foreseeable level of funding to fulfil its mission.

investigating corruption; available at <http://bit.ly/1HQCrSZ>. For a comparative perspective, see also the Council of Europe, Committee of Ministers, Recommendation (2000) 23 on the independence and functions of regulatory authorities for the broadcasting sector, 20 December 2000, available at <http://bit.ly/1LAeOJ5> and its Explanatory Memorandum, available at <http://bit.ly/1CGZsjP>; and the Declaration of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector, 26 March 2008, available at <http://bit.ly/1T1ou6E>.

Mandate and powers of the Commission

Articles 6 and 7 of the Draft Bill outline the powers and responsibilities of the Commission. These powers need further specification in order to enable the Commission to fulfil its mandate. In particular:

- The Commission should have competence to develop broadcasting standards codes. The Draft Law provides that the Commission shall develop rules relating to advertising, and monitor the compliance of broadcasters with these standards (Article 6). Whilst this is an appropriate provision, the powers granted to the broadcast regulator are limited only to rules governing advertising, whereas typically broadcast regulators are expected to develop and apply a broadcasting code. A broadcasting standards code would generally cover standards related to programming, sponsorship, product placement in television programmes, fairness and privacy, protecting children in a digital world, and other issues. It should also establish the standards of conduct for the broadcast media during election; while currently, Article 6 of the Draft Law only states that the Commission should make regulatory decisions during elections, but does not specify on what basis.

Mindful of this need, it is recommended that the Commission be vested with powers to develop broadcasting standards codes to guide coverage of particular issues such as elections, protection of minors, or the reporting of crimes. These broadcasting codes should be developed through a full consultation and participatory process with stakeholders.

- The Draft Law envisages the role of the Commission as including “making regulatory decisions and organising audio-visual and electronic media landscape during the election and referendum period.” However, it fails to provide any detail as to what this entails or how the Commission should interact in its role with other relevant authorities (in particular the Independent Higher Authority of the elections).
- The role of the Commission on media ownership is unclear. Article 5 of the Draft Law states that the Commission should “avoid focusing on the ownership of the audio-visual institutions.” It is not clear what this duty entails. It is not clear if the Commission can monitor compliance with the rules on concentration and transparency of media ownership. Under international freedom of expression standards, media pluralism is one of the main objectives of media policy and must be guaranteed by law. It is also important for the Draft Law to precisely define the regulator’s role in this respect.
- Furthermore, ARTICLE 19 recommends that since it appears that the Commission will be entrusted with the power to issue rulings on licencing of broadcasters (as per Article 6 of the Draft Law), the general principles governing licencing should be set out in the Draft Law in order to increase the foreseeability of licencing.

When developing the national frequency allocation table, the Commission should take into account the requirements of pluralism and diversity as described above. The process of the development of the frequency table should be open and participatory. In addition, the frequency table should be developed with a view to allocating broadcast frequencies among the three tiers of broadcasting (public, commercial, community), the two types of broadcasters (radio and television), and the geographical reach (national, regional and local). In general, a more detailed description of the license allocation

process should be provided, either in the Draft Law or in a dedicated piece of legislation.

- Article 14 stipulates that the Commission should be consulted “as the assent to the government’s proposals naming presidents general and managers of public media institutions.” We understand this to mean that the Commission should have a say over the appointment of the management of the public service media. We note that the board and management of public service media should be appointed through an independent and transparent process, and we do not understand the rationale for establishing a role for the Commission in this process.

Recommendations:

- The Commission should be vested with powers to develop broadcasting standards codes to guide coverage of particular issues such as elections, the protection of minors, the reporting of crimes and other issues. Such codes should be developed in consultation with, and in a participatory process that includes, all relevant stakeholders;
- The Draft Law should specify the scope of the Commission’s role during election periods and explicitly set out the areas that it should regulate;
- The Draft Law should specify the role of the Commission in respect to monitoring the concentration of media ownership;
- The Draft Law should include general principles relating to the rules on allocation of licences, interconnection, or any other matter where the Commission is given the power to issue rules, in order to describe the general framework that constrains the power of the Commission to decree rules.
- Article 14 of the Draft Law should be omitted.

Composition of the Commission

Part IV of the Draft Law deals with the organisational and management matters of the Commission. The Commission is to be composed of a Council and an administrative institution (Article 15).

The Council is to be composed of nine “independent and impartial members, known for their competence and good ethics” (Article 18); while each member should have one six-year long mandate. Article 19 provides that these members should be elected by the National Assembly (the Tunisian Parliament) as follows:

- One judicial judge and one administrative judge, each selected from four judges respectively, nominated by the Judiciary Higher Council;
- One member, selected from four candidates nominated by “the most representative press professional organisation”;
- One member, selected from four candidates, nominated by “the most representative audio-visual professional organisation”;
- One member, selected from four candidates, nominated by “the most representative media editors professional organisation;”
- Four members who have individually submitted their applications (these should come from the specialised fields of law, finance, social sciences and press).

The Draft Law stipulates that the parity principle shall be respected and that professional organisations should not nominate candidates affiliated with them.

Article 20 further stipulates additional requirements members must comply with, including citizenship, age, and professional record.

As noted in the section on international standards, the independence of broadcasting regulatory bodies should be secured through an open, democratic and transparent appointment process. Hence, the appointment of members and management structures of the regulator should be undertaken in a manner that is open and transparent.

Specific systems for the appointment of members of broadcasting regulatory bodies vary in different countries; however, international standards require that this process be free from political interference and economic interests. The appointment process should not be controlled completely by the ruling party as this could lead to appointments being purely political, rather than in the public interest. It is also recommended that appointment processes should include some element of public participation, for example through hosting public hearings or allowing the public to nominate suitable candidates.

Importantly, the governance and management structures of broadcasting regulatory bodies should be reasonably representative of society as whole.

ARTICLE 19 notes that the provisions of the Draft Law only partially meet these requirements. In particular, ARTICLE 19 observes the following issues:

- There is insufficient public participation in the process of nominating members of the Commission. The proposed procedure for nominating the members of the regulatory body is based on the idea that different public institutions – professional entities, editors, judges – should nominate their representatives to the broadcast regulator. This procedure secures equal presentation and influence of different interests in the operation of the broadcast regulator. However, the proposed regime fails to secure public participation, and hence, the democratic legitimacy of the broadcast regulator. ARTICLE 19 recommends that members to the broadcast regulator should also be nominated by the public, professional and civil society organisations;
- ARTICLE 19 appreciates that the Draft Law states that the principle of “parity” shall be observed in nominations. However, it is not clear what this principle means. We believe that the Draft Law should clearly require respect for gender equality and parity in the governance and managerial structures as well as the representation of the society as whole in the Commission. An explicit guarantee against any form of discrimination in the nominations (including on the grounds of gender) would, thus, be preferable. This could be done by reference to the anti-discrimination legislation or through explicit provisions in the Draft Law.
- The provisions on conflict of interest/the rules of incompatibility of members are confusing. We recommend both to strengthen the provisions on the conflict of interest of potential candidates and the provisions on the conflict of interest of members (Article 42 and 43).

We note that international standards require that the membership of the broadcasting regulator’s governing body consists of people with proven expertise and who are suitably qualified to provide the regulator with the necessary knowledge to effectively regulate the various industries. They should also be required to be independent from government, political parties and the regulated industry so that the independence of the body is not questioned. The members of a governing body should also be persons with

integrity that can be relied upon, and trusted. Therefore, those that have been convicted of a serious crime may not serve in governing bodies of a regulator.

We do not think that these criteria are sufficiently addressed in the Draft Law. As for the candidacy, persons who hold a position in or have significant direct or indirect financial interest in the broadcasting or telecommunications sector should not be eligible to serve. Although the Draft Law already requires the independence of nominated candidates, persons who are invested in the very sectors which the Commission regulates should not be appointed at all, since they face a permanent conflict of interest. To ensure that these rules do not excessively narrow the field of qualified candidates, the Draft Law could provide that any candidate who makes it to the shortlist will be given a reasonable time to eliminate any barrier to his or her appointment.

As for the conflict of interest of members during their tenure on the Commission, we find the provisions of Article 43 confusing. These provisions provide various arrangements and exceptions for the candidates, even in case of “real and serious conflict of interest.” We reiterate that those individuals with a conflict of interest in the subject matter of the Commission should be disqualified from being a member of the Council.

Recommendations

- The Draft Law should provide for public participation in the nomination process for members of the Council of the Commission;
- The Draft Law should provide that the membership of the Council of the Commission should be representative of society as a whole, including gender parity;
- In order to avoid any ambiguity in interpretation, the Draft Law should stipulate that membership of the Council of the Commission is incompatible with having significant direct or indirect interests in telecommunications or broadcasting.

Accountability

ARTICLE 19 welcomes that the Draft Law requires the Commission to submit to Parliament an annual activity report and a report on the audio-visual landscape, which are then to be discussed in the general assembly of the Parliament (Article 51). Regular reports about audio-visual media are additionally to be “published to the public.”

Public accountability is an important indicator of the broadcasting regulator’s independence. Regulatory authorities should be accountable to the public for their activities, and should, for example, publish regular or *ad hoc* reports relevant to their work or the exercise of their missions. In the Access to Airwaves Principles, ARTICLE 19 recommends that such accountability to the public should be ensured through a multi-party body, such as the legislature or a committee. The Principles also recommend that detailed annual reports on activities and budgets, including audited accounts of regulatory bodies, are published and widely disseminated.

The provisions of the Draft Law meet these recommendations only partially. We appreciate that an annual report is presented and discussed in the Parliament, thereby providing higher accountability to the public. However, the matter of the dissemination of the annual report to public is not further explained. The Draft Law also does not contain any provisions on the publication of reports on audited accounts. For the sake of clarity, and in order to highlight

the importance of the accountability and transparency of the Commission, it would be useful to stipulate the provisions related to the publication of financial audits directly in the Draft Law.

Recommendations:

- The accountability mechanism for the Commission should be strengthened based on ARTICLE 19's recommendations.

Missing provisions

ARTICLE 19 observes that the Draft Law is lacking in clarity (and missing certain provisions) on many important aspects relevant to the execution of duties by members of the Commission's Council. In particular:

- There are no provisions on the means of terminating or otherwise cutting short the term of Council members before the end of their mandate. We note that international standards stipulate that powers to dismiss the members of the governance and managerial structures of the broadcast regulator should be vested in the appointing body, should be subject to judicial review and should be permitted only in specific circumstances;
- Similarly, the Draft Law is completely silent on the matter of payment and **reimbursement of the members of the Commission's Council**. It only deals with the contracts of the Commission's administrative staff. In the Access to Airwaves Principles, ARTICLE 19 recommends that rules on payment and reimbursement of members should be set out clearly in law in a manner that does not allow for discretion in relation to individual members. Members should be prohibited from receiving any funds other than those expressly provided for by law. Mindful that discretion in relation to salaries creates tension and opportunities for the exercise of undue influence, we consider that this regime is problematic from the standpoint of the broadcast regulator's independence. It is recommended that the rules relating to payment and reimbursement of members of the broadcast regulator are clearly specified in the Draft Law;
- We reiterate the previous concern that there are no provisions on the funding of the Commission. Such provisions might be contained in other legislation that has not been reviewed, however, there is no reference to any other law in the provisions of the Draft Law. As such, it is unclear on what basis the budget of the Commission can be reviewed, amended or reduced. The absence of such provisions would make it possible for the government to make significant reductions or cuts without justification and in an arbitrary manner.

As noted above, under international law independent funding has been recognised as being a fundamental and key principle towards ensuring the overall independence of broadcast regulators. The Access to Airwaves Principles also require that funding decisions should be clearly set out in law and should not depend on *ad hoc* decision-making; they should also be transparent and made only after consultation with the regulator.

In light of these requirements, ARTICLE 19 observes that financial independence and budgetary autonomy of the Commission should be provided for in the Draft Law explicitly.

- Another important omission in the Draft Law is a guarantee of due process of law for proceedings undertaken by the Commission. We believe that the procedural rules for the Commission's decision-making, including for dealing with complaints, should be described in the Draft Law. These should include a time limit for the Commission to reach a decision, the conditions for hearing the plaintiffs and parties, the obligation to provide a detailed, written explanation of the reasons for a decision reached, the right of appeal and all other such guarantees that constitute the right to a fair trial under international law generally.

ARTICLE 19 reiterates that in the area of broadcasting, the most important requirement is that sanctions should be proportionate and designed to protect the public interest. In most cases sanctions should be applied in a graduated fashion, for example starting with a warning or fine. Suspension or revocation of a licence is a very heavy sanction and should be used only as a last resort.

Recommendations:

- The Draft Law should provide the rules for the dismissal of members of the Commission's Council;
- The Draft Law should clearly set the rules for reimbursement and payment of the members of the Commission's Council. The Draft Law should stipulate that members are prohibited from receiving any funds other than those directly connected with the exercise of their functions as members of the Commission's Council;
- The financial independence of the Commission should be provided through a set of safeguards pertaining to the Commission's budget, in order to shield it from interference of the government;
- The Draft Law should describe with detailed precision the procedures that apply to decision-making by the Commission.

About ARTICLE 19

ARTICLE 19 advocates for the development of progressive standards on freedom of expression and freedom of information at the international and regional levels, and their implementation in domestic legal systems. The organisation has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the organisation publishes a number of legal analyses each year, comments on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available at <http://www.article19.org/resources.php/legal>.

If you would like to discuss this analysis further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at legal@article19.org. For more information about the ARTICLE 19's work in Tunisia, please contact Saloua Ghazouani Oueslati, Director of ARTICLE 19 Tunisia and Middle East and North Africa programme, at saloua@article19.org.