

ARTICLE 19

Tunisia: Draft Law on the National Agency to Manage Public Advertisements & Subscriptions

August 2020

Legal analysis

Executive summary

In this analysis, ARTICLE 19 reviews the Tunisian Draft Law on the National Agency for the Management of Public Advertisement and Subscriptions (the Draft Law) for its compliance with international standards on freedom of expression.

ARTICLE 19 notes that under international human rights standards, States have a duty to create an enabling legal and regulatory environment that provides for the development of a free, diverse and pluralistic media. Financial support by public authorities to private media companies can contribute to maintaining or increasing pluralism and diversity in such media landscape, provided that critical safeguards are in place to prevent governmental influence over the media. In this respect, the Draft Law moves in the right direction as it provides for an independent process to administer public advertising and media subscriptions. The Draft Law foresees the creation of an independent public body - the National Agency for the Management of Public Advertisements and Subscriptions (the Agency) - to oversee public advertising and subscriptions for newspapers and periodicals on behalf of government institutions. Nonetheless, the Draft Law contains a number of provisions that are problematic from freedom of expression perspective. In particular, it lacks sufficient guarantees that would prevent the interference with the media independence and fails to ensure the independence of the Agency.

More broadly, the Draft Law is part of wider reforms of the media sector in Tunisia. A number of civil society organisations, including ARTICLE 19, have previously expressed concerns regarding the regulatory reforms of the media ecosystem, including the lack of full consultations with all relevant stakeholders. In this respect, we are concerned that the Draft Law is being introduced without meaningful prior consultations with all stakeholders in the media sector and civil society.

ARTICLE 19 urges the Tunisian legislators to amend the Draft Law to address our concerns. We remain committed to supporting the reform process through constructive engagement.

Summary of recommendations

- The protection of the right to freedom of expression, as well as one or more objectives of general interest (e.g. providing for a public advertising and governmental subscription process that is politically neutral and independent, as well as media pluralism), should be explicitly mentioned in the Law;
- The Agency must be able to operate autonomously and impartially in the public interest and must not be subject to interference by the Government or any public authority. The Agency should be accountable to the Parliament;
- Additional detail should be on the precise procedure to follow for organisational approval, whether that involves director-level approval or rather approval from the board;
- The Law should clarify the nature of the consultation with the special committee;
- Ban public advertisements that disseminate political messaging or campaigning on behalf of political candidates or parties. Election and political campaigning should be regulated by a separate legislation;
- Suspend public advertising during general elections unless commissioned or approved by the independent electoral authority;
- The power to appoint the members of the special Committee should be granted to a multi-stakeholder group that includes the government, the National Assembly, civil society and other relevant stakeholders, such as academia and sector experts, in order to guarantee the independence of the Committee;
- The scope of the special committee's role and decision-making powers should be clarified.

- The Law should explicitly state that the allocation of public support will take place on the basis of fair and neutral criteria that it will be non-discriminatory and will never be based on content or viewpoint expressed in the media;
- The Law should affirm that neither the allocation of public advertisements nor subscriptions will be used to undermine the editorial independence of media;
- The Law should contain the institutional, organisational, and functional guarantees for the Agency to operate independently of the government in power and the economic or social powers;
- The Law should explicitly provide for the stable and ongoing financial independence of the Agency;
- The decisions of the Agency must be made publicly available, e.g. on the Agency's website;
- There should exist a right of appeal or judicial review against the Agency's decisions.

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Introduction

In this analysis, ARTICLE 19 reviews the draft Law on the National Agency for the Management of Public Advertisement and Subscriptions (the Draft Law)¹ for its compliance with international freedom of expression standards.

The Tunisian Government initially introduced the Draft Law in September 2018, which seeks to establish a national agency to manage public advertising and media subscriptions by public authorities. The Draft Law - which forms part of the broader ongoing reform of the media sector in Tunisia - was sent to the Tunisian Parliament in January 2019 but has since remained pending for approval.

Public advertising and state subscriptions represent an important source of financial support, revenues and stability for Tunisian media companies, and can therefore be considered forms of state aid to media. This is important since the commercial media have recently undergone a period of crisis characterised by the overhaul of old business models as audiences increasingly consume the news online “for free.” At the same time, withdrawing government advertising or subscriptions as a source of revenue can represent a means to exert state control, and a worrying example of undermining freedom of expression. It is therefore important to ensure that the available public funding to the media is allocated fairly and does not lead to indirect censorship or exert a chilling effect on the media’s right to freedom of expression.

The stated aim of the Draft Law is to improve the management of public finances and promote the national paper and electronic press, in line with the Tunisian Constitution (Articles 10 and 15). To achieve these aims, the Draft Law outlines certain criteria to ensure that the process is carried out with objectivity and fairness. It also foresees the creation of the National Agency for the Management of Public Advertisements and Subscriptions (the Agency) - an independent public body to oversee public advertising and purchase newspapers and periodicals on behalf of government institutions. It also calls for the creation of a special committee under the Agency entrusted with establishing the criteria for distributing public ads amongst the press and selecting the list of press institutions that meet these criteria.

ARTICLE 19 has extensive expertise on public advertising and state subsidies to the media. For instance, in 2017, we published a policy brief *Freedom of Expression and State Aid to Media*,² which summarises the international standards in this area. This legal analysis relies upon the recommendations contained in that policy brief. Further, we have supported development of standards on public advertising and have worked extensively with the Special Rapporteur on Freedom of Expression of the Inter-American Commission, who developed the *Principles on the Regulation of Government Advertising and Freedom of Expression*,³ that can be useful for the Tunisian Government from a comparative perspective.

In this analysis, ARTICLE 19 first outlines the relevant international standards on public advertising and government subscriptions, followed by the analysis of the specific provisions of the Draft Law. Overall, ARTICLE 19 concludes that the Draft Law contains some positive provisions on the independence of the Agency and the need to use objective and fair criteria in

¹ This 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 ARTICLE 19, [Freedom of expression and state aid to media](#), 2017.

³ [The Principles on the Regulation of Government Advertising and Freedom of Expression](#), Office of the Special Rapporteur for Freedom of Expression, Inter-American Commission on Human Rights, 2012.

allocating public advertisements and newspaper and periodical subscriptions. However, we are concerned that the Draft Law does not put in place the necessary safeguards to ensure the Agency's independence, which will remain subject to governmental oversight.

Importantly, ARTICLE 19 believes that the Tunisian Government should ensure that the Draft Law is fully consulted with all stakeholders. So far, a number of civil society organisations, including ARTICLE 19, have previously expressed concerns about the lack of full and comprehensive consultations with civil society on the Draft Law. Therefore, ARTICLE 19 urges the Tunisian Government to follow the recommendations in this analysis and ensure that it is finalised with full and meaningful consultations with all stakeholders in the media sector and civil society. We are available to constructively engage with this process.

Applicable freedom of expression standards

The right to freedom of expression is protected by Article 19 of the Universal Declaration of Human Rights (UDHR),⁴ and further elaborated upon in Article 19 of the International Covenant on Civil and Political Rights (ICCPR),⁵ and in regional treaties, in particular the African Charter on Human and Peoples' Rights⁶ and the 2019 Declaration of Principles on Freedom of Expression and Access to Information in Africa.⁷ In national law, the right to freedom of expression is enshrined in Articles 31 and 32 of the Constitution of the Republic of Tunisia.

The scope of the right to freedom of expression is broad, although not absolute. It requires States to guarantee to all people the freedom to seek, receive or impart information or ideas of any kind, regardless of frontiers, through any media of a person's choice, including online. A State may, exceptionally, restrict the right to freedom of expression under Article 19(3) of the ICCPR, provided that the limitation is:

- Provided for by law, with sufficient precision to enable individuals to conduct themselves in adherence with the law;
- In pursuit of a legitimate aim, listed exhaustively as: (1) respect of the rights or reputations of others; (2) the protection of national security or public order (*ordre public*); (3) or of public health or morals;
- Necessary in a democratic society, meaning that the State must specifically demonstrate the nature of the threat that it is responding to, 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.

Any limitation imposed by the State on the right to freedom of expression must conform with the three-part test outlined above. It should be noted that the right to freedom of expression must be exercised freely by the media, due to the “pre-eminent role of the press in a State governed by the rule of law.”⁸

International and regional standards on state aid to media

Under international human rights law, States have both the negative obligation to refrain from restricting the right to freedom of expression beyond permissible restricting and a positive duty to create an enabling legal and regulatory environment that promotes the development of a free, diverse, pluralistic and independent media landscape.⁹ Media policy – including legal and

⁴ Many of the Universal Declaration's 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).

⁵ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, UN Treaty Series, vol. 999, p. 171. Tunisia ratified the ICCPR in 1969 and is therefore legally bound to respect and to ensure the right to freedom of expression as contained in Article 19 of the ICCPR

⁶ Organization of African Unity (OAU), African Charter on Human and Peoples' Rights (Banjul Charter), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Article 9.

⁷ African Commission on Human and Peoples' Rights, Revised Declaration of Principles on Freedom of Expression and Access to Information in Africa (African Declaration), Principle 10.

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

⁹ C.f. e.g. European Court of Human Rights (European Court), *Centro Europa 7 S.R.L. and di Stefano v. Italy* [GC],

regulatory measures such as subsidies and other forms of state aid - should aim to promote a vibrant media sector that will share the broadest possible diversity of information and ideas, particularly about matters of public interest.¹⁰

On the regional level, the 2019 African Declaration of Principles on Freedom of Expression and Access to Information (the African Declaration) provides that:

States shall promote a diverse private media as vehicles for the development and dissemination of a variety of content in the public interest.¹¹

Financial support by public authorities to private media companies can contribute to maintaining or increasing pluralism and diversity in the media landscape. For these reasons, public support to private media should never be used to attempt to assert control over media operators. The Human Rights Committee in its General Comment No. 34, which provides authoritative guidance on the interpretation of scope of the right to freedom of expression under Article 19 ICCPR, highlighted that:

The State should not have monopoly control over the media and should promote plurality of the media. Consequently, States parties should take appropriate action, consistent with the Covenant, to prevent undue media dominance or concentration by privately controlled media groups in monopolistic situations that may be harmful to a diversity of sources and views.¹²

The regional human rights bodies have made similar recommendations with respect to the importance of using State funding to promote media pluralism. The African Declaration affirms that:

States shall promote a conducive economic environment in which all media can flourish, including through the adoption for policies for the provision of financial or other public support for the sustainability of all media through a fair, neutral, independent and transparent process, and based on objective criteria.¹³

International standards on public advertising and public aid

International freedom of expression standards also require that public aids are never used to control, influence or otherwise restrict the editorial independence and freedom of any media organisation. As an important source of financial support for media outlets, public advertising is considered a form of public aid and must be appropriately regulated. A lack of appropriate legal regulation of public advertising may lead to pressure on media outlets and journalists through the biased, opaque allocation of advertisements. Thus, the African Declaration says that:

App. No. 38433/09, 7 June 2012, para 139.

¹⁰ The regional human rights bodies have also made similar recommendations. The European Court of Human Rights has repeatedly stressed that Article 10 (which guarantees the right to freedom of expression) of the European Convention on Human Rights creates a positive obligation for States to enact a legal and regulatory framework that safeguards pluralism and allows every person to exercise their right to freedom of expression.

¹¹ African Declaration, *op.cit.*, Principle 14.1.

¹² The UN Human Rights Committee, General Comment No. 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34, para 40..

¹³ African Declaration, *op.cit.*, Principle 24.1.

States shall ensure that the allocation of funds for public advertising is transparent and subject to public accountability, and they shall not abuse their power over the placement of public advertising.¹⁴

Other regional human rights bodies have made similar recommendations. The European Court of Human Rights has frequently affirmed that Article 10 of the European Convention on Human Rights, which guarantees the right to freedom of expression, creates a positive obligation for States to enact a legal and regulatory framework that safeguards pluralism and allows every person to exercise their right to freedom of expression.¹⁵ In addition, Article 11 of the European Union Charter of Fundamental Rights explicitly provides that ‘freedom and pluralism of the media shall be respected.

At the international level, the international and regional freedom of expression rapporteurs stated in their 2002 Joint Declaration that:

Governments and public bodies should never abuse their custody over public finances to try to influence the content of media reporting; the placement of public advertising should be based on market considerations.¹⁶

The 2003 Joint Declaration of the UN, OSCE and OAS Rapporteurs on Freedom of Expression also criticised “attempts by some governments. to limit freedom of expression and to control the media and/or journalists through regulatory mechanisms which lack independence or otherwise pose a threat to freedom of expression.”

Similarly, the 2008 Joint Declaration of the UN, OSCE and OAS Rapporteurs on Freedom of Expression affirmed that:

States should put in place effective systems to ensure transparency, fairness, and non-discrimination in access by the media to State resources, including public advertising.

States should put in place appropriate measures to create an economic environment which supports a diverse media landscape, including legacy media and media serving local and rural communities, and which do not undermine the independence of the media, such as independent or uniform subsidy systems, tax relief.¹⁷

From a comparative perspective, it should be noted that the Inter-American Commission on Human Rights affirmed that:

The exercise of power and the use of public funds by the State, the granting of customs duty privileges, the arbitrary and discriminatory placement of official advertising and government loans, the concession of radio and television broadcast frequencies, among others, with the intent to put pressure on and punish or reward and provide privileges to social communicators and communications media because of the opinions they express threaten freedom of expression, and must be explicitly prohibited by law. The means of communication have the right to carry out their role in an independent manner. Direct or indirect pressures exerted upon journalists or other social communicators to stifle the

¹⁴ African Declaration, *op.cit.*, Principle 24.2.

¹⁵ See IviR, [Study of fundamental rights limitations for online enforcement through self-regulation](#), December 2015.

¹⁶ 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, Joint Declaration on freedom of expression and the administration of justice, commercialization of freedom of expression and criminal defamation, December 2002.

¹⁷ 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, [Joint Declaration on media independence and diversity in the digital age](#), May 2018, paras 6(a) and (b).

dissemination of information are incompatible with freedom of expression.¹⁸ [Emphasis added]

Further, the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, in the Principles on the Regulation of Government Advertising and Freedom of Expression, emphasised the need for specific legal rules on public advertising to prevent the arbitrary use of public funds. The Principles also state that such rules should define any communication, announcement, or ad space purchased with public funds, in any media and in any format.¹⁹

Civil society recommendations

From the civil society perspective, ARTICLE 19 summarised the relevant comparative standards on media subsidies in its policy brief Regulation on state aid to media.²⁰ The brief highlighted that public aids to the media should never be used to control, influence or otherwise restrict the editorial independence and freedom of any media actor organisation.

In the policy, ARTICLE 19 suggested that all forms of public support to private media, including the allocation of public advertising and state subscriptions, should comply with the following conditions:

- There needs to be a clear legal basis for every form of state/public support to the media;
- The relevant legislation must make clear that public support pursues one or various objectives of general interest, such as, but not limited to, the promotion of pluralism and diversity, support to professional ethics, support to accurate and reliable journalism, promotion of equality, innovative journalistic practices, adaptation to the digital age, or media literacy;
- The legislation must include all applicable criteria that will preside over the allocation of public support, as well as clear information and guidelines on the applicable procedures and deadlines;
- Time limits on the duration of state aids should be clearly set out. These limits should be sufficient to provide beneficiaries with reasonable foreseeability of resources and plan their businesses accordingly, while also allowing for a periodical verification that public aid serves its purposes;
- The legislation must explicitly state that the allocation of public support will take place on the basis of fair and neutral criteria, that it will never be used to promote official figures, that it will be non-discriminatory and will never be based on political content or viewpoints expressed by media actors;
- The legislation should also include a formal statement that public support shall never be used to undermine the editorial independence of media actors, as well as provide for sanctions for public officials who would violate this principle;

¹⁸ Declaration of Principles on Freedom of Expression, 2012, Principle 13.

¹⁹ Principles on the Regulation of Government Advertising and Freedom of Expression, *op.cit.*, para 37.

²⁰ ARTICLE 19, Regulation on state aid to media, December 2012.

- The legislation must provide for an independent body to be responsible for the allocation and oversight of direct subsidies to individual media actors;
- Individual decisions on the allocation of public subsidies must be amenable to judicial review;
- There must be transparency on the definition of public policy on state support to private media as well as on the allocation of public funds to media actors. Media stakeholders and civil society organisations need to be consulted during the elaboration of public policy on state aid. Public authorities, including independent bodies in charge of allocating direct subsidies, must publish annual reports on the use of public funds to support media actors;
- Media outlets that receive state subsidies should be audited annually and make their audited accounts public.

The Draft Law is also assessed for its compliance with these recommendations.

Analysis of the Draft Law

Objectives of the Law

According to the Reasons for the Law, the Draft Law is aimed at “encouraging the national paper and electronic journalism sector and guaranteeing the good management of public funds in accordance with the provisions of Articles 10 and 15 of the Constitution.”

The reference to the constitutional provisions that guarantee the right to freedom of expression is positive. However, ARTICLE 19 recommends that the Law explicitly refers to the right of freedom of expression. It should clearly state that the aim is to remove political influence from public advertising and the subscription process, and it may be appropriate to mention secondary objectives such as the promotion of pluralism and diversity of the media and the promotion of high-quality journalism.

Recommendations:

- The protection of the right to freedom of expression, as well as one or more objectives of general interest (e.g. providing for a public advertising and governmental subscription process that is politically neutral and independent, as well as media pluralism), should be explicitly mentioned in the Law.

Establishment of National Agency

Lack of legal or functional independence

Article 1 provides for the creation of a National Agency for the Management of Public Advertisements and Subscriptions (the “Agency”), which is to be supervised by the central administration.

In order to comply with international standards and best practice in this area, it is critical to ensure that any supervision by the central administration does not interfere with the functional independence of the Agency. ARTICLE 19 notes that all formal powers, including with respect to media subsidies and public advertising, should be exercised by independent public authorities that are protected from political or economic interference. For example, from comparative standards, the African Declaration provides that:

A public regulatory authority that exercises powers in the areas of broadcast, telecommunications or internet infrastructure shall be independent and adequately protected against interference of a political, commercial or other nature.²¹

Under international standards, the independence of the decision-making body should be secured, among other things, by an appointment process for members which is open, transparent, involves the participation of civil society, and is not controlled by any particular political party.

Under these standards, the Agency must be able to operate autonomously and impartially in the public interest, free from the control of any other person or entity, including the government and its institutions, and no person or entity must seek to influence the Agency’s members or

²¹ African Declaration, Principle 17.1

staff in the discharge of their duties, or to interfere with the activities of the Agency. This autonomy must be respected at all times.

Recommendations:

- The Agency must be able to operate autonomously and impartially in the public interest and must not be subject to interference by the Government or any public authority. The Agency should be accountable to the Parliament.

Scope of **Agency's** powers

Article 2 provides that the Agency shall purchase newspaper and periodical subscriptions on behalf of public authorities, and award public advertisements in accordance with “objective and fair criteria that guarantee the good management of public money on the one hand and that encourage national paper and electronic press on the other hand.” Article 2 then sets out the responsibilities of the Agency regarding public advertising and the purchase of newspapers and periodicals.

For public advertising, the Agency must identify the types of public ads that fall within the competence of the Agency (as defined in Article 3). The Agency must then establish and subsequently update a list of media that meet the criteria that are entitled to publish ads, after consulting the special committee established by Article 4 of the Draft Law. However, no guidance is provided on the nature of the ‘consultation’ that is required with the committee, or how a potential conflict between the two bodies should be resolved. The Agency must also receive ad requests issued by public institutions and distribute them to authorised media, as well as arrange for payment.

With respect to the purchase of newspaper and periodical subscriptions, the Agency is responsible for deciding which annual subscriptions to purchase in accordance with the “objective and fair criteria” set in accordance with Article 5 of the Draft Law.

Recommendations:

- Additional detail should be on the precise procedure to follow for organisational approval, whether that involves director-level approval or rather approval from the board;
- The Law should clarify the nature of the consultation with the special committee.

Article 3 – Public interest advertising

Article 3 sets the scope of the Agency’s mandate and defines public advertising. The article defines public advertising as all awareness-raising advertisements and announcements linked to the public interest, in addition to advertisements of all types conducted by certain public institutions such as calls for bids/tenders, and announcements. It includes ads published in paper and electronic newspapers and periodicals; but there is no mention of TV or radio broadcasters.

ARTICLE 19 welcomes the use of a broad definition of public advertising in the Draft Law. As noted in the Principles on the Regulation of Government Advertising and Freedom of Expression, government advertising should be defined ‘simply and inclusively.’ For instance, ‘government

advertising includes any communication, announcement, or ad space purchased with public funds, in any media and in any format.²²

However, it is well-established in other jurisdictions that it is inappropriate to place government advertising during certain periods. Many countries place restrictions such as banning advertisements with political messaging that benefits a political party or politician, as well as (disproportionate) government spending on advertising before and during elections, in order to prevent the government from abusing its advantage for re-election.²³

ARTICLE 19 notes that there are currently no limits in the Draft Law on the quantum or time period for placing government advertisements in Tunisia. Hence, we suggest that the Draft law should prohibit advertising campaigns that disseminate political messages from public authorities during election periods and restrict advertising during election periods. For a comparative handling of the issue of public advertising during elections, it is useful to consider the Canadian Policy on Communications, which requires approval by the Deputy Head of the relevant ministry, and may only be allowed where it “is required by statute or regulation for legal purposes; to inform the public of a danger to health, safety or the environment; to post an employment or staffing notice; or to undertake specific advertising that is deemed urgent.”²⁴

Recommendations:

- Ban public advertisements that disseminate political messaging or campaigning on behalf of political candidates or parties. Election and political campaigning should be regulated by a separate legislation;
- Suspend public advertising during general elections unless commissioned or approved by the independent electoral authority.

Article 4 – Special committee

Article 4 provides for the creation of a special committee within the Agency responsible for establishing the criteria for the distribution of public advertisements and for the purchase of newspaper and periodicals. The composition is to be determined by government order and must include representatives of the profession and of representative journalism bodies, without specifying how many members it should have. ARTICLE 19 suggests that this should be clarified.

Furthermore, the scope of the special committee’s powers should be also clarified. As noted with respect to Article 2 of the Draft law, it is unclear how the special committee will be consulted or what effect this consultation will have on the ultimate decision.

Recommendations:

- The power to appoint the members of the special Committee should be granted to a multi-stakeholder group that includes the government, the National Assembly, civil society and other relevant stakeholders, such as academia and sector experts, in order to guarantee the independence of the Committee;

²² Principles on the Regulation of Government Advertising and Freedom of Expression, *op.cit.*, para 37.

²³ See OECD, [Funding of Political Parties and Election Campaigns and the Risk of Policy Capture](#), 2016, OECD Public Governance Reviews; and Principles on the Regulation of Government Advertising and Freedom of Expression, *op.cit.*

²⁴ See Canada, Policy on Communications, *op. cit.*, para 6.8.

- The scope of the special committee’s role and decision-making powers should be clarified.

Article 5 – Criteria for the allocation of public advertisements

Article 5 of the Draft Law outlines the issues that the special Committee must consider when establishing the criteria for the distribution of public advertisements among paper and electronic press outlets, and for the purchase of newspaper and periodical subscriptions. The criteria must be approved by a governmental order. The latter indicates further possibility of the state interference into the process.

In accordance with international standards, the Draft Law should explicitly state that the allocation of public support will take place on the basis of fair and neutral criteria, that it will be non-discriminatory and will never be based on content or viewpoint expressed in the media. The Law should also include a formal statement that public support shall never be used to undermine the editorial independence of media.

From a comparative perspective, ARTICLE 19 notes that in some countries, the domestic courts have obliged public bodies to allocate advertising in a non-discriminatory way. For instance:

- In Botswana, the High Court found that a government directive requiring public bodies and private companies in which the State had a majority shareholding to refrain from advertising in two specified publications was unconstitutional. The Botswana government had imposed the ban on the newspapers because, it was charged, they were too critical of the country’s leaders and it hoped to demonstrate its displeasure about “irresponsible reporting and the exceeding of editorial freedom.”²⁵
- In India, the High Court of Andhra ruled that while the government could not be compelled to enter into an advertising contract with any newspaper, it was obliged to allocate its advertisements even-handedly: “It is not expected of the Government to exercise this power in order to favour one set of newspapers or to show its displeasure against another section of the press. It should not use the power over such large funds in its hands to muzzle the press or as a weapon to punish newspapers which criticize its policies and actions.”²⁶

Recommendations:

- The Law should explicitly state that the allocation of public support will take place on the basis of fair and neutral criteria that it will be non-discriminatory and will never be based on content or viewpoint expressed in the media;
- The Law should affirm that neither the allocation of public advertisements nor subscriptions will be used to undermine the editorial independence of the media.

Appointment of **the Agency’s administration and support to journalism**

Articles 6-8 of the Draft Law outline the process of appointment of the Agency’s Director General, and financing for the Agency. Both are to be established by government order.

²⁵ *Media Publishing v Attorney General of Botswana*, [2001] High Court of Botswana 229/2001.

²⁶ *Ushodaya Publications Pvt Ltd v. Government of Andhra Pradesh*, AIR [1981] AP 109, 117

ARTICLE 19 reiterates its concern about the government's role in appointing key staff without a clear legislative framework or parliamentary oversight, which jeopardises the Agency's independence.

Article 10 of the Draft Law stipulates that the Agency should deduct 5% of the amount of each public ad before settlement, based on a prior written authorisation from the related written press institution, and allocate it "for the support of social services benefiting Tunisian journalists."

ARTICLE 19 welcomes a stated aim to support Tunisian journalism. However, we are concerned that the Draft Law is unclear how the Agency's own operations will be financed as this is only vaguely referenced in Article 8, which provides for "resources collected out of the distribution of public advertisement," as well as grant/donations and resources from the state budget when necessary, as well as "all other resources." It is not stated how the budget will be developed or allocated. Further, it is also not clear what will be an exact mechanism for allocation of support to journalists.

Recommendations:

- The Law should contain the institutional, organisational, and functional guarantees for the Agency to operate independently of the government in power and the economic or social powers;
- The Law should explicitly provide for the stable and ongoing financial independence of the Agency.

Transparency of decision-making and oversight

ARTICLE 19 notes that in addition to being legally and functionally independent, the Agency must guarantee the highest standards of transparency and accountability. We also recommend that the decisions of the Agency to be made public and accessible to the general public via appropriate channels, such as their publication on the Agency's website.

ARTICLE 19 is also concerned by the lack of any provision for oversight of the decisions of the Agency. We strongly believe that for the Agency to be fully transparent and accountable, all its decisions issued in the discharge of its functions (as these concern media freedom) should be public, be accompanied by written reasons and be subject to a right of appeal before the administrative courts. This will allow, in accordance with international standards, for media actors to have judicial recourse against any individual decision on the allocation of public subsidies, whether that be public ads or subscriptions.

Recommendations:

- The decisions of the Agency must be made publicly available, e.g. on the Agency's website;
- There should exist a right of appeal or judicial review against the Agency's decisions.

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 Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, freedom of expression and equality, 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. The organisation's 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 Oualesti, Regional Director for Tunisia and MENA of ARTICLE 19, at saloua@article19.org.