

Twinning Project TN/13/ENP/TE/27b
Support for the Instance National of Telecommunications (INT)

Report on the independence of the Instance National of Telecommunications

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1. Purpose of the Report

This Report has been drafted in the context of the Twinning project TN/13/ENP/TE/27b between the *Instance Nationale des Telecommunications* of Tunisia (INTT), the Italian *Autorità per la Garanzie nelle Comunicazioni* (AGCOM), the *Comisión Nacional de los Mercados y la Competencia* (CNMC) of Spain and the *Direction Générale de la Compétitivité, de l'Industrie et des Services* (DGCIS) of France. More specifically, its realization responds to the fulfilment of the objectives laid down within the component A of the Twinning project, devoted to the reinforcement of the working procedures and –consequently- the authoritativeness of INT.

The Report was therefore drafted with the broad aim of serving to the institutional reinforcement of the INT and, in particular, with the concrete ambition of strengthening its independence, essential feature, as we will see throughout this Report, to the effective carry out of the regulatory role in the telecommunications sector.

To this purpose, AGCOM and CNMC held two sessions focused on the topic of independence. During the first mission, that took place between 5th and 7th October 2015, a general approximation to the concept of independence, as applied to National Regulatory Authorities (NRAs) in the European Union (EU), was made to the INT Board. Although this first meeting served to acquire a broad knowledge about the INT situation regarding its independence towards the Government, this issue was comprehensively addressed during the second mission, held between 28th and 30th October. In this session, a questionnaire was circulated to the INT experts in order to collect information about both the legal context around independence in INT and any other practices or factors that, although not specified in the Law, have an impact on the independent operation of INT.

The questionnaire, structured in 7 sections was designed to cover the main features affecting the independence of sector-specific regulators. Each section therefore addresses one of the aspects that we understand as essential to determine the level of independence of telecommunication NRAs. In particular, the following topics were investigated:

- Institutional framework
- Appointment procedures and governance
- Human /staff resources
- Financial autonomy
- Accountability and transparency
- Decision making powers and Enforcement

Information obtained through this exercise has been the main basis for the elaboration of this Report, whose structure naturally follows that one of the questionnaire.

A first section has been nevertheless inserted to present the concept of independence and how it has been formalized in the regulatory frameworks adopted in the energy, telecommunications

and audiovisual sectors in the European Union.

After this introduction, the Report addresses the situation of INT through the analysis of each of the seven broad topics identified in the questionnaire. After a brief outline of the reasons why the topic discussed is relevant for the independence of the NRAs, for each section a paragraph on “Literature review” is included, which highlights the position of the studies that were carried out and published by some relevant institutions, organizations and academics on the topic of interest: the reports from INDIREG¹ (which, although it has been conducted with reference to the audiovisual sector, is probably the most comprehensive study on the independence of EU regulators), from CERRE², from OECD³, studies from the World Bank and many academics.

Then, we describe the findings about the situation of INT deriving from the responses to the questionnaire and we close with conclusions, where relevant, a set of recommendations.

Finally, the Report summarizes the analysis of the answers, draws the general conclusions and recommendations. Such recommendations focus on the elements which would be hindering the independent carry out of functions by INT and are aimed at fostering and reinforcing the INT independence, for the benefit of the Tunisian telecommunication sector and ultimately of the Tunisian end users.

It is worthwhile highlighting that, although it has been drafted and presented within the framework of the EU Twinning Project TN/13/ENP/TE/27b, this Report has been drafted by experts from the EU Member States and does not necessarily reflect the position and the views of the EU Commission or any of the Twinning partners.

¹ INDIREG FINAL REPORT. Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive <http://www.indireg.eu>.

² CERRE (2014), Code of Conduct and Best practices for the setup, operations and procedure of regulatory authorities,

³ The report on the Governance of regulators: <http://www.oecd.org/gov/regulatory-policy/governance-of-regulators.htm>

2. The principle of independence and its formalization in the EU telecom, energy and audiovisual frameworks

As one of the main actors in regulatory policy, regulators have an important and increasingly complex role in the delivery of regulatory regimes and regulations. The governance arrangements for regulators are a key factor in a regulator's ability to operate effectively, to achieve the social, environmental and economic outcomes, it is responsible for.

Several national and multinational institutions⁴ have published reports on the governance arrangements and the institutional setup of regulators and have identified some crucial principles that are able to foster the efficiency of the regulators:

- Role clarity
- Preventing undue influence and maintaining trust
- Decision-making and governing body structure for independent regulators
- Accountability and transparency
- Engagement
- Funding
- Performance evaluation

All of the mentioned principles lead to the concepts of “independence and autonomy”, which have been tackled by the European institutions at various levels. In the sectors of energy, electronic communications and railways regulation, for example, there are specific provisions included in the EU Directives that are aimed at providing safeguards to the independence of the regulators, both from market agents and Governments. In the audiovisual sector, although the EU Directive on audiovisual services seems to point to independent NRAs as the preferred institutional set up, it does not lay down any concrete obligation on Member States to implement it.

⁴ See, for example, OECD Best Practice Principles for Regulatory Policy (July 2014), European Regulators Group for Audiovisual Media Services (ERGA), ERGA Report on the independence of National Regulatory Authorities (December 2015); Australian Productivity Commission, Mutual Recognition Schemes (September 2015); Improving Economic Regulation of Urban Water: A report prepared for the Water Services Association of Australia (August 2014); New Zealand Productivity Commission, Regulatory institutions and practices (June 2014); Australian National Audit Office, Best Practice Guide: Administering Regulation: Achieving the Right Balance (June 2014).

2.1 Electronic communications

The EU Directives on electronic communications provide for a wide range of powers, responsibilities and tasks to be vested in National Regulatory Authorities in order to ensure effective competition between market players. Under the existing electronic communications framework, NRAs are required to deal with important and complex issues such as determining relevant markets, conducting market analyses and imposing obligations on identified SMP operators.

The assignment of this role to NRAs is accompanied by quite strong requirements as laid down in Art 3 of the Framework Directive (FD)⁵. This Directive, adopted in 2002, included the obligation of regulatory independence regarding companies and in 2009 was revised in order to extend such a safeguard not only to private but to any other public body.

The reasons behind this safeguard of independence can be found in the relevant recitals of the 2002 Directive and its revised version of 2009. In particular, in relation to the independence of the companies, they refer to the need to avoid the risk of conflicts of interests between the regulation of the sector and operational (or financial) interests and ensuring the impartiality of the decisions of the NRAs - a concept referred to as “principle of separation of regulatory and operational functions”:

*(11) In accordance with the principle of the separation of regulatory and operational functions, Member States should guarantee the independence of the national regulatory authority or authorities with a view to ensuring the impartiality of their decisions. This requirement of independence is without prejudice to the institutional autonomy and constitutional obligations of the Member States or to the principle of neutrality with regard to the rules in Member States governing the system of property ownership laid down in Article 295 of the Treaty. National regulatory authorities should be in possession of all the necessary resources, in terms of staffing, expertise, and financial means, for the performance of their tasks.*⁶

As to the principle of political independence, the 2009 FD clarifies in its recitals the need to strengthen the effectiveness, authority and predictability of the NRAs' decisions by protecting them against external intervention or political pressure, which is deemed to jeopardize the impartial assessment of the matters under NRA analysis:

(13) The independence of the national regulatory authorities should be strengthened

⁵ DIRECTIVE 2002/21/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) as amended by Directive 2009/140/EC and Regulation 544/2009, https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/140framework_5.pdf.

⁶ Recital 11 FD 2002.

*in order to ensure a more effective application of the regulatory framework and to increase their authority and the predictability of their decisions. To this end, express provision should be made in national law to ensure that, in the exercise of its tasks, a national regulatory authority responsible for ex-ante market regulation or for resolution of disputes between undertakings is protected against external intervention or political pressure liable to jeopardise its independent assessment of matters coming before it. Such outside influence makes a national legislative body unsuited to act as a national regulatory authority under the regulatory framework. For that purpose, rules should be laid down at the outset regarding the grounds for the dismissal of the head of the national regulatory authority in order to remove any reasonable doubt as to the neutrality of that body and its imperviousness to external factors. It is important that national regulatory authorities responsible for ex-ante market regulation should have their own budget allowing them, in particular, to recruit a sufficient number of qualified staff. In order to ensure transparency, this budget should be published annually.*⁷

The precise requirements are formally formulated by Art. 3 of the Framework Directive⁸. The

⁷ Recital 13 FD 2009.

⁸ Article 3, National regulatory authorities:

1. Member States shall ensure that each of the tasks assigned to national regulatory authorities in this Directive and the Specific Directives is undertaken by a competent body.
2. Member States shall guarantee the independence of national regulatory authorities by ensuring that they are legally distinct from and functionally independent of all organisations providing electronic communications networks, equipment or services. Member States that retain ownership or control of undertakings providing electronic communications networks and/or services shall ensure effective structural separation of the regulatory function from activities associated with ownership or control.
3. Member States shall ensure that national regulatory authorities exercise their powers impartially, transparently and in a timely manner. Member States shall ensure that national regulatory authorities have adequate financial and human resources to carry out the task assigned to them.
- 3a. Without prejudice to the provisions of paragraphs 4 and 5, national regulatory authorities responsible for ex-ante market regulation or for the resolution of disputes between undertakings in accordance with Article 20 or 21 of this Directive shall act independently and shall not seek or take instructions from any other body in relation to the exercise of these tasks assigned to them under national law implementing Community law. This shall not prevent supervision in accordance with national constitutional law. Only appeal bodies set up in accordance with Article 4 shall have the power to suspend or overturn decisions by the national regulatory authorities. Member States shall ensure that the head of a national regulatory authority, or where applicable, members of the collegiate body fulfilling that function within a national regulatory authority referred to in the first subparagraph or their replacements may be dismissed only if they no longer fulfil the conditions required for the performance of their duties which are laid down in advance in national law. The decision to dismiss the head of the national regulatory authority concerned, or where applicable members of the collegiate body fulfilling that function shall be made public at the time of dismissal. The dismissed head of the national regulatory authority, or where applicable, members of the collegiate body fulfilling that function shall receive a statement of reasons and shall have the right to request its publication, where this would not otherwise take place, in which case it shall be published. Member States shall ensure that national regulatory authorities referred to in the first subparagraph have separate annual budgets. The budgets shall be made public. Member States shall also ensure that national regulatory authorities have adequate financial and human resources to enable them to actively participate in and contribute to the Body of European Regulators for Electronic Communications (BEREC).

first sentence of this provision applies to all Member States, who must all ensure that their NRAs are legally distinct from, and functionally independent of, market players. To that end, Member States must ensure at least that:

- Every NRA is a legal person separate from any organization providing electronic communications networks or services. This means that assigning the least part of the regulatory tasks to a company that constitute a breach of the EU framework;
- NRAs have “functional independence” in their relationship with market players. This means that, if a Member State retains ownership or control of a market player, it is obliged to ensure an effective structural separation of the regulatory function from activities associated with ownership or control (market players should not be able to interfere with or to influence the decisions of the regulatory body). In practice, Member States are obliged to avoid as much as possible every conflict of interests between those different functions at every level of their administration;

Member States must ensure that national regulatory authorities exercise their powers impartially, transparently and in a timely manner, and that they have adequate financial and human resources to carry out the task assigned to them. Specifically, NRAs should have separate annual budgets, which have to be made public.

As mentioned above, the newly added paragraph 3a of the Framework Directive introduced the obligation of political independence, although only for the NRAs’ powers related to ex ante market regulation and dispute resolution, leaving the decision related to other regulatory tasks at the discretion of Member States. Thus, Art 3.3a obliges NRAs responsible for ex-ante market regulation or for the resolution of disputes between companies to act independently and prohibits them from seeking or taking instructions from any other body in relation to the exercise of these tasks assigned to them under national law implementing Community law. The text, however, explicitly mentions that these obligations shall not prevent supervision in accordance with

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- 3b. Member States shall ensure that the goals of BEREC of promoting greater regulatory coordination and coherence are actively supported by the respective national regulatory authorities.*
 - 3c. Member States shall ensure that national regulatory authorities take utmost account of opinions and common positions adopted by BEREC when adopting their own decisions for their national markets.*
 - 4. Member States shall publish the tasks to be undertaken by national regulatory authorities in an easily accessible form, in particular where those tasks are assigned to more than one body. Member States shall ensure, where appropriate, consultation and cooperation between those authorities, and between those authorities and national authorities entrusted with the implementation of competition law and national authorities entrusted with the implementation of consumer law, on matters of common interest. Where more than one authority has competence to address such matters, Member States shall ensure that the respective tasks of each authority are published in an easily accessible form.*
 - 5. National regulatory authorities and national competition authorities shall provide each other with the information necessary for the application of the provisions of this Directive and the Specific Directives. In respect of the information exchanged, the receiving authority shall ensure the same level of confidentiality as the originating authority.*
 - 6. Member States shall notify to the Commission all national regulatory authorities assigned tasks under this Directive and the Specific Directives and their respective responsibilities.*

national constitutional law. This provision introduces the principle of the NRA's accountability, highlighting that the NRAs must be responsible to the appeal bodies, these being the only ones with the power to suspend or overturn decisions by the national regulatory authorities.

Another new requirement relates to the dismissal of the head (or the Board) of the regulatory body. In this respect, Member States have to ensure that the head of a national regulatory authority or, where applicable, members of the collegiate body, may only be dismissed if they no longer fulfil the conditions required for the performance of their duties. Such conditions should be laid down in advance in national law and the decision to dismiss the head/Board Member has to be made public at the time of dismissal. The dismissed head/Board Member also has to receive a statement of reasons and shall have the right to require its publication, where this would not otherwise take place, in which case it shall be published. This specific requirement has also been analysed by an interpretative note of the European Commission⁹.

Summary of the principles stated in Art 3 of the Framework Directive:

- The NRA must be independent of all organizations providing electronic communications networks, equipment or services.
- It shall exercise its powers impartially, transparently and in a timely manner.
- The NRA should shall not seek or take instructions from any other body in relation to the exercise of these tasks assigned to it.
- Only appeal bodies that are independent of the parties involved (they may be a Court) shall have the power to suspend or overturn NRA's decisions
- The Head and Board Members can be dismissed only if they no longer fulfil the conditions required for the performance of their duties (laid down in advance in national law). Dismissal decision shall be made public and a statement of reasons shall be made available.
- NRAs should have adequate financial and human resources to enable them to carry out their tasks, also at EU level. This also means that NRAs must have a separate annual budget.

⁹ Commission Staff Working Paper, Interpretative Note On Directive 2009/72/Ec Concerning Common Rules For The Internal Market In Electricity And Directive 2009/73/Ec Concerning Common Rules For The Internal Market In Natural Gas, January 2010, page. 9.

2.2 Energy (electricity and gas)

The European framework regulating the energy sector is slightly more advanced in its provisions regarding the independence of the NRAs than the framework regulating the electronic communications sector. Already in 2003, paragraph 34 of the preamble in the Electricity Directive¹⁰ stated that regulators should be able to take decisions in relation to all relevant regulatory issues if the internal market in electricity is to function properly, and that the national regulatory authorities should be fully independent from any other public or private interests of the electricity and gas industry (without prejudice to judicial review or parliamentary supervision in accordance with the constitutional laws of the Member States).

More recently, Directive 2009/72/EC¹¹, repealing Directive 2003/54/EC, stated in its Art. 35 that Member States must guarantee that there is only one single and independent NRA at national

¹⁰ DIRECTIVE 2003/54/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, of 26 June 2003, concerning common rules for the internal market in electricity, Recital 34.

¹¹ DIRECTIVE 2009/72/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, of 13 July 2009, concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC.

Article 35, Designation and independence of regulatory authorities:

1. *Each Member State shall designate a single national regulatory authority at national level.*
2. *Paragraph 1 of this Article shall be without prejudice to the designation of other regulatory authorities at regional level within Member States, provided that there is one senior representative for representation and contact purposes at Community level within the Board of Regulators of the Agency in accordance with Article 14(1) of Regulation (EC) No 713/2009.*
3. *By way of derogation from paragraph 1 of this Article, a Member State may designate regulatory authorities for small systems on a geographically separate region whose consumption, in 2008, accounted for less than 3 % of the total consumption of the Member State of which it is part. This derogation shall be without prejudice to the appointment of one senior representative for representation and contact purposes at Community level within the Board of Regulators of the Agency in compliance with Article 14(1) of Regulation (EC) No 713/2009.*
4. *Member States shall guarantee the independence of the regulatory authority and shall ensure that it exercises its powers impartially and transparently. For this purpose, Member State shall ensure that, when carrying out the regulatory tasks conferred upon it by this Directive and related legislation, the regulatory authority:*
 - (a) *is legally distinct and functionally independent from any other public or private entity;*
 - (b) *ensures that its staff and the persons responsible for its management:*
 - (i) *act independently from any market interest;*
 - (ii) *do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks. This requirement is without prejudice to close cooperation, as appropriate, with other relevant national authorities or to general policy guidelines issued by the government not related to the regulatory powers and duties under Article 37.*
5. *In order to protect the independence of the regulatory authority, Member States shall in particular ensure that:*
 - (a) *the regulatory authority can take autonomous decisions, independently from any political body, and has separate annual budget allocations, with autonomy in the implementation of the allocated budget, and adequate human and financial resources to carry out its duties;*
 - (b) *the members of the board of the regulatory authority or, in the absence of a board, the regulatory authority's top management are appointed for a fixed term of five up to seven years, renewable once.*

In regard to point (b) of the first subparagraph, Member States shall ensure an appropriate rotation scheme for the board or the top management. The members of the board or, in the absence of a board, members of the top management may be relieved from office during their term only if they no longer fulfil the conditions set out in this Article or have been guilty of misconduct under national law.

level, and ensure that it exercises its powers impartially and transparently. For this purpose, Member States must ensure that, when carrying out the regulatory tasks conferred upon it by this Directive and related legislation, the regulatory authority is legally distinct and functionally independent from any other public or private entity.

In addition, compared to electronic communications, the electricity Directive applies stricter independence requirements for the position of the head and the members of the board of the regulatory authority or, in the absence of a board, the regulatory authority's top management:

- the head and the members of the board are appointed for a fixed term of five up to seven years, renewable once. Member States are obliged to ensure an appropriate rotation scheme for the board;
- the head and the members of the board or, in the absence of a board, the top management may be relieved of office during their term only if they no longer fulfil the conditions set out in the Directive or have been guilty of misconduct;

In addition, it states that the regulator can take autonomous decisions, independently from any political body, and has separate annual budget allocations, with autonomy in the use of the allocated budget, and adequate human and financial resources to carry out its duties. On the other hand, Member States are obliged to ensure that its staff and its managers:

- act independently from any market interest;
- do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks. This requirement is without prejudice to close co-operation, as appropriate, with other relevant national authorities or to general policy guidelines issued by the government not related to the regulatory powers and duties under the Directive.

Summary of the principles stated in Art 35 of the Directive 2009/72/EC:

- One single NRA at national level.
- It shall exercise its powers impartially and transparently.
- Legally distinct and functionally independent from any other public or private entity.
- Staff and managers:
 - i. act independently from any market interest;
 - ii. do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks.
- The NRA can take autonomous decisions, independently from any political body.
- Separate annual budget allocations, with autonomy in the implementation of the allocated budget.
- Adequate human and financial resources to carry out its duties.

- Board appointed for a fixed term of 5 to 7 years, renewable once.
- Appropriate rotation scheme for the Board.
- Members of the Board may be relieved from office during their term only if they no longer fulfil the conditions set out in this Article or have been guilty of misconduct under national law.

2.3 Railway

The European framework regulating the railway sector is also quite comprehensive regarding the provisions on the independence of the regulator body.

While the Railway Directive¹² of 2001 already set out the establishment of a regulatory body for “*the efficient management and fair and non-discriminatory use of rail infrastructure*”, it did not foresee its independence from governments, but only from “*any infrastructure manager, charging body, allocation body or applicant*”. In this sense, the Directive itself allowed Member States to grant the Ministry responsible for transport matters the category of regulatory body for the railway sector.

Nevertheless, in 2012 the new Directive 2012/34/EU¹³, repealing the Directive of 2001 introduced, in a similar reinforcing path as for the electronic communications sector, a significant change in favour of strengthening the independence framework for the regulator setup and operation.

On one hand, Art 55¹⁴ of the new Directive specified the requisite of independence to apply also

¹² DIRECTIVE 2001/14/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification

¹³ DIRECTIVE 2012/34/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 November 2012 establishing a single European railway area.

¹⁴ Article 55 Regulatory body

1. Each Member State shall establish a single national regulatory body for the railway sector. Without prejudice to paragraph 2, this body shall be a stand-alone authority which is, in organisational, functional, hierarchical and decision-making terms, legally distinct and independent from any other public or private entity. It shall also be independent in its organisation, funding decisions, legal structure and decision-making from any infrastructure manager, charging body, allocation body or applicant. It shall furthermore be functionally independent from any competent authority involved in the award of a public service contract.

2. Member States may set up regulatory bodies which are competent for several regulated sectors, if these integrated regulatory authorities fulfil the independence requirements set out in paragraph 1 of this Article. The regulatory body for the rail sector may also be joined in organisational term with the national competition authority referred to in Article 11 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty (1), the safety authority established under Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004 on safety on the Community's railways (1) or the licensing authority referred to in Chapter III of this Directive, if the joint body fulfils the independence requirements set out in paragraph 1 of this Article.

3. Member States shall ensure that the regulatory body is staffed and managed in a way that guarantees its independence. They shall, in particular, ensure that the persons in charge of decisions to be taken by the

to any government or public entity. Apart from the general principle that the NRA should be “*in organisational, functional, hierarchical and decision-making terms, legally distinct and independent from any other public or private entity*”, Art 55 further clarified that the persons in charge of decisions taken by the regulatory body “*shall not seek or take instructions from any government or other public or private entity when carrying out the functions of the regulatory body*”.

On the other hand, the same Art 55 and Art 56 laid down detailed provisions on how to ensure in practice such independence principle. In particular, the Directive addresses different aspects linked to the concept of independence, such as:

- the need for full authority over the recruitment and management of the staff;
- the necessary organization capacity in terms of human and material resources;
- the process for appointment of the executive board members, which should be based on clear and transparent rules;
- the conditions for their selection – to be made in a transparent procedure on the basis of merit, including appropriate competence and relevant experience, preferably in the field of railways or other network industries – and dismissal – only allowed for disciplinary reasons not related to their decision making
- guarantees to avoid conflicts of interest, including an annual declaration of commitment and a declaration of interest; or
- the obligation of a cooling off period (not less than a year) after end of their mandate.

Looking at these conditions, when compared to the electronic communications framework, we could conclude that the railway Directive is noticeably more severe in ensuring independence.

It is however interesting that the only mention to budgetary independence is included in the

regulatory body in accordance with Article 56, such as members of its executive board, where relevant, be appointed under clear and transparent rules which guarantee their independence by the national cabinet or council of ministers or by any other public authority which does not directly exert ownership rights over regulated undertakings.

Member States shall decide whether these persons are appointed for a fixed and renewable term, or on a permanent basis which only allows dismissal for disciplinary reasons not related to their decision-making. They shall be selected in a transparent procedure on the basis of their merit, including appropriate competence and relevant experience, preferably in the field of railways or other network industries.

Member States shall ensure that these persons act independently from any market interest related to the railway sector, and shall therefore not have any interest or business relationship with any of the regulated undertakings or entities. To this effect, these persons shall make annually a declaration of commitment and a declaration of interests, indicating any direct or indirect interests that may be considered prejudicial to their independence and which might influence their performance of any function. These persons shall withdraw from decision-making in cases which concern an undertaking with which they had a direct or indirect connection during the year before the launch of a procedure.

They shall not seek or take instructions from any government or other public or private entity when carrying out the functions of the regulatory body, and have full authority over the recruitment and management of the staff of the regulatory body.

After their term in the regulatory body, they shall have no professional position or responsibility with any of the regulated undertakings or entities for a period of not less than one year.

recitals but not in the articles.

(77)The financing of the regulatory body should guarantee its independence and should come either from the State budget or from contributions of the sector levied in a compulsory way, while respecting the principles of fairness, transparency, non-discrimination and proportionality.

It also should be noted that, like in the energy sector, Art.55 states that Member States must guarantee that there is only one single NRA at national level. It is interesting to signal that the railway Directive is the only one laying down provisions governing the integration of such regulatory body within a higher converged authority, competent for several regulated sectors and even including the competition authority. The Directive explicitly allows for such integration, insofar as such an integrated body fulfils the independence requirements applying to the railway regulator.

Finally, given its impact in terms of independence, the precision made by the railway Directive that the decisions taken by the regulatory body shall not be subject to the control of another administrative instance should be highlighted.

Summary of the principles stated in Art 55 and 56 of the Directive 2012/34/EU:

- One single NRA at national level.
- Regulatory bodies may be set up which are competent for several regulated sectors and competition law, if these integrated regulatory authorities fulfil the independence requirements.
- In organisational, functional, hierarchical and decision-making terms, legally distinct and independent from any other public or private entity.
- Staffed and managed in a way that guarantees independence. Full authority over the recruitment and management of the staff of the regulatory body.
- Necessary organisational capacity in terms of human and material resources, which shall be proportionate to the importance of the rail sector in the Member State
- Decisions shall not be subject to the control of another administrative instance.
- Managers:
 - i. act independently from any market interest;
 - ii. make annually a declaration of commitment and a declaration of interests
 - iii. withdraw from decision-making in cases which concern an undertaking with which they had a direct or indirect connection during the year before the launch of a procedure
 - iv. do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks.

- v. After their term in the regulatory body, they shall have no professional position or responsibility with any of the regulated undertakings or entities for a period of not less than one year (cooling-off period)
 - Member States flexibility to set appointment terms for board members: fixed and renewable term, or on a permanent basis.
 - Appointed under clear and transparent rules which guarantee their independence. Selected in a transparent procedure on the basis of their merit, including appropriate competence and relevant experience.
 - Dismissal only for disciplinary reasons not related to their decision-making.
 - Members of the Board may be relieved from office during their term only if they no longer fulfil the conditions set out in this Article or have been guilty of misconduct under national law.

2.4 Audiovisual

Whereas, as described above, the concept of independence of regulators has been solidly enshrined in the EU Directives in other sectors, such as electronic communications and energy, at European level. It has not been developed for the audiovisual sector

Thus, although Art. 30 of the EU Directive on audiovisual media services¹⁵ mentions independent NRAs, it neither defines nor enlists their competences or makes the notion of independence mandatory to Member States. It actually states that “*Member States shall take appropriate measures to provide each other and the Commission with the information necessary for the application of this Directive, in particular Articles 2, 3 and 4, in particular through their competent independent regulatory bodies*”

In March 2014, through a Decision by the European Commission¹⁶ the European Regulatory Group for the Audiovisual (ERGA) was established in the EU as an advisory body to the Commission. Its task is to advise and assist the Commission in its work to ensure a consistent implementation of the Directive across the EU. According to its Work Programme for 2014/2015, ERGA has set up a *ad hoc* working group, assigning it the task to make concrete proposals on the independence of the audiovisual regulators in view of the revision of the EU Directive, which should be completed by the end of 2016. In this sense, on October 21, 2014, ERGA had already adopted a Statement on the independence of NRAs¹⁷, in which it considered the independence of regulatory bodies in the communications sectors “*key to their effectiveness, supporting the*

¹⁵ DIRECTIVE 2010/13/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, of 10 March 2010, on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

¹⁶ COMMISSION DECISION of 3.2.2014 on establishing the European Regulators Group for Audiovisual Media Services, C(2014)462.

¹⁷ ERGA(2014)03, ERGA statement on the independence of NRAs in the audiovisual sector. <http://ec.europa.eu/digital-agenda/en/news/erga-statement-independence-nras-audiovisual-sector>

fulfilment of their role to protect the interests of citizens and consumers and, at the same time, to ensure a predictable and dynamic competitive environment in their sectors” and alleges that “at a high level, regulators should be able to carry out their regulatory tasks without direction or interference from political or commercial interests”.

The ERGA working group on “Independence of NRAs” was chaired by the Italian regulator, AGCOM. It drafted a report that was finally adopted by the ERGA Plenary on 15 December 2015. The Report provides recommendations on the characteristics of the independent regulatory authorities and asks the Commission to take them into account in the review of the AVMSD in order to foster the independence of regulatory authorities. The report was also published on the EU Commission website, at this link: <http://ec.europa.eu/digital-agenda/en/news/erga-report-independence-national-regulatory-authorities>.

3. Analysis of the independence in INT

As introduced in Section 1, the main aim of this Report is to analyse the situation of INT, the Tunisian *Instance Nationale des Télécommunications*, in terms of its independence, especially from political influence. To this purpose, the seven basic factors related to independence presented in the next subsections have been assessed and compared against the EU regulatory framework for electronic communications. Where relevant and possible, recommendations have been made in order to improve the INT legal structure and/or operational practice as regards to the factors investigated.

Before going through the revision of the questionnaire results, it is worthwhile providing a brief description of the INT general structure and regulatory framework.

The INT was created in 2001 by Art. 63 of the Tunisian Telecommunications Code (the Telecom Code)¹⁸ as a specialized body with legal personality and financial autonomy.

The INT consists of an organ asked to assure the missions of regulation of the Telecommunications sector (The INT's college), and of an organ of administrative and financial management of its activities (the Council of management).

- *The INT's college: according to the article 64 of the telecommunications code, the INT's college consists of seven members, named by decree:*
 - *a President, practicing full-time,*
 - *a Vice-president, an adviser at the Court of Cassation, practicing full-time,*
 - *a member adviser at one of the two rooms in charge of the control of public enterprises at the revenue court, practicing full-time,*
 - *un Vice-président, conseiller auprès de la Cour de cassation, exerçant à plein temps,*
 - *and four (04) members chosen among competent personalities in the technical, economic or legal domain relative to telecommunications.*

- *The President. Besides his function of President of the INT's college, the President of the INT also insures the Administrative and Financial Department, assisted by the management council. As such, he exercises the attributions confided traditionally to the Managing director of a public institution and in particular he takes care of:*
 - *Prepare and stop the Budget of the Authority and insure the management,*
 - *Prepare financial statements,*
 - *Conclude markets,*
 - *Propose the organization of services to the Authority, its internal rules as well as the particular status of the staff,*
 - *Authorize the expenses and the perception of the INT's claims,*
 - *Represent the INT at thirds in all civil, administrative and judicial acts.*

¹⁸ Law n° 2001-01 of 1 January 2001 adopting the *Code des Télécommunications*, modified by Law n° 2002-46 of 7 May 2002, Law n° 2008-1 of 8 January 2008 and Law n° 2013-10 of 12 April 2013.

- *The Council of Management is an administrative organ asked to assist the INT's President in the administrative and financial management; Besides the attributions devolved to the Board of directors of an industrial and commercial public undertaking, the legislator, in a concern to particularize the Authority of the other similar institutions of regulation, conferred to him, at the same time, the attributions of a regulatory authority, by submitting to his approval, in particular, the following questions:*
 - *the budget of the INT,*
 - *financial statements,*
 - *the organization chart and the internal rules, the project of the particular status of the Authority as well as its regime of remuneration,*
 - *markets and the concluded agreements,*
 - *acquisitions, transactions*
 - *loans contracted by the INT.*

- *The permanent secretariat*

3.1 Institutional framework

The first section of the questionnaire was intended to evaluate the way in which the institutional structure of INT - whether provided by Law or otherwise- affirms its independence and autonomy in the execution of its tasks.

The institutional framework determines the place of the NRA within the State administration, its competences, powers and resources, as well as its relationship with other private and public bodies, including the government. It is therefore a crucial factor as it conditions the NRA's effective action and its capacity to adequately respond to the problems identified in the regulated markets.

The legal framework defining the institutional governance set up of the NRA should therefore ensure that it takes its decisions in a transparent, efficient and impartial manner. To this aim, a guarantee of independence should be enshrined as a basic pillar of such institutional set up, which means to establish the NRA as legally distinct from and functionally independent from market players and any other public body.

In addition to a general obligation of independence, the prescription by law of formal specific requirements is also deemed as essential and as a way to that, the general principles should be applied in practice.

3.1.1 Literature review

Generally¹⁹, all the articles and studies related to the issue of independence of regulators agree that “the regulatory body can achieve the relevant degree of structural independence from the government if established as a separate legal entity. This idea is also further supported by analysis of sector-specific requirements of independence and efficient functioning, since the issue was emphasized as one of the main conditions for achieving fair competition in gradually liberalized markets.”

The INDIREG report²⁰, elaborated for the audiovisual sector and specifically focusing on the institutional setup of regulatory bodies, stresses that: «[...] a functional separation between the ministry and the regulatory body shelters the autonomy of the regulatory body from politics but also from industry, because industry capture can also be performed via political channels. Also, a functional separation prevents the regulatory body from taking up the government’s mode of law making, which is mainly based on negotiating with all interested parties and which is not considered as very efficient when carrying out regulatory tasks»

Similarly, CERRE remarks that «Independence implies that the regulatory authority does not receive any instruction, threat or inducement from the national executive or legislative powers, directly or indirectly, regarding the decisions it takes or envisages taking». Moreover, «regulatory decisions must (...) be made in an environment which is shielded from undue influence as much as possible».

The regulator, according to the INDIREG report, should derive its own powers and responsibilities from a public law, be organisationally separate from ministries and be neither directly elected nor managed by elected officials. « [...] experts [...] pointed out that [...] in cases where legislative and regulatory powers are not functionally separated, conflicts of interest can arise».

In the same vein a report for the World Bank²¹ adds that «The independence and institutional autonomy of the regulatory body should be adequately and explicitly protected from interference, particularly interference of a political or economic nature. »

¹⁹THE OECD accepts that the body is connected in condition that it benefits from necessary conditions for its independence

²⁰INDIREG FINAL REPORT. Indicators for independence and efficient functioning of audiovisual media servicesregulatory bodies for the purpose of enforcing the rules in the AVMS Directive<http://www.indireg.eu>.

²¹Steve Buckley, Broadcasting, Voice and Accountability. A public interest approach to policy, law, and regulation, The World Bank Group, page. 160

3.1.2 The situation of INT

The INT, Instance National of Telecommunications, was created in 2001 by Art. 63 of the Tunisian Telecommunications Code (the Telecom Code) as a specialized body with legal personality and financial autonomy.

Therefore, the Telecom Code explicitly refers to the independence by not qualifying INT as a public enterprise or Public Establishment with Administrative or not administrative character and by conferring on the INT a financial independence.

The absence of a formal requirement for INT independence in the Law and the concrete choice for its institutional set up as a specialized body in the form of Instance implicitly implies the intention of the legislator to keep the separation of regulatory and operational functions and to assign exclusive jurisdiction to INT over the tasks assigned by Law and, therefore, to ensure a functional separation from other institutional bodies such as the Ministry or the Government.

This would mean that, although not being formally defined as an independent authority, INT is commonly understood to be independent and, in general, executes its tasks in accordance to this philosophy. The answers to the section 7 of the questionnaire, on the application, would support this line of thought, that the decisions of the INT wouldn't be submitted to none by other public authorities, in particular the ministry and the government.

The capacity of INT to act, has other limits which will be described in the following chapters, the legal requirement of the financial independence awarded the INT, a significant level of independence in its Daily functioning.

3.1.3 Conclusions and recommendations

According to the assessment carried out, the INT seems to enjoy in practice of a certain level of independence from the government, derived from its institutional layout in the form of an Instance, which would provide it with exclusive jurisdiction over the regulatory tasks assigned to it by the Telecom Code²² and ensure functional separation from the governmental bodies. Also, the legal guarantee laid down in the Telecom Code regarding financial independence is considered to have a positive impact as to the independent operation of the regulator.

However, the lack of a formal requirement of independence and its formalization by means of a minimum set of essential safeguard requirements – as we will see throughout the following sections of this Report, e.g. in relation to the leaving office of the Head – means that INT is exposed to the risk of external intervention or political pressure. In this sense, we would

²²Law n° 2001-01 of 1 January 2001 adopting the *Telecommunications Code*, modified by Law n° 2002-46 of 7 May 2002, Law n° 2008-1 of 8 January 2008 and Law n° 2013-10 of 12 April 2013.

recommend the explicit prescription by Law of the independence of INT, regards to various those concerned in telecommunications sector.

It should be noted to this regard, the case of the audiovisual regulator, the HAICA (*Haute autorité indépendante de la communication audiovisuelle*), whose independence is ensured via the Tunisian Constitution, in particular in its Art 125 relative to the “Constitutionally Independent Instances”²³.

Taking this precedent into account, the possibility could be considered of adding INT to the group of entities covered by Art 125 of the Constitution. If not, at least the INT independence should be explicitly prescribed and preserved in the new of the Telecom Code. This could be done through a general reference of the INT as the independent national regulatory authority for the telecommunications markets, with legal personality, administrative and financial autonomy, and capacity to act with full independence from the Government, other public administration and market agents. This general institutional regime could be made more precise by means of concrete provisions, prescribing that:

- The INT shall act with independence of any commercial and private interest
- Neither the President, nor the college or the staff of INT cannot seek or accept instructions from any other body during the exercise of tasks assigned to them by the Telecom Code or any other Law.

RECOMMENDATIONS (INSTITUTIONAL FRAMEWORK)

Recommendation n°1

The Tunisian Telecom Code should explicitly prescribe the independence of INT regarding market players and political power.

3.2 Appointment procedures and governance

Despite the fundamental need of mandating the NRA’s independence by Law, It is necessary on the practical plan that the behaviour of the regulatory authority is independent and waterproof to the external political pressure. Therefore, there is need to lay down specific rules aimed at ensuring impartiality of the NRAs’ decision making and their susceptibility to external influence.

²³ CHAPITRE VI: THE INDEPENDENT CONSTITUTIONAL AUTHORITIES

Article 125

The independent constitutional authorities work in the strengthening of the democracy. All the institutions of the State owe facilitate them the work.

They are endowed with the legal entity and with the financial and administrative autonomy.

They are elected by the Assembly of the people to which they present their annual report and in front of which they are responsible.

Their election is made in a qualified majority. The law fixes the composition of these authorities, their organization, as well as the modalities of their control.

As we have seen in Section 2 about the EU framework for electronic communications and energy, there are a number of requirements generally accepted as to help dissipating doubts on the independence of the regulator (governance system, financial organization, set of competences, etc). They are, as a matter of fact, the object of our analysis over the next sections.

This section starts such an analysis by exploring the appointment procedures and governance of the INT, covering aspects such as the nomination of the Head and the Members of college, their terms of office, grounds for dismissal and the mismatching regime applying to them.

3.2.1 Literature review

Regarding the importance of the appointment procedures and governance for the independence of NRAs, the INDIREG report states that “organisations gain autonomy when they have maximum control on the resources on which they are dependent. In particular, a stable source of funding, e.g. by a fee levied on the regulated industries, and the authority to control appointment, allocation, promotion, dismissal and salary policies in relation to the regulatory authority’s staff, are important attributes”. Hence, “The most obvious safeguards to create an arm’s length relation from elected politicians stem from a legal framework which prescribes how the members of the highest decision making organ of the independent regulatory body take office. Thus, the nomination, appointment, tenure and protection against dismissal are of utmost importance when looking at the formal independence of independent regulatory agencies”²⁴.

A similar concept is also expressed by an OECD report: “Terms of appointment that span over an electoral cycle is likely to promote independence from the political process. Procedures regarding re-appointment should be mindful of the need to guard against the perception of “capture” by the (re)appointing authority. Term limits can be useful to guard against perceived capture, but must avoid unnecessarily depriving the regulatory system of the useful expertise and experience built up by a regulator. Overlapping terms of board members can be a useful mechanism to both provide continuity of approach and protect independence”²⁵.

3.2.2 The situation of INT

Composition of the college and its terms of office

Art 64 of the Telecom Code sets the configuration of the INT Board, which will be composed of three permanent members among whom the President, the Vice president –selected among the magistrates of the Court of Cassation– and a permanent member –chosen among advisers from the court of auditors, and four (4) non-permanent members, who are selected among persons with recognized competence in the technical, economic or legal domain in the telecommunication sector.

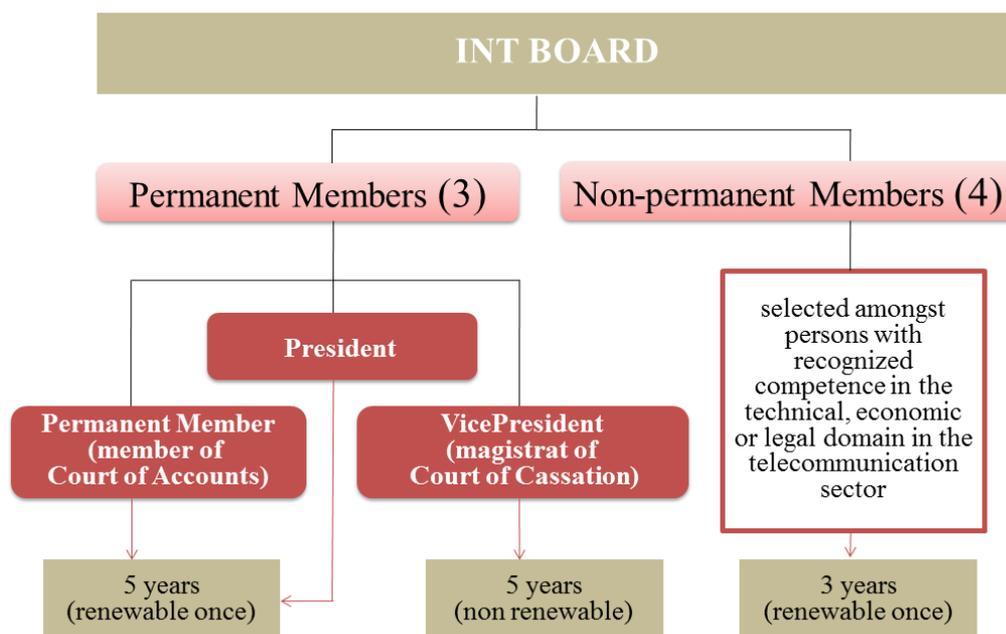
²⁴ INDIREG Final Report, page. 31.

²⁵ OECD, The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy, 2014, page. 60.

The mandates vary for the different Members of the Board:

- President and permanent Member, 5-year mandate, renewable once
- Vicepresident, non-renewable 5-year mandate
- Non-permanent Members, 3-year mandate, renewable once

The electoral cycle is of 5 years, although, as stated by INT in its response to the questionnaire, there is no coincidence between elections and the modification of INT's college.



Appointment procedure and ground for revocation of mandate

As to their appointment, the same article 64 specifies that it will be made by Decree, which is issued by the Head of Government, although it does not describe the concrete procedure to be followed.

Only for the case of the Vicepresident, Magistrate of the Court of Cassations, it exists since 2012 an open selection process led by the temporary Council of the Magistrature, the other Members being selected directly by the Government.

The Telecom Code does not specify the dismissal rules of the members of the council neither define the possible grounds for dismissal. The only exception is nevertheless provided by Art 69 of the Code²⁶, which empowers the INT President to request the removal of a member of the college in case of absenteeism inequitable in council meetings. Should this request be done, the replacement by a new Member is made by Governmental Decree.

In addition, any Member, including the President, can be rejected in case of conflicts of interests.

²⁶Telecom Code. Art 69 - (...) The president of the Authority can ask for the replacement of any member (limb) which goes away three times without motive in the meetings of the Authority. The replacement is made by decree.

Incompatibility and conflicts of interest rules

Art 64 of the Telecom Code on the composition of the Board should be mentioned as it dictates exclusive dedication of the positions of the President, Vicepresident and the permanent member.

In addition, the Art 70²⁷ sets the incompatibility requirements applicable to the members of the Council. In particular, they must not have, directly or indirectly, any interests in companies operating in the telecommunications sector. It should be noted that this obligation does not cover the parents of the member president or college and that no period was planned for the obligation of incompatibility after the end of their mandate.

3.2.3 Conclusions and recommendations

As mentioned, the way as the Head and the council Members are appointed is the key in safeguarding the NRA against capture and external political influence. An objective selection process, based on eligibility criteria including e.g. a thorough knowledge of the field under regulation, appointment by the Parliament instead of the Government, a terms of office not tied to the electoral cycle, incompatibility rules and objective clear procedure for a not arbitrary redundancy, are essential elements that help reducing the vulnerability of NRA's decisions in external influence or political pressure.

The assessment of the INT governance system reveals some positive elements. For example, the composition of the council is clearly laid down in the Telecom Code, which also specifies the duration of the Board Members' mandates in a way that a certain rotation/overlapping is introduced, this reducing the risk of linking the appointment process to the political cycle. The fact that the terms of office are either non-renewable or renewable only once is also very positive, considering that renewable mandates are more susceptible to political pressure insofar as the decision of renewal is in the hands of the Government. Other provisions such as the obligation of exclusive dedication for the permanent Members, the specification of the eligibility criteria for the non-permanent Members and the incompatibility requirements in relation to any private interest in the telecommunication sector, are also in line with the international standards on independence.

However, there seems not to be any clear reason for not extending the requirement of having a recognized competence in the technical, economic or legal domain in the telecommunication sector, currently applying only to the non-permanent members, to permanent members in this particular case the president, the vicepresident and the permanent member. This would provide

²⁷Code of the Telecom. Art 70 - The function of member of the National Authority of Telecommunications is incompatible with the direct or indirect ownership of interests in any company which exercises its activities in the field of telecommunications. Any concerned part can reject any member of the authority by written request the signature of his author of which is certified or by electronic request matched of the signature of his author. The request is subjected to the president of the authority who makes a decision on the matter within five days after hearing of both parts. The vice-president replaces the president of the authority, in case of challenge of the latter.

more objectivity to the nomination procedure. The same could be said in relation to the appointment and dismissal by Governmental Decree. In this case, the system could be strengthened in terms of independence, for instance, by involving the Parliament in the assessment of the candidates and by specifying in the Telecom Code the motives of revocation. Some examples of criteria are presented below:

- Resignation accepted by the Government.
- Expiry of the term of office.
- A situation of incompatibility.
- Have been declared guilty of a crime
- Permanent disability.
- Violation engraves of duties of its responsibility or violation of an obligation on incompatibilities, conflicts of interests or obligation of confidentiality.

Finally, in order to reinforce the independence vis-à-vis the regulated undertakings, it could be considered to extend the incompatibility regime for the Board Members beyond the end of their mandate in INT, the so called “cooling off period”. This would entail the impossibility for the President and the Board Members to take a position in a company operating in the sector after, for example, two years after conclusion of their term of office. A compensation mechanism could be foreseen in order to counterbalance any professional damage derived from such an obligation. As an example, in Spain, the Telecoms’ Law has established such a system of compensation, so that during the cessation of their functions by resignation, expiration of the warrant or permanent inability to perform their duties, the members of the council shall be entitled to receive, from the month following that in which the termination occurs and for a period equal to that for which they have held office, with a limit of two years, a monthly monetary compensation sum equal to one-twelfth of eighty percent of the total remuneration assigned to the position concerned in the budget in effect during the period indicated.

RECOMMENDATIONS (APPOINTMENT PROCEDURE AND GOVERNANCE)

Recommendation n°2

A number of measures could be introduced in order to strengthen the appointment procedure:

- extending the requirement of having a recognized competence in the technical, economic or legal domain in the telecommunication sector to the President and all Members of the INT Board
- providing the Parliament with a role in the selection of the candidates (hearings, veto power, etc)

Recommendation n°3

The Telecom Code should specify a closed list of grounds for dismissal of the President and Board Members. Removal from office should only occur when the President of the Board Members no longer fulfil the conditions required for the performance of their duties, as laid down in the Telecom Law. These could include:

- Resignation accepted by the Government
- Expiry of the term of office
- A situation of incompatibility arising
- Having been convicted of a felony
- Permanent disability
- Serious breach of the duties of his office or breach of duty on incompatibilities, conflicts of interest or the duty of confidentiality

3.3 Human resources/staff

To bring to a successful conclusion their functions in a effective way at a high level of the standards, it is essential that the NRAs has a necessary and sufficient number of human resources and having the necessary knowledge, the skill and the expertise.

Expertise allows the regulatory authority to independently assess the information obtained from the industry, and not to become too dependent on outside competence (for example, information provided by political or commercial interests) so the protection against it allows in particular avoiding the statutory capture²⁸. In the absence of knowledge and expertise, a regulatory authority's decision-making may be reduced to choosing between rival submissions and must, often, balance conflicting and different stakeholders interests²⁹.The NRA decision-making will be, as a result, considered as authoritative by the relevant stakeholders.

Therefore, the NRA's ability (to respond to the competition problems identified in the regulated markets) resides to a large extent in his policy of recruitment and preservation of his staff with

²⁸ INDIREG: Para. 4.3.4, p. 364.

²⁹ CERRE Code of Conduct and Best Practices for the setup, operations and procedure of regulatory authorities (7 May 2014).

the level required from expertise and in the adaptation of its human resources to the needs for an extremely changeable environment and to the high technological evolution such as the telecommunications sector.

In this sense, operational autonomy, especially regarding the management of human resources, is essential granted to an expert, efficient and impartial decision-making by NRAs.

It means, among others that the NRA must be capable of deciding in a autonomous way for the number, the professional profiles of its human resources, the procedures of recruitment - which must be opened and transparent-and fix the remuneration for its staff.

In relation to this latter element, the possibility to offer an attractive career path in terms of remuneration and/or promotion plays a key role in the NRA's ability to recruit and retain the necessary qualified staff to respond to the challenges posed by a highly specialized and complex sector as the telecommunications one. This issue is therefore strongly linked to the NRA's financial autonomy and, more specifically, to the extent it can autonomously set its remuneration policy and execute its own budget in relation to salaries.

In particular, the capacity to remunerate with salaries which are competitive with those paid in the private sector determines the NRA's degree of attraction and retention of staff, making the employees less vulnerable to offers from the industry.

To address these matters, the questionnaire presented to INT experts contained, amongst others, questions such as the adequacy of the INT's human resources, its autonomy in relation to the recruitment of human resources, remuneration or internal organization, as well as difficulties in attracting and retaining suitably qualified staff.

3.3.1 Literature review

Almost all the studies on the independence of the NRAs underline that "One of essential characteristic of an independent regulatory authority is that he(it) is equipped with enough human resources having an adequate expertise, including the members of the highest decision-making body and / or an expertise acquired by external councils"³⁰.

"The autonomy of the regulatory organization strengthens the authority of the regulatory agency. An organization has more autonomy when it controls its resources. 'So, a stable source of resources³¹, coming of Fees charged to the regulated industries and of the authority to control the mission, the promotion and the politicsof salary, is considered important".

Independence is positively linked to "the development and application of technical expertise, because expertise can be a source of resistance against improper influences»³²,

³⁰INDIREG Final Report, page. 363 – 364.

³¹INDIREG Final Report, page.39.

³²INDIREG Final Report, page. 31-32.

Preventing post-employment staff movement to industry can limit regulators' ability to attract the necessary talented staff, as employment by the regulator would narrow potential later career opportunities. However, mandatory time gaps or cooling-off periods between leaving a regulator and taking up a position in the regulated industry may be warranted as conditions of employment in some cases, for example:

- where regulated entities are expected or required to reveal commercially sensitive information to the regulator, and would be less open with the regulator if its staff left to join one of its competitors; or
- where departing staff of a regulator would have knowledge that would hinder the regulator's enforcement strategy if held by a regulated firm³³.

³³OECD, The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy, 2014, page. 62-63.

3.3.2 The situation of INT

At present, INT has around 60 employees, of which approximately 20 are considered as technical staff. It should be noted that, at the moment of elaboration of this Report, there is a recruitment process in progress of 12 new employees.

The Art 63(ter) of the Telecom Code³⁴ sets the staff regime of the INT by referring to the Law n°85-78 on the general status of public agents. This law imposes very strict rules regarding recruitment, remuneration and career of the staff and submits all decision, taken in this executive in the prior authorization of the Ministry in charge of ICT (information and communication Technology) and the Presidency of the government.

3.3.3 Conclusions and recommendations

INT seems to be understaffed when compared to regulators of other countries in the same area who have a similar role and similar responsibilities. The limited number of technical staff available within the INT might be able to put at risk its capacity to respond to the demands of such a specialized and complex sector as the telecommunications one.

But most importantly, INT ability to recruit and retain staff is severely limited by the low level of salaries due to the restrictions imposed by Law n°85-78.

In order to ensure that INT carries out its duties effectively and to a high level of standard, it is essential that it can attract and maintain personnel with the necessary knowledge, competence and expertise. This is a prerequisite to guarantee that INT decisions have authoritativeness before the relevant stakeholders.

To this end, the legal basis of the status of the staff must be revised to return the levels of remuneration competitive compared with salaries paid into the private sector and to return so the employees of the INT less vulnerable to job offers proposed by the industry.

³⁴*Telecoms' Code. Art 63 (ter) - The staff of the national authority of telecommunications is submitted to the measures of the law n°85-78 of August 5th, 1985, carrying the general status of agents of offices, public institutions with industrial and commercial character and companies, which the capital belongs directly and completely to the State or to the local public authorities, such as modified and completed by the law n°99-28 of April 3rd, 1999.*

RECOMMENDATIONS (HUMAN RESOURCES/STAFF)

Recommendation n°4

INT should have adequate and appropriately qualified human resources to carry out its functions effectively. The Telecoms Code should include a specific provision laying down this principle.

Recommendation n°5

The Law should be amended with a view to vest INT with the necessary autonomy to fix the remuneration regime of its staff. Salaries should be set at a level which is competitive compared to the private sector, in order to ensure INT's ability to recruit and retain highly qualified human resources.

3.4 Financial autonomy

The effective functioning of NRAs in the execution of their duties is directly connected to their availability of sufficient and adequate financial resources. It is also an essential factor to preserve the independence of the NRAs' decision making. The more the level and execution of the budget depends on the intervention by an external party (especially the Government), the more the risk exists that the decisions of the NRA cede to external (usually political) pressures.

Therefore, as the EU regulatory framework for electronic communications has done for the European NRAs, the national legal system should include guarantees related to the sufficiency of financial means of the telecommunication regulator.

In order to ensure this principle, a system based in a strong financial autonomy conferred to the NRA both in the preparation and allocation of the budget, has demonstrated to be fundamental. As a matter of fact, the design of the approval procedure for the regulator's budget and the external intervention in its allocation are factors with a great impact on the ability of the NRA to perform its regulatory tasks effectively and adequately. Also, the source of the regulators' budget is recognized to play a role in the level of financial autonomy and operational capacity (the more the budget source is separate from the State budget, the more autonomy is for the NRA).

In any case, full financial autonomy should be understood without prejudice to the existence of transparency and accountability measures allowing public control over the NRAs' financial expenditure and operational activity.

The questionnaire object of this Report tried to examine the aforementioned factors, addressing questions on the autonomy in the preparation and approval of the NRA's budget, autonomy also in its allocation, adequacy of financing resources, sources of financing (operators fees or state budget), or external approval of financial statements (subject to external approval by the independent audit office, independent commission or other body).

3.4.1 Literature review

Financial autonomy is “An important indicator for dependency potential of the regulatory body. Where external parties have legal influence on the level of the budget, they can both exert pressure to get politically motivated decisions from the body, as well as undermine its operational capacity through inadequate financing. This can occur intentionally or unintentionally, resulting from a lack of knowledge, e.g. due to missing market studies. The greater the influence of one single player regarding the budget allocation, the more likely it is to be used to punish or reward the body in order to generate politically motivated decisions”³⁵.

Regarding the financial autonomy of the regulatory authority, the INDIREG report has identified two different aspects as best practices: “the regulatory authority should be able to play a significant role in the budget setting process, e.g. being able to make a reasoned proposal which can only be denied for (limited) reasons. The importance of being involved (at least in an advisory role) in the process of determining the appropriate level of the overall budget follows immediately from the theoretical framework of independence”³⁶.

“To promote efficiency and equity, it should be made clear who pays for the regulator’s operations, how much and why. A regulator should disclose in its annual report what proportion of its revenue comes from each of these sources”³⁷.

Different funding models may have different advantages, according to the context and the existence of external audits. With some respects, a funding model based only on the fees or contributions from operators may be preferable; with some others, a mixed model (partly public, partly coming from the fees or contributions from operators) could be a better choice to provide a higher degree of protection from industry influence. “Funding sources may include budget funding from consolidated revenue, cost-recovery fees from regulated entities, monies from penalties and fines and interest earned on investments and trust funds. This mix of funding sources should be appropriate for the particular circumstances of the regulator”³⁸.

Moreover, “The existence of an external audit mechanism of the regulator’s financial situation is an important mechanism for making sure that it is functioning in an appropriate manner, i.e. to make sure that it is spending money correctly in light of the tasks that it needs to fulfil. Recommendation (2000) of the Council of Europe allows for the supervision of regulatory authorities with respect to the lawfulness of their activities and the correctness and transparency

³⁵ INDIREG Final Report, page. 54

³⁶ INDIREG Final Report, page. 360

³⁷ OECD, The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy, 2014, page. 99.

³⁸ A mixed funding, comprising fees levied from industry and government funding, can reduce risk potentials for dependencies and can therefore be qualified as best practice. Source: OECD, The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy, 2014, page. 99.

of their financial activities”³⁹.

The adequacy of economic means is essential to preserve regulators’ autonomy. As reported by the CERRE Code, “a regulatory authority should be endowed with sufficient resources to carry out their tasks adequately”⁴⁰.

3.4.2 The situation of INT

Art 63 (bis) of the Telecom Code⁴¹ sets the basis for the independent operation of INT, endowing it with full financial autonomy. The same provision establishes that the administrative and financial administration of INT will be set by Governmental Decree.

In this sense, Decree n° 2003-922⁴² was approved on 21th April 2003 on the administrative and financial organization as well as on the modalities of INT functioning (Decree on administrative and financial organization). This Decree would confirm the INT’s financial autonomy, as it empowers the President (Art 2), amongst other competences, to elaborate the draft budget, manage its allocation and to adopt the draft financial statements of the body.

However, although being competent for the preparation of the draft budget, the President is not responsible for its adoption, this decision being left to the INT management committee (management council), internal body created by virtue of the said Decree n° 2003-922 (Art 5). The management council is in charge of assisting the President in the administrative and financial management of the INT and is empowered to adopt decisions such as the budget, the financial statements or the organisation chart and the Internal Regulations of the authority.

The management council is composed by 5 members⁴³:

- the President of INT, who chairs it;
- the Vicepresident of INT;
- the permanent Member of the INT Board;
- a representative of the Prime Ministry;
- a representative of the Ministry of Finances.

The representatives of the Ministries are non-permanent Members and are appointed by the INT

³⁹ INDIREG Final Report, page. 394.

⁴⁰ CERRE (2014), Code of Conduct and Best practices for the setup, operations and procedure of regulatory authorities, p.6.

⁴¹ Telecom Code Art 63 (bis)- The national Authority of telecommunications is provided with the legal personality and with the financial autonomy. The administrative and financial organization of the national authority of telecommunications is fixed by decree

⁴² Decree N° 2003-922 of April 21st, 2003, fixing the administrative and financial organization and the operating procedures of the national authority of telecommunications. http://www.intt.tn/upload/txts/fr/decret_197.pdf

⁴³ Art. 6 of Decree n° 2003-922.

President on the proposal of the Prime Minister and the Minister of Finances for a mandate of 3 years, renewable once.

As to the financing scheme, the Decree on administrative and financial organization, in its Art 13⁴⁴, sets the source of INT funding, which is primarily based on the taxes derived from the assignment of numbers and addresses, as also provided by Art 41 of the Telecom Code. This means that INT has its own budget, which is separate from the State one.

By virtue of Art 41 (bis) of the Telecom Code, any remaining budget at the end of the budgetary year is submitted to the Fund for the Development of TIC, managed by the Ministry.

Finally, the INT accounts are audited by independent and external experts (Art 14 of the Decree)⁴⁵ and adopted by the management council. The results of the financial management are published annually in the Official Journal (Art 14 of the Decree).

3.4.3 Conclusions and recommendations

Very positively, the telecom legal framework awards the INT with a high degree of financial autonomy, setting the right conditions for an efficient carry out of its regulatory task. In this sense, not only the Telecom Code explicitly provides INT with full autonomy for elaborating, adopting and allocating the budget, but also defines clear and transparent procedures.

Although it can be argued that there could be some kind of governmental intervention in the financial management, stemming from the presence of representatives of the Prime Ministry and the Ministry of Finances in the INT Management Board, the fact that the decision is in all ways kept within the INT internal bodies and that those members are appointed by the President of INT, who in any case holds the competence of preparing the draft budget, seems to act as a safeguard for the INT autonomy.

On the other hand, the funding system based on the collection of numbering taxes directly by the INT, is definitely a factor supporting the regulator's financial independence, as it ensures a separate budget less vulnerable to political influences than a system based on a direct funding from the State. According to the responses to the questionnaire, the funds obtained through this system would be sufficient to the performance of the INT duties as assigned by the Law.

Finally, it should also be noted that the legal scheme set for the INT control of its financial statements is in line with the general international standards. In particular, we refer to the fact that it is to INT to approve its accounts, although after audit from an external body (in

⁴⁴Decree N° 2003-922. Art. 13. - the budget of the authority includes expenditures and revenue below:

- Revenues:
- Income ensuing from fees of attribution of the numbers and the addresses,
- Subsidies and endowments that the State gives, where necessary, in the example,
- The divers obtained for example by the behalf of national or international organism, after the approval of the Management Council,
- The loans. (...)

⁴⁵“A member of Tunisian accountants experts”, in accordance to Art 14 of Decree N 2003-922.

accordance to the accountability and transparency principles).

In contrast to the positive conclusions regarding the budgetary model of INT, it should be highlighted that full financial autonomy is challenged by the high legal constraints faced by INT to set the level of remuneration of its staff. As explained in the previous section on human resources/staff, this is an essential prerequisite for an efficient performance and should therefore be addressed via a reform of the legal framework applying to the authority.

3.5 Accountability and transparency

The EU Regulatory Framework for electronic communications stipulates that “Member States shall ensure that national regulatory authorities exercise their powers impartially, transparently and in a timely manner”. Also, when mandating NRAs to act independently, it also clarifies that “this shall not prevent supervision in accordance with national constitutional law”.

Transparency and accountability are therefore understood as the flip coin of independence. They help ensuring that NRAs make appropriate exercise of their autonomy by respecting their mandate and achieving their objectives. It is, in other words, an incentive to good governance and performance.

Accountability is exercised by means of reporting mechanisms (publication of the decisions, dissemination of information about the NRA activities, etc), involvement of stakeholders in the decision-making process (hearings of interested parties in dispute resolution proceedings, running of public consultations prior to the adoption of decisions, etc), the obligation to provide sufficient justification of the decisions and actions taken by the NRA, or by providing access to information and documents. In this sense, transparency is a necessary requisite to achieve accountability, the higher the level of former, the higher the level of the latter.

As to the actors the NRAs should be accountable to, we could refer to:

- Parliament, from which the independent nature of NRAs is emanating.
It is standard practice that NRAs report on their activities periodically to Parliament (e.g. presentation of the Annual Report)
- Stakeholders, which includes the regulated entities and any other interested party such as operators benefiting from rights stemming from regulation or consumer associations.
In this case, the organization of public consultations granting stakeholders the opportunity to provide opinion on draft decisions of the NRA or the right to entities to be heard before a decision affecting them is taken, are representative practices supporting accountability.
- Any citizen.
Taking into account that the NRA regulation can have significant impact not only on the sector but in the whole economy and society, citizens should have the right to monitor the NRA’s activity by, for example, being able to access any information and

documents elaborated by the NRA (without prejudice to limitations based on confidentiality).

Finally, accountability is also connected to the notion of judicial review of the NRA's decisions and any other control of compliance such as the one made by external auditors (e.g. Court of Auditors) or the need to follow general administration principles (e.g. budgetary balance).

To understand the INT situation regarding accountability and transparency, the questionnaire addressed questions on (i) the legal framework governing publication of the NRA's decisions; (ii) any obligation to report e.g. to Parliament or Government; (iii) the existence of external auditing; and (iv) whether public consultations are foreseen within the decision making process.

3.5.1 Literature review

Accountability and transparency are the other side of the coin of independence and a balance is required between the two. "Comprehensive accountability and transparency measures actively support good behaviour and performance by the regulator, as they allow the regulator's performance to be assessed by the legislature or another institution"⁴⁶.

"A certain degree of transparency regarding decision making is essential for all regulatory bodies to act in an impartial manner. This essential characteristic can be satisfied by regulatory bodies that provide their decisions publicly and give reasons for their decisions or by delivering a meaningful annual activity report or equivalent mechanisms"⁴⁷.

"The regulator exists to achieve objectives deemed by government and the legislator to be in the public interest and operates within the powers attributed by the legislature. A regulator is therefore accountable to the legislature, either directly or through its minister, and should report regularly and publicly to the legislature on its objectives and the discharge of its functions, and demonstrate that it is efficiently and effectively discharging its responsibilities with integrity, honesty and objectivity. A system of accountability that supports this ideal needs to clearly define what the regulator is to be held accountable for, how it is to conduct itself and how this will be assessed. The judiciary should help ensure that the regulator operates within the powers attributed to it"⁴⁸.

"Citizens and businesses that are subject to the decisions of public authorities should have ready access to systems for challenging the exercise of that authority. This should include internal review of delegated decisions, as well as more robust external review by a body such as a court. An important distinction can be made between the principle that specific decisions of a regulator should be subject to judicial review, and the regulator's ultimate accountability for its performance to the legislature. Delegated decisions (such as those of inspectors) can have a

⁴⁶ OECD, The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy, 2014, page. 81.

⁴⁷ INDIREG Final Report, page. 364.

⁴⁸ OECD, The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy, 2014, page. 81.

material effect on regulated entities and should be subject to a timely and transparent internal review process on request. The regulator should advise the regulated entity of any options for internal review when they are informed of the decision. The internal review process should be published and made accessible to regulated entities. There should also be timely, transparent and robust mechanisms for the external review of significant regulatory decisions. External reviews – such as the Court’s decisions- can act as an accountability mechanism and can improve the quality of the regulator’s decision-making and internal review processes”⁴⁹.

Finally, “in order to become a ‘relevant actor’, the regulatory body should have the capacity for networking with all relevant actors and for interacting with the public. This can foster public awareness of regulatory issues. If there is more than one regulatory body in place, it is especially important that the public is well informed about the body’s responsibility for complaints, and complaint-handling procedures. As a best practice characteristic, the regulatory body should therefore have an obligation to organise open consultations in all cases having a direct or indirect impact on more than one market player”⁵⁰.

A report from the OECD on the independence of regulators explains that “The regulator should disclose what rules, data and informational inputs will be used to make decisions. However, where such disclosure would likely lead to gaming of the regulatory system by regulated entities, it would be appropriate for the regulator to be permitted to limit such transparency. Transparency in the actions and decisions of regulators is beneficial for preventing reviews of decisions. By being open and providing explanations of decisions regulators can avoid the risk of a large number of appeals to those processes provided the decisions are perceived to be fair and evidence based. Enforcement actions should also be disclosed in a timely and readily accessible manner. However, limiting transparency may be appropriate where confidentiality is required, for example, in relation to enforcement actions that have not yet been resolved (and where disclosure may prematurely affect the reputation of a regulated entity)”⁵¹.

On the same line, the INDIREG report highlights that establishing a set of transparency rules regarding decision making and accountability measures is essential for all regulatory bodies to act in an impartial manner. “This essential characteristic can be met by regulatory bodies that provide their decisions publicly and give reasons for their decisions or by delivering a meaningful annual activity report or equivalent mechanisms”⁵².

3.5.2 The situation of INT

In relation to transparency, the Telecom Code includes the mandate of INT to submit to

⁴⁹ OECD, Principles for the Governance of Regulators, page. 52. <http://www.oecd.org/gov/regulatory-policy/Governance%20of%20Regulators%20FN%202.docx>

⁵¹ OECD, The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy, 2014, page. 83- 84.

⁵² INDIREG Final Report, Page. 364.

Parliament and the relevant Ministry an annual report of its activities (Art 77).

In addition, the procedure for dispute resolution as provided by Art 67-69 of the Telecom Code, foresees the right to the parties to be heard before INT adopts its decision on the case.

On the other hand, although not provided by Law, according to its response to the questionnaire, INT carries out public consultations on its main draft decisions. While they are reported to be open to any interested party, it seems that the consideration of the contributions by stakeholders would not be systematically justified in the final decision. Most decisions are also published by INT on its website (www.intt.tn) as a matter of regulatory practice, as there is no legal obligation governing this issue.

Moreover, access to INT documents is ensured by the Decree-Law n° 2011-41 on general access to administrative documents of public administration⁵³.

Finally, as explained in other sections of this Report, the INT accounts are audited by independent and external experts and the results of the financial management are published annually in the Official Journal. Also, decisions are subject to judicial review (see section on Enforcement).

3.5.3 Conclusions and recommendations

The analysis carried out shows that, in general, INT carries out its activity in line with the principles of accountability and transparency. In some cases, specific measures are clearly defined by Law, whilst in others, no procedure is mandated in a legal document but transparency is anyhow followed by INT in its regulatory practice.

In order to reinforce and ensure application of the highest standards of accountability and transparency, it would be useful to lay down in the Telecom Code the obligation to publish all INT's decisions, the obligation and procedures governing public consultations, and the obligation to adopt reasoned decisions, especially to take account of responses to the public consultations.

RECOMMENDATIONS (ACCOUNTABILITY AND TRANSPARENCY)

Recommendation n°6

In order to reinforce and ensure application of the highest standards of accountability and transparency, it would be useful to lay down in the Telecom Code the obligation to publish all INT's decisions, the obligation and procedures governing public consultations, and the obligation to adopt reasoned decisions, especially to take account of responses to the public consultations.

⁵³ Decree law N 2011-41 of May 26th, 2011, concerning the access to the administrative documents of the public organism. <http://www.uma.rnu.tn/image.php?id=130>.

3.6 Decision making powers, enforcement and judicial review

The effectiveness of a regulatory authority intervention is strongly dependent, on one hand, on the powers it has been conferred with, i.e. what kind of actions it can actually take in the markets, and, on the other hand, on its capability to enforce such decisions once they have been taken. Any safeguard regarding the regulator's independence would be without real effect if its area of intervention or its capacity to make the regulated entities comply with its decisions is restricted. Therefore, ensuring independence requires that a clear and sufficient set of regulatory powers are assigned to the regulator, which includes the power to sanction infringements of its decisions. The EU Regulatory Framework is unambiguous to this regard: "Member States shall lay down rules on penalties applicable, to infringements of national provisions adopted pursuant to this Directive and the Specific Directives and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be appropriate, effective, proportionate and dissuasive." (Art 21a, Framework Directive).

In this point, it should be recalled, as described in the section regarding accountability, that the concession to the NRA of independence in the exercise of its powers goes hand in hand with the counterpart obligation to remain transparent and accountable, this latter concept related not only with the reporting obligations (to Parliament, stakeholders, etc) but also to the judicial review of the NRA's decisions.

The judicial review of decisions can have an important impact on the enforcement of the measures. In particular, appeals can condition the entry into force of the adopted measures – they can significantly delay their implementation in cases of suspension of their effects – but can also have an impact in terms of the content of the decision itself, in case the appeal body (e.g. a Court) has the power not only to overturn the decision but also to modify it.

In the EU, where the right of appeal is a basic element of the Regulatory Framework, safeguards have been included in order to ensure that enforcement of the NRAs decisions is not undermined by the automatic suspension of their effects by the appeal body. In cases of automatic suspension, appeals could be used by the regulated entities to delay execution of the NRA decisions:

"Pending the outcome of the appeal, the decision of the national regulatory authority shall stand, unless interim measures are granted in accordance with national law." (Art 4, FD 2009).

"Interim measures suspending the effect of the decision of a national regulatory authority should be granted only in urgent cases in order to prevent serious and irreparable damage to the party applying for those measures and if the balance of interests so requires." (Recital 14)

In order to investigate all these issues for INT, the questionnaire included questions on whether INT decision making powers are defined in law and questions intended to examine the enforcement system, in particular, the sanctioning framework. The appeals procedure was also

addressed, with a focus on the practice governing suspension of the NRA decisions in case of appeal.

3.6.1 Literature review

The enforcement power of a NRA is a very important criterion to measure its independence, as it is clearly stated by all reports discussing this topic: “The imposition of regulatory obligations on businesses is commonly implemented through [...] inspections or investigations, warnings, directions or penalties [...]”⁵⁴.

“The range of enforcement powers given to a regulator dictates whether it can act independently or whether it needs to go to courts or another entity to enforce compliance with the rules. [...] Regulators need to be able to impose a wide range of enforcement powers, with deterrent sanctions as an ultimate recourse, to ensure that its regulations are respected and its decisions are enforced. [...] Regulator has a range of proportional enforcement powers, ranging from warnings, through the ability to impose deterrent fines, to the suspension and revocation of licences, bearing in mind that this is an extreme sanction, to be used sparingly. Regulatory theory indicates that only a range of sanctions provides for a strong position in the interaction between regulators and regulates. A less optimal solution is where the regulator only has the power to impose deterrent fines, with no possibility to suspend or revoke a licence”⁵⁵.

3.6.2 The situation of INT

The functions and powers of INT are primarily laid down in the Telecom Code, in particular in its Art 63, which lists detailed tasks such as determination of costs for the calculation of the interconnection tariffs or management of the numbering national plan amongst the INT responsibilities. The Telecom Code provides INT with a power to issue regulatory decisions on the areas of its competence but also with a power of inspection and investigation (art 66), of dispute resolution (art 67) and of sanctioning (art 74).

In addition to the Telecom Code, the Decree 2014-53⁵⁶ on the conditions of provision of networks, provides INT with additional functions related to market analysis, specifically the competence to define markets, to designate operators with significant market power and to impose obligations on such operators.

Apart from the power to adopt administrative decisions, INT can equally adopt guidelines in order to orient the action of the agents in the sector.

⁵⁴ OECD, The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy, 2014, pagE. 27.

⁵⁵ INDIREG Final Report, Page. 376.

⁵⁶ Decree n°2014-53 of January 10th, 2014 modifying and completing the decree n°2008-3026 of September 15th, 2008 fixing the general conditions of exploitation of the public networks of telecommunications and networks access.

Regarding the INT enforcement powers, Art 67 of the Telecom Code – which lays down the procedure for dispute resolution –, also grants INT the general capability to initiate on its own initiative any investigation and to take action on the infringement of any legislative or normative provision in the telecom sector⁵⁷. On the other hand, Art 74 of the Telecom Code sets out the power and the procedure for the imposition of sanctions in case of infringement of the law. This article provides INT with the power to impose the end of the violation or to impose specific obligations. If the operator does not comply with the INT decision, a financial penalty may be levied with an upper limit of 3% of turnover over the previous year. In case the infringement poses a threat to the normal functioning of the telecommunication sector, INT may oblige the operator to put an end to its activities for a period not exceeding 3 months. Finally, INT can order the publication of the sanctioning decision to the affected operator in the newspaper decided by INT at the expenses of the operator.

Art 75 and 75 bis of the Telecom Code grant the right of appeal against INT decisions. In particular, Art 75 establishes that the decisions taken in the context of dispute resolution may be challenged in front of the Court of Appeal of Tunis. In this case, the decision will be automatically suspended unless the INT orders its immediate execution pursuant to Art 75 paragraph 2. On the other hand, Art 75bis sets out the right of appeal for any other decision taken by INT. Such decisions are considered of administrative nature and are therefore susceptible of being challenged in front of the Administrative Court. In this case, there will be no automatic suspension of the decision, the Court granting suspension on a case-by-case basis.

3.6.3 Conclusions and recommendations

The analysis carried out shows that the Telecom Code, in line with the EU and international practice, establishes a framework aimed at ensuring enforcement of INT decisions through the sanctioning procedure enshrined in Art 67 and 74.

However, the effectiveness of such a framework could be undermined if it is not adequately designed, providing the NRA with sufficient tools for the imposition of sanctions.

- Firstly, the Law provides the NRA with a very basic sanctioning scheme: it treats all breaches in the same way, lacking any criteria for the categorization of the infringements and any criteria for the determination of the amount of the sanction, which is fixed at an upper limit of 3% of the turnover. In many EU Countries, for example, the Law classifies the infringements as minor, serious and very serious infringement and the sanctions are varying according to the level of the breach.
- Secondly, the Law does not specify what happens in case of repeated breach (recidivism) or persistent breach. In several EU Countries, the Law would foresee strict sanctions for

⁵⁷ Paragraph art 67 2 Telecom Codes: " the National Authority of Telecommunications can (...) Seize automatically to rule on breaches of the legal and statutory measures in the field of telecommunications. "

these types of illegal practices, e.g. by doubling the initial fine in case the violation is repeated or by establishing periodic (daily, weekly...) penalty payment until the operator ceases the illegal behaviour.

- Finally, the Law does not foresee interim measures to be applied in case of urgent matters.

Therefore, it would be useful to complete the sanctioning regime of the Telecom Code by introducing the aforementioned aspects.

As regards the judicial review, the Telecom Code correctly grants the right of appeal to the parties affected by the INT decisions. Nevertheless the effectiveness of the appeal system might be jeopardized by the fact that the effects of some INT decisions (those related to dispute resolution procedures) are automatically suspended as soon as they are challenged by the operators. The operators, as a matter of fact, might be tempted to challenge the unfavourable INT decision merely in order to delay its execution. This is however a problem that can hardly be solved with a modification of the Telecom Code, since the automatic suspension applies to all procedures in front of the civil Court of Appeal.

RECOMMENDATIONS (ENFORCEMENT & JUDICIAL REVIEW)

Recommandation n°7

In order to increase INT authoritativeness and credibility the enforcement of INT decisions should be reinforced. To this aim, it is suggested to complete the sanctioning regime set out in the Telecom Code by introducing the following amendments:

- A set of criteria for the categorization of the infringements (e.g. minor, serious and very serious infringement)
- A set of criteria for the determination of the amount of the sanction, linked to the level of the breach (the more serious the infringement, the stricter the penalty).
- A provision addressing the case of repeated breach (recidivism), linking it to a stricter sanctioning regime.
- A provision addressing the case of persistent breach, establishing the possibility to impose periodic (daily, weekly...) penalty payments.
- A provision introducing interim measures to be applied in case of urgent matters.

4. Conclusions and recommendations (summary)

1. The Tunisian Telecom Code should explicitly prescribe the independence of INT vis-à-vis market players and political influence.
2. A number of measures could be introduced in order to strengthen the INT Board Members appointment procedure:
 - a. extending the requirement of having a recognized competence in the technical, economic or legal domain in the telecommunication sector to the President and all Members of the INT Board
 - b. providing the Parliament with a role in the selection of the candidates (hearings, veto power, etc)
3. The Telecom Code should specify a closed list of grounds for dismissal of the President and Board Members. Removal from office should only occur when the President of the Board Members no longer fulfil the conditions required for the performance of their duties, as laid down in the Telecom Law. These could include:
 - a. Resignation accepted by the Government
 - b. Expiry of the term of office
 - c. A situation of incompatibility
 - d. Having been convicted of a felony
 - e. Permanent disability
 - f. Serious breach of the duties of his office or breach of duty on incompatibilities, conflicts of interest or the duty of confidentiality
4. INT should have adequate and appropriately qualified human resources to carry out its functions effectively. The Telecoms Code should include a specific provision laying down this principle.
5. The Law should be amended with a view to vest INT with the necessary autonomy to fix the remuneration regime of its staff. Salaries should be set at a level which is competitive compared to the private sector, in order to ensure INT's ability to recruit and retain highly qualified human resources.
6. In order to reinforce and ensure application of the highest standards of accountability and transparency, it would be useful to lay down in the Telecom Code the obligation to publish all INT's decisions, the obligation and procedures governing public consultations, and the obligation to adopt reasoned decisions, especially to take account of responses to the public consultations.
7. In order to increase INT authoritativeness and credibility the enforcement of INT decisions should be reinforced. To this aim, it is suggested to complete the sanctioning regime set out in the Telecom Code by introducing the following amendments:
 - a. A set of criteria for the categorization of the infringements (e.g. minor, serious and very serious infringement)
 - b. A set of criteria for the determination of the amount of the sanction, linked to the level of the breach (the more serious the infringement, the stricter the penalty).
 - c. A provision addressing the case of repeated breach (recidivism), linking it to a stricter sanctioning regime.

- d. A provision addressing the case of persistent breach, establishing the possibility to impose periodic (daily, weekly...) penalty payments.
- e. A provision introducing interim measures to be applied in case of urgent matters.

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