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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

TUNISIA

URGENT OPINION

ON

**THE CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK
ON THE REFERENDUM AND ELECTIONS
ANNOUNCEMENTS BY THE PRESIDENT OF THE REPUBLIC,
AND IN PARTICULAR ON THE DECREE-LAW N°22 OF 21 APRIL 2022
AMENDING AND COMPLETING THE ORGANIC LAW
ON THE INDEPENDENT HIGH AUTHORITY FOR ELECTIONS (ISIE)**

*Issued on 27 May 2022 pursuant to Article 14a
of the Venice Commission's Rules of Procedure*

on the basis of comments by

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I. Introduction

1. On 27 April 2022, the European External Action Service (EEAS) through the European Union Delegation in Tunisia requested an urgent opinion from the Venice Commission on the constitutional and legislative framework concerning the referendum and elections announced by the President of the Republic Kaïs Saïed, and in particular on Decree-Law No. 2022-22 amending and supplementing Organic Law No. 23 on the Independent High Authority for Elections (hereinafter ISIE), promulgated by the President on 21 April 2022 (see CDL-REF(2022)018 and CDL-REF(2022)019).

2. On 28 April 2022, the Bureau of the Venice Commission authorised the preparation of an opinion on this issue, on account of the fact that the Independent High Authority for Elections is responsible for preparing a constitutional referendum in a very short time (less than three months at the time of the request).

3. Mr Cesare Pinelli (substitute member, Italy), Mr Jean-Claude Scholsem (substitute member, Belgium) and Mr François Seners (substitute member, France) were appointed as rapporteurs.

4. Due to time constraints, it was not possible to travel to Tunis. On 10, 11 and 12 May 2022, the rapporteurs and Ms Simona Granata-Menghini, Director, Secretary of the Venice Commission, held online meetings with the former President of the ISIE, representatives of the political parties and alliances Afek Tounes, National Salvation Front, Democratic Current, Ennahda and Movement for Democracy, an independent member of parliament, representatives of the legal community, including Mr Mohamed Salah Ben Aissa, former Dean of the Faculty of Legal, Political and Social Sciences of Tunis, former Minister of Justice, Emeritus Professor of Public Law and Mr Amin Mahfoudh, Professor of Public Law, and representatives of Tunisian civil society. The Commission is grateful to the Council of Europe Office in Tunis for the excellent organisation of these meetings and to all these interlocutors for their availability. On 19 May 2022, the draft urgent opinion was transmitted for comments to the Tunisian Minister of Foreign Affairs, Migration and Tunisians Abroad, in accordance with the protocol on the preparation of urgent opinions of the Venice Commission. The Tunisian authorities were invited to submit their comments on the draft opinion by 23 May 2022. At the request of the Tunisian authorities, on 23 May 2022, the rapporteurs and Ms Granata-Menghini held an online exchange of views with Mr Sadok Belaïd, Coordinating President of the "National Consultative Instance for the New Republic", established by Decree-Law No. 2022-30 of 19 May 2022. On 21 May, the Tunisian authorities requested an extension of the deadline for the submission of their observations to 24 May at noon, then a further extension of the deadline to 24 May in the evening and finally to 26 May 2022. These extensions were granted. The Minister of Foreign Affairs, Migration and Tunisians Abroad submitted his comments on 26 May 2022.

5. This urgent opinion has been drafted on the basis of the rapporteurs' comments and the results of the online meetings, as well as the written observations of the Minister of Foreign Affairs, Migration and Tunisians Abroad. It has been issued in accordance with the Venice Commission's protocol on the preparation of urgent opinions (CDL-AD(2018)019) on 27 May 2022 and will be presented to the Venice Commission for endorsement at its 131^e plenary session (Venice, 17-18 June 2022).

II. The scope of the present Opinion

6. This Opinion deals with the constitutional and legislative framework concerning the referendum and elections announced by President of the Republic Kaïs Saïed, and in particular with Decree-Law No. 2022-22 amending and supplementing Organic Law No. 2012-23 on the Independent High Authority for Elections (hereinafter: ISIE), promulgated by the President on 21 April 2022.

7. This Opinion does not directly concern the other presidential decrees and decree-laws adopted by the President of the Republic as of 26 July 2021, in particular presidential decrees No. 2021-69 of 26 July 2021, No. 2021-80 of 29 July 2021, No. 2021-109 of 24 August 2021, No. 2021-117 of 22 September 2021 and decree-law No. 2022-11 of 12 February 2022. The Venice Commission expressly reserves its position on the compatibility of these decrees with international standards and with the Tunisian constitution (in the absence of a constitutional court).

III. Context

8. A state of emergency was declared in Tunisia on 24 June 2021¹ due to the pandemic and was extended on 23 July until 19 January 2022.² It has subsequently been extended to 18 February 2022, then to 31 December 2022.

9. On 26 July 2021, invoking "the Constitution, in particular Article 80",³ the President of the Republic of Tunisia adopted a presidential decree suspending the functions of the Head of Government and members of the Government;⁴ on 29 July 2021, he adopted a decree-law on the suspension of the powers of the Assembly of People's Representatives (hereinafter RPA) "for a period of one month from 25 July 2021" ;⁵ on 24 August 2021, he adopted the decree-law on the extension of the exceptional measures relating to the suspension of the powers of the Assembly of People's Representatives "until further notice".⁶

10. On 26 August 2021, the President of the Venice Commission made a public statement on the state of emergency in Tunisia,⁷ expressing concern about the concentration of powers in the hands of the President of the Republic, expressing the conviction that a solution "can - and must - be found within the democratic parameters set by the Tunisian Constitution" and offering the assistance of the Venice Commission.

¹ [Décret présidentiel n° 2021-59 du 24 juin 2021, portant déclaration de l'état d'urgence | DCAF Tunisie \(legislation-secureite.tn\)](#)

² [Décret présidentiel n° 2021-67 du 23 juillet 2021, portant prorogation de l'état d'urgence | DCAF Tunisie \(legislation-secureite.tn\)](#)

³ Article 80 of the Constitution of Tunisia: "In the event of imminent danger threatening the national integrity, security or independence of the country and hindering the regular functioning of the public authorities, the President of the Republic may take the measures required by a state of emergency, after consultation with the Head of Government and the President of the Assembly of People's Representatives and after informing the President of the Constitutional Court. He shall announce these measures in a message to the people.

The aim of these measures must be to guarantee, as soon as possible, a return to the regular functioning of the public authorities. During this period, the Assembly of People's Representatives is considered to be in permanent session. In this situation, the President of the Republic may not dissolve the Assembly of People's Representatives and no motion of censure may be presented against the Government.

Thirty days after the entry into force of these measures, and at any time thereafter, the matter may be referred to the Constitutional Court, at the request of the President of the Assembly of People's Representatives or of thirty of its members, to rule on the maintenance of the state of emergency. The Court shall give its decision in a public hearing within a period not exceeding fifteen days.

These measures shall cease as soon as the reasons for them cease. The President of the Republic shall address a message to the people in this regard.

⁴ [Décret présidentiel n° 2021-69 du 26 juillet 2021, portant cessation de fonctions du Chef du Gouvernement et de membres du Gouvernement | DCAF Tunisie \(legislation-secureite.tn\)](#)

⁵ [Décret présidentiel n° 2021-80 du 29 juillet 2021, relatif à la suspension des compétences de l'Assemblée des représentants du peuple | DCAF Tunisie \(legislation-secureite.tn\)](#)

⁶ [Décret Présidentiel n° 2021-109 du 24 août 2021, relatif à la prorogation des mesures exceptionnelles relatives à la suspension des compétences de l'Assemblée des représentants du peuple. | DCAF Tunisie \(legislation-secureite.tn\)](#)

⁷ [Venice Commission :: Council of Europe \(coe.int\)](#).

11. On 22 September 2021, the President issued Presidential Decree No. 2021-117 on exceptional measures.⁸ This Presidential Decree describes the organisation of powers during the state of emergency. It states that "The powers of the Assembly of People's Representatives remain suspended". "Legislative texts are taken in the form of a decree-law, they are promulgated by the President of the Republic who orders their publication in the Official Gazette of the Tunisian Republic, after deliberation by the Council of Ministers"; "Executive power is exercised by the President of the Republic assisted by a Government led by a Head of Government" who, like the ministers and secretaries of state, is appointed by the President of the Republic; "The President of the Republic represents the State and directs its general policy and fundamental choices"; he "presides over the Council of Ministers"; he "sees to the execution of the laws, exercises general regulatory power"; he "exercises in particular the following functions ensuring the high command of the armed forces, declaring war and concluding peace after deliberation by the Council of Ministers, the creation, modification and abolition of ministries and secretariats of state, the determination of their competences and attributions, the creation, modification or abolition of public establishments and public enterprises and administrative services, as well as the determination of their competences and attributions, the termination of the functions of one or more members of the Government or the examination of their resignation, the accreditation of State diplomats abroad and the acceptance of the accreditation of representatives of foreign States, the appointment to senior posts and their termination, the ratification of treaties, the granting of pardons"; he "may submit to a referendum any draft decree-law".

12. Article 4, 2^e sentence of Decree No. 2021-117 states that 'When issuing decree-laws, the achievements in terms of human rights and freedoms guaranteed by the national and international legal system may not be undermined'. Under the Tunisian Constitution, international treaties take precedence over laws (and therefore decree-laws), while being inferior to the Constitution (Article 20 of the Constitution).

13. Article 5 of Presidential Decree No. 2021-117 specifies that decree-laws may be issued in the following areas:

- the approval of treaties,
- the organisation of justice and the judiciary,
- the organisation of information, press and publishing,
- the organisation of political parties, trade unions, associations, organisations and professional bodies and their financing,
- the organisation of the National Army,
- the organisation of the internal security forces and customs,
- the electoral law,
- freedoms and human rights,
- personal status,
- the general arrangements for implementing the Constitution,
- the fundamental duties of citizenship,
- local power,
- the organisation of constitutional bodies,
- the organic law of the budget,
- the creation of categories of public institutions and public enterprises,
- nationality,
- civil and commercial obligations,
- the procedures before the different categories of courts,
- the determination of crimes and misdemeanours and the penalties applicable to them, as well as offences punishable by a custodial sentence,
- the general amnesty,

⁸ [Décret Présidentiel n° 2021-117 du 22 septembre 2021, relatif aux mesures exceptionnelles | DCAF Tunisie \(legislation-securite.tn\)](https://www.legislation-securite.tn)

the determination of the basis of assessment of taxes and contributions, their rates and the procedures for their collection,
 the currency issuing regime,
 borrowing and financial commitments of the State,
 the determination of senior jobs,
 the declaration of assets,
 the fundamental guarantees granted to civil and military servants,
 the treaty ratification regime,
 the laws of finance, budget settlement and approval of development plans,
 the fundamental principles of property and real rights, education, scientific research, culture, public health, the environment, town and country planning, energy, labour law and social security.

14. Article 7 of this decree states that "Decree-laws are not subject to appeal for annulment". In the final provisions, Article 20 of the same decree states that "The preamble of the Constitution, its first and second chapters and all constitutional provisions that are not contrary to the provisions of this Presidential Decree shall continue to be applied". Article 21 abolishes the Interim Constitutional Review Body. Article 22 empowers the President of the Republic to draw up draft revisions relating to political reforms with the assistance of a commission whose organisation is determined by Presidential decree. These draft revisions are submitted by the President of the Republic to a referendum for approval.

15. On 13 December 2021, the President announced a roadmap, including the continued freezing of the Assembly of People's Representatives until early parliamentary elections are held on 17 December 2022, and the submission of the draft revision of the Constitution (based on a national consultation and proposals of a commission) to a referendum on 25 July 2022. This announcement was formalised by Presidential Decree No. 506-2022 of 25 May 2022 convening the electorate on 25 July 2022 for the referendum on the draft new constitution.

16. On 30 March 2022, the President dissolved the Assembly of People's Representatives.

17. From 30 March to 1st April 2022, the President of the Venice Commission visited Tunis to meet the President of the Republic and representatives of the Tunisian authorities, civil society and the international community. In her meeting with the President on 1^{er} April 2022 on the modalities of the return to constitutional rule and the preparation of the reform of the constitution, the referendum announced for 25 July 2022 and the elections scheduled for 17 December 2022, Ms Bazy Malaurie reaffirmed that the Venice Commission is ready to put its expertise at the service of the Tunisian people and to support the implementation of democratic reforms in the respect of the rule of law and human rights.⁹ The readiness of the Venice Commission to work, in particular, on a possible revision of the electoral legislation was reiterated in a letter she sent to the President of the Republic on 11 April 2022.

IV. Decree-Law No. 2022-22 of 21 April 2022 "amending and supplementing certain provisions of Organic Law No. 2012-23 of 20 December 2012 establishing the Independent High Authority for Elections".

18. Decree-Law No. 2022-22 makes very significant changes to the legal regime of the ISIE. According to the new Article 5:

"The Council of the Independent High Authority for Elections is composed of seven members appointed by presidential decree and chosen as follows

- *Three members chosen by the President of the Republic from among the members of the previous independent higher bodies for elections.*
- *One judicial magistrate with at least ten years of effective seniority, from among three magistrates proposed by the Judicial Council.*

⁹ [Venice Commission: Council of Europe \(coe.int\)](https://www.coe.int/).

- *One administrative magistrate with at least ten years of effective seniority, from among three judges proposed by the Council for the Administrative Judiciary.*
- *One financial magistrate with at least ten years' effective seniority, from among three judges proposed by the Financial Magistrates' Council.*
- *One specialist engineer in the field of information systems and computer security, with at least ten years' effective seniority, from among three specialist engineers proposed by the Centre national de l'informatique.*

Members holding these positions are considered to have never left their posts.

Nominations are submitted by the relevant bodies to the President of the Republic.

19. Decree-Law 2022-22 no longer refers to Article 80 of the Constitution specifically and refers to Article 5 of Presidential Decree 2021-117 (which sets out the areas in which the President may issue decree-laws, including 'the electoral law' and 'the organisation of constitutional bodies').¹⁰

20. Decree-Law 2022-22 thus removes the power to elect the members of the ISIE Council from the Assembly of People's Representatives (Article 6 of Organic Law 2012-23 on the Independent High Authority for Elections, amended by the decree-law), and confers the power of appointment to the President of the Republic. Furthermore, according to Article 15 amended by the decree-law (new paragraph 2), the members of the Council can be dismissed by the President of the Republic "on the proposal of the president of the body or of at least five members on the basis of a reasoned report and after respecting the rights of defence of the person concerned." Article 15 of the organic law provided, on the other hand, that "The request for dismissal is presented by at least half of the members of the Council of the Authority. It shall be submitted to the plenary legislative assembly for approval by an absolute majority of its members.

21. The immunity regime of the President of the ISIE and the members of its Council has been modified, since the lifting of functional immunity - which was previously the competence of "the legislative assembly in plenary session by an absolute majority of its members"¹¹ - is now the responsibility of the Council of the Authority by a majority of its members.¹²

22. Article 4 extends the powers of the ISIE to referendums:

The words "and declarations of participation in the referendum campaign" are added after the words "for elections" in subparagraph 6 and the words "and referendum campaigns" are added after the words "election campaigns" mentioned in subparagraph 14 of Article 3 of the aforementioned Organic Law No. 2012-23 of 20 December 2012.

23. All references that the previous legislation made to the Assembly of People's Representatives are now made to the President of the Republic. Indeed, the annual reports on the activity and action programme of the ISIE are no longer submitted to the Legislative Assembly, but to the President (new Art. 18.3). The President of the Republic now approves the annual budget (new Art. 20) and the annual financial account of the ISIE (new Art. 30).

24. Finally, the Decree-Law significantly strengthens the powers and authority of the president of the ISIE, who is now directly appointed by the President of the Republic (whereas under Article 6 of the organic law, he was elected by the Assembly of People's Representatives by an absolute majority in the first round and by a simple majority in the second round). The vice-president of the Authority, who was elected by the members of the body by consensus or by absolute majority (Article 8 of the organic law), is now chosen by the president of the ISIE without taking into account the opinion of the Council (new Article 8 on the "substitute" of the president). The

¹⁰ See, on the other hand, Article 70 of the Constitution which, in the event of the dissolution of the Assembly of People's Representatives, authorises the President of the Republic to issue decree-laws, but which excludes the electoral regime from the domain of decree-laws.

¹¹ Former Article 14 of the Organic Law.

¹² New Article 14.

President of the ISIE will control the executive body of the ISIE - the executive secretariat - by appointing the executive director who plays a decisive role in the organisation of elections. Whereas this responsibility was previously assigned to the Board of Directors, the Executive Director is now solely responsible to the President of the ISIE.

V. Analysis

A. Compatibility with the Constitution

25. The Venice Commission is not in principle competent to rule on the constitutionality of laws or decree laws in lieu of a constitutional court. In Tunisia, however, the constitutional court has never been established, despite the existence of an express constitutional provision¹³. Article 21 of Presidential Decree No. 2021-117 abolished the Interim Constitutional Review Body. Moreover, according to Article 7 of Presidential Decree No. 2021-117, decree-laws are not subject to appeal for annulment before the administrative courts. It follows that no Tunisian court is empowered to rule on the constitutionality of the changes made to the ISIE regime by Decree-Law No. 2022-22, or to annul them. In these circumstances, the Venice Commission considers that if it analyses the compatibility of Decree-Law No. 2022-22 with the Constitution and the Tunisian normative framework, it does not impinge on the competence of the Constitutional Court or the Tunisian courts. Moreover, the Venice Commission's opinions are not binding.

26. At the same time, since Presidential Decree No. 2021-117 of 22 September 2021 the 2014 Constitution has been partially "suspended", without the provisions still in force being clearly identified and in advance (see paragraph 14). A new decree-law could intervene at any time and announce a subsequent change in the constitutional and legislative framework. Furthermore, a constitutional reform is pending, as a result of an extra-constitutional procedure, taken in the framework of a state of exception, the scope and content of which are unknown; a referendum is imminent, while the text which will be submitted to it is not available. The Venice Commission expressly reserves its position on the compatibility of this situation with the principles of democracy, rule of law and respect for human rights.

27. Article 125 of the Constitution states that:

"Independent constitutional bodies work to strengthen democracy. All state institutions must facilitate the fulfilment of their tasks.

These bodies have legal personality and administrative and financial autonomy. They are elected by the Assembly of People's Representatives by a qualified majority and they submit an annual report to the Assembly, which is discussed for each body in a plenary session set up for this purpose.

The law shall determine the composition of these bodies, the representation within them, the procedures for their election, their organisation, as well as the procedures for calling them to account.

28. According to Article 126:

"The elections authority, called "Independent High Authority for Elections", is responsible for the administration of elections and referendums, their organisation and supervision during their different phases. It ensures the regularity, sincerity and transparency of the electoral process and proclaims the results.

The Authority has regulatory powers in its field of competence.

¹³ Articles 118-124 and Article 148.2.5 of the Constitution (which set the deadline for the establishment of the constitutional court at one year from the date of the first parliamentary elections after the adoption of the Constitution). See in this respect the statement of the President of the Venice Commission of 14 November 2018 "the constitutional court must be established without delay": [Venice Commission :: Council of Europe \(coe.int\)](https://www.venicecommission.org/en/press-releases/2018/11/14-the-constitutional-court-must-be-established-without-delay)

The Authority is composed of nine independent, neutral members, chosen from among persons of competence and integrity, who carry out their duties for a single term of six years. One third of its members are renewed every two years.

29. Decree-Law 2022-22 violates the very letter of Articles 125 and 126 of the Constitution. First, it amends Article 126 of the Constitution, reducing the number of ISIE members, reducing their term of office to four years and abolishing the renewal by thirds. Furthermore, the provision that the members of the ISIE Council are appointed by the President of the Republic instead of the Assembly of People's Representatives is a clear violation of Article 125. Moreover, in a situation where the Parliament is dissolved and a single institution, the President of the Republic, monopolises political power, the qualification of these members as "independent" and "neutral" required by Article 126 is not respected. It should be stressed that no state institution will have the power to challenge the work of the ISIE, nor the decisions of the Authority or its President.

30. Furthermore, Decree-Law No. 2022-22 does not establish a transitional regime, as the mandate of the new ISIE is not intended to end with the end of the state of emergency.¹⁴

31. The amendments made by Decree-Law No. 2022-22 therefore significantly undermine the independence of the ISIE, without prejudice to the personal qualities of the newly appointed members, who, according to the observations of the Minister of Foreign Affairs, Migration and Tunisians Abroad, are "competent persons, recognised for their probity, with experience in organising elections and, moreover, not subject to suspicion of corruption or legal proceedings".¹⁵

32. The objection could be raised that the question of the compatibility of Decree-Law No. 2022-22 with Articles 125 and 126 of the Constitution is irrelevant, as these constitutional provisions were suspended by Presidential Decree No. 2021-117 of 22 September 2021, on exceptional measures. Even assuming that a decree-law can legitimately suspend the Constitution or amend it on the basis of its Article 80, in the Commission's view this objection is unfounded.

33. Indeed, Article 22 of Presidential Decree 2021-117 states:

"The President of the Republic shall draw up the draft revisions relating to political reforms with the assistance of a commission whose organisation shall be determined by Presidential decree.

The purpose of these draft revisions must be the establishment of a genuine democratic regime in which the people are effectively the holders of sovereignty and the source of powers, exercising them through elected representatives or by referendum.

This regime is based on the separation of powers and the real balance between them, it enshrines the rule of law and guarantees public and individual rights and freedoms and the achievement of the objectives of the 17 December 2010 revolution relating to work, freedom and national dignity.

These draft revisions shall be submitted by the President of the Republic to a referendum for approval."

34. There can be no doubt that a regime based on 'the separation of powers and the real balance between them', and which 'enshrines the rule of law and guarantees public and individual rights and freedoms', sets the conditions in Articles 125 and 126 of the Constitution to guarantee the independence of an institution that is absolutely necessary for the proper functioning of a democracy, such as the Independent High Authority for Elections. If this is the case, if the applicability of Articles 125 and 126 cannot be doubted in the light of Presidential Decree No.

¹⁴ This is in contrast to the 'provisional' Superior Council of the Magistracy created by Decree-Law No. 2022-11, which is charged with exercising its functions until the establishment of a Superior Council of the Magistracy (Article 29).

¹⁵ The President of the Republic appointed the members of the new ISIE by Presidential Decree No. 2022-459 of 9 May 2022; they were sworn in on 11 May 2022.

2021-117, the provisions of Decree-Law No. 2022-22 granting the President of the Republic the power to appoint and dismiss the members of the ISIE should be deemed unconstitutional.

35. Furthermore, Article 20 of Presidential Decree No. 2021-117 upholds the application of the preamble of the Constitution, its first chapter (general principles), its second chapter (rights and freedoms) and all constitutional provisions that do not conflict with the decree-law in question. Even if these are only provisions of principle, it should be noted that the preamble refers to 'peaceful alternation of power through free elections' and that Article 34 guarantees 'the rights to elect, vote and stand for election'.¹⁶ In this respect, the reform of the Independent High Authority for Elections by Decree-Law 2022-22 raises objections in principle, since elections may no longer be 'free' as they lack an independent institution to judge them.

36. Article 4 of Presidential Decree 2021-117 states that 'in issuing these decree-laws, the achievements in terms of human rights and freedoms guaranteed by the national and international legal system may not be undermined'. The existence of an independent system guaranteeing the sincerity of political elections constitutes the guarantee of one of these freedoms.

37. This requirement is the main reason for the creation of the ISIE; it should be stressed in this respect that reforming it to make it subject to the presidential executive is an even more serious infringement than its abolition would have been, since it tends to maintain the fiction of an independent control that, in reality, no longer exists.

38. Finally, with regard to the permanent nature of the changes to the ISIE regime introduced by Decree-Law No. 2022-22, it must be stressed that these changes erase the role of parliament, even though Article 80 states that the objective of exceptional measures is to 'guarantee the regular functioning of the public authorities as soon as possible'. However, the exclusion of the Assembly of People's Representatives from the preparation of elections to the exclusive benefit of the President of the Republic does not re-establish the 'regular' functioning of state institutions under the terms of the Constitution. It is true that no one knows at this stage the content of the new Constitution that will be submitted to the referendum of 25 July 2022; one might expect it to be consistent with Decree-Law No. 2022-22 on this point. However, the reproduction of such an arrangement of competences in the new constitution would be problematic from the point of view of the balance of powers.

B. Compatibility with international standards

39. The Code of Good Practice in Electoral Matters, adopted by the Venice Commission in 2002 and endorsed by the Committee of Ministers, the Parliamentary Assembly and the Congress of Local and Regional Authorities of the Council of Europe, requires procedural guarantees for the organisation of the election by an impartial body: "only transparency, impartiality and independence from political manipulation will ensure the proper administration of the electoral process, from the period preceding the elections until the end of the processing of the results".¹⁷ While the Code of Good Conduct is not in itself binding on Tunisia, it reflects the standards of the common constitutional heritage.

40. The subordination of the ISIE to the executive branch jeopardises its independence and impartiality, which are the main requirements for the proper administration of elections imposed by the Code of Good Conduct. The powers now attributed to the President of the Republic can be used to control the composition and functioning of the election administration. In particular, it should be noted that with regard to the power to dismiss members of the Council, point 77 of the Code of Good Conduct states that dismissal for disciplinary reasons must be based on grounds

¹⁶ Article 34 of the Constitution.

¹⁷ [https://venice.coe.int/webforms/documents/?pdf=CDL-AD\(2002\)023rev2-cor-f](https://venice.coe.int/webforms/documents/?pdf=CDL-AD(2002)023rev2-cor-f) para. II.3.1.a. and para. 68.

"clearly and exhaustively specified in the law" and that "discretionary recall is unacceptable". The reasons for dismissal - gross negligence in fulfilling their obligations under this law, conviction by irrevocable judgement for an intentional offence or crime, or failure to meet any of the requirements for membership of the board of the Independent High Authority for Elections - have not been changed, which is positive. However, the Code of Good Conduct states that "*Members of electoral commissions should not be removable by the bodies that appointed them*", as this calls into question their independence. It is true that this is not a discretionary dismissal and that the proposal for dismissal must be submitted to the President of the Republic for decision "*on the basis of a reasoned report and after respecting the rights of defence of the person concerned*".¹⁸ However, the President has a decision-making power ("*The proposal of the Panel is submitted to President of the Republic to decide whether or not to dismiss*") and it should be recalled that presidential decrees are not subject to appeal. It should also be noted that a President of the Republic can be a member of a political party and a candidate in parliamentary elections, in addition to presidential elections (the mandate of the members of the new ISIE is four years, which covers the next parliamentary and presidential elections).

41. It should also be noted that the immunity of the President and of the members of the Council of the ISIE has been reinforced, since it can only be lifted by the Council itself. This creates a risk of impunity.

42. The Code of Good Practice prescribes that "*It is desirable that decisions be taken by a qualified majority (e.g. 2/3) so as to encourage debate between a majority and at least one or other party in the minority. The use of consensus is preferable*".¹⁹ However, Decree-Law 2022-22 changes the majority required for decision-making: according to the former Article 18 of the Organic Law, "*the decisions of the Council of the Authority are taken by an absolute majority of its members*". The new text of Article 18 now provides that "*The Council of the Authority shall take its decisions by a majority of the members present and in the event of a tie, the chairman shall have the casting vote. The quorum for the validity of the meetings of the Council of the Authority - which was two-thirds of the members - has also been changed: now 'at least five members must be present. In the absence of a quorum, a second meeting is held after twenty-four (24) hours, regardless of the number of members present. The three members directly appointed by the President of the Republic can alone take decisions, and in the event of a tie, the vote of the President of the body, also chosen by the President of the Republic, prevails. These changes are also not in line with the Code of Good Conduct. This applies to both elections and referendums*".²⁰

43. The Code of Good Conduct states that "*b. The basic elements of electoral law, and in particular the electoral system itself, the composition of electoral commissions and the delimitation of constituencies, should not be subject to change less than one year before an election, or should be dealt with at the constitutional level or at a level higher than ordinary law*".²¹ These principles have been repeated and developed in an interpretative statement²² and also apply to referendums.²³

44. The Explanatory Report states that "*electoral law must have a certain stability so that it does not appear to be subject to partisan manipulation*" (paragraph 58). "*Stability of the law is an important element of the credibility of the electoral process, which is itself essential for the consolidation of democracy. Indeed, if the rules change frequently, the voter may be confused and not understand them, especially if they are complex; above all, he or she may consider, rightly or wrongly, that electoral law is an instrument that those in power manipulate in their*

¹⁸ Article 15 (paragraph 2 new) of Decree-Law No. 2022-22.

¹⁹ Para. 80.

²⁰ Venice Commission, Revised Guidelines on the Conduct of Referendums, [CDL-AD\(2020\)031](#), II.3

²¹ Par. II.2.b.

²² Venice Commission, Interpretative statement on the stability of electoral law; [CDL-AD\(2005\)043](#).

²³ Venice Commission, Revised Guidelines on the Conduct of Referendums, [CDL-AD\(2020\)031](#), II.3.

favour, and that the voter's vote is therefore not the element that decides the outcome of the ballot" (para. 63). "The need to guarantee stability does not, in practice, concern so much the fundamental principles, whose formal questioning is difficult to envisage, as certain more specific rules of electoral law, in particular the electoral system itself, the composition of electoral commissions and the division of constituencies. These three elements often appear - rightly or wrongly - to be decisive for the outcome of the election, and it is necessary to avoid not only manipulation in favour of the party in power, but also the very appearance of manipulation" (para. 64). "What is to be avoided is not so much the modification of the voting system, for it can always be improved, but its repeated revision or revision shortly before the election (less than a year). Even if there is no intention to manipulate, it will appear to be linked to short-term partisan interests" (para. 65).

45. The explanatory report further states that *"One way to avoid manipulation is to define in the Constitution or in a text superior to the ordinary law the most sensitive elements (electoral system itself, composition of electoral commissions, constituencies or rules on the division of constituencies). Another, less rigid, solution is to provide in the Constitution that, in the event of a change in the electoral law, the old system will continue to apply to the next election - at least if it takes place in the coming year - and that the new system will only apply to subsequent elections. (para. 66). "For the rest, electoral law should in principle have legislative rank. Implementing rules, including technical and detailed rules, may nevertheless be of a regulatory nature" (para. 67).*²⁴

46. The reason for these recommendations is that constitutional amendment and the adoption of organic or constitutional laws require a higher majority than the adoption of ordinary laws, and that a broad consensus can legitimise changes close to an election deadline. It is only the more technical and detailed amendments that can be adopted by the executive, and are not subject to the one-year deadline before the elections. Decree-Law No. 2022-22 was not subject to any consultation with Tunisia's political forces and is far from being purely technical.

47. It must therefore be concluded that the Decree-Law falls short of the conditions set by the Code to consider an Electoral Commission as "impartial" and "independent" and that the manner and timing of the adoption of Decree-Law No. 2022-22 do not comply with international standards.

48. This does not mean that reform of the ISIE regime is not necessary, nor desirable. The Minister of Foreign Affairs, Migration and Tunisians Abroad stressed in his observations that "the reform of the ISIE is primarily a response to the need to improve its functioning while avoiding the overbidding to which it has been subjected on several occasions and remedying its weaknesses, in particular the absence of a system of sanctions for electoral offences". The Venice Commission stresses that such changes should be adopted by the Parliament through an inclusive procedure, after the 2022 parliamentary elections.

49. Moreover, it can be noted (beyond the disregard of the recommendations of the code of good electoral conduct on the stability of electoral rules in the year preceding an election) that strengthening the powers of the ISIE to control referendum operations (by Article 4 of the decree amending Article 3 of Organic Law No. 2012-23 of 20 December 2012) will present logistical problems for this body, as these new members will have a very short time to train in the exercise of these powers and to effectively exercise them. The Tunisian authorities argue in this respect that "the majority of the new members already have a wealth of experience in organising elections, having previously been members of the ISIE".

²⁴ For referendums, see Venice Commission, Revised Guidelines on the Conduct of Referendums, [CDL-AD\(2020\)031](#), II.3.a.

50. It should be noted that no referendum has been held since the 2014 Constitution, and that the legislation on referendums is deficient. In particular, it does not differentiate between a decision-making and a consultative referendum and does not specify a quorum for participation or approval.²⁵ In this respect, the Venice Commission said in its revised guidelines on the holding of referendums that

"[...]

*b. It is acceptable to impose a specific approval quorum or majority for referendums on matters of fundamental constitutional importance. [...]"*²⁶

In this case, a quorum for approval appears acceptable, and all the more desirable as the constitutional amendments to be submitted to the referendum will not have been prepared in a transparent and inclusive parliamentary procedure.

51. The current legislation provides that "the Instance shall endeavour to ensure equality between the parliamentary parties participating in the referendum in the use of the means of propaganda" (Article 117): as Parliament has been dissolved, the legislation should indicate how the ISIE should proceed.

52. By Decree-Law No. 2022-30 of 19 May 2022 "establishing the National Consultative Commission for a New Republic", this new body was created, which will be composed of the following 3 commissions:

- The Consultative Commission on Economic and Social Affairs, chaired by the President of the Bar Association, and composed of representatives of the Tunisian General Labour Union, the Tunisian Union of Industry, Trade and Handicrafts, the Tunisian General Union of Agriculture and Fishing, the National Union of Tunisian Women, and the Tunisian League for the Defence of Human Rights. This commission, "in the light of the Tunisian economic and social experience, presents its proposals on the aspirations of the Tunisian people, based on the will expressed on 17 December 2010 and confirmed in the national consultation." (Article 8 of the Decree-Law);
- The Consultative Commission on Legal Affairs, composed of the deans of the faculties of law, legal and political sciences and chaired by the oldest member. This commission 'shall draw up a draft constitution that meets the aspirations of the people and guarantees the principles of justice and freedom in a true democratic system' (Article 13 of the decree-law) and 'shall undertake to support the national achievements in the field of rights and freedoms, particularly those relating to the rights acquired by women, as well as the expectations of young people, and the anchoring of the rule of law and institutions, the establishment of a democratic regime granting the people sovereignty which they will exercise through their elected representatives or directly through referendums or popular petitions, and based on the principle of separation of powers and balance between them' (Article 14 of the Decree-Law).
- The National Dialogue Commission, composed of members of the two above-mentioned commissions and chaired by the coordinating president of the National Consultative Commission. This Commission, "in the light of the results of the work of the two consultative commissions, undertakes to synthesise the proposals submitted by each commission with a view to establishing a new republic embodying the legitimate aspirations expressed by the Tunisian people in the revolution of 17 December 2010 and confirmed in the national consultation" (Article 20 of the Decree-Law).

53. The final report of the National Dialogue Commission is to be submitted to the President of the Republic no later than 20 June 2022. On 19 May 2022, the President of the Republic

²⁵ Article 117 of the Organic Law No. 2014-16 of 26 May 2014, on Elections and Referendums (<https://legislation-securite.tn/law/44286>) only states that "The rule of the majority of votes cast is adopted for the proclamation of the results of the referendum."

²⁶ Venice Commission, Revised Guidelines on the conduct of referendums, III.7.a and b, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2020\)031-f](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)031-f)

appointed Dean Sadok Belaïd as the coordinating president of the National Consultative Body for the New Republic.

54. Decree-Law No. 2022-32 of 25 May 2022, on exceptional provisions for the referendum of 25 July 2022, provides that 'by exception to the provisions of Article 113 of the aforementioned Organic Law No. 2014-16 of 26 May 2014, the draft of the new constitution of the Tunisian Republic, which is the subject of this referendum, shall be published by presidential decree within the maximum time limit of 30 June 2022.²⁷ This decree-law also stipulates that "the provisions of Organic Law No. 2014-16 of 26 May 2014 on elections and the referendum shall apply to the referendum of 25 July 2022" (Article 2 of the Decree-Law). In this respect, the Venice Commission noted the deficiencies of the five provisions of this organic law concerning the referendum (see above).

55. Presidential Decree No. 2022-506 of 25 May 2022, calling for a referendum on the draft of the new constitution of the Tunisian Republic, stipulates that on 25 July 2022 voters will be called upon to answer 'yes' or 'no' to the following question: Do you agree with the draft of the new constitution of the Tunisian Republic?

56. The Venice Commission finds it extremely difficult to envisage that, in two months, a constitutional synthesis can be arrived at and offered to the people for approval (whereas the popular consultation carried out at the beginning of 2022 did not give rise to widespread popular support, as participation remained very limited) and, at the same time, the referendum can be organised. The Minister of Foreign Affairs, Migration and Tunisians Abroad argues in this respect that "the ISIE is currently in control of the timetable established by the President of the Republic and reserves the right to revise it if necessary". Nevertheless, the Venice Commission does not consider that such short deadlines for public discussion of a new constitution (less than one month between the publication of the draft new constitution and the referendum) can confer democratic legitimacy on the process.

57. There is also a risk that the referendum cannot be properly prepared and becomes a de facto plebiscite on the person of the President of the Republic (although some interlocutors ruled out this possibility). The Commission said again recently that "*constitutional amendment procedures allowing the adoption of constitutional amendments by referendum without prior parliamentary approval often seem problematic in practice*" because "*there is a significant risk, especially in new democracies, that referendums on constitutional amendment turn into plebiscites on the leadership of the country and that such referendums are used as a means of providing legitimacy to authoritarian tendencies*".²⁸ This only confirms problems that have been identified before: "*The Venice Commission has expressed recurrent concerns about a number of referendums held in member states, both about the procedure for initiating these referendums and about the nature of the proposed changes. On the procedural side, the Commission first argued that the referendum must respect the rule of law and, in particular, that it must comply with the whole legal order, especially the procedural rules for constitutional revision. It also warned against using a referendum to circumvent important constitutional guarantees, such as the need for a qualified majority in parliament. Regarding the nature of the proposed changes, the Commission was concerned that in most cases such referendums were aimed at a concentration of powers and a reduction of democratic control by parliament*"²⁹. "*The use of referendums should not be used to upset the balance of power, i.e. to be invoked by the President or the government to circumvent parliamentary amendment procedures*"³⁰. Therefore, "*when a text is put to the vote at the request*

²⁷ Article 113 of the organic law stipulates: "Voters are called to the referendum by presidential decree to which is annexed the draft text that will be submitted to the referendum. The decree and its annex shall be published in the Official Gazette of the Tunisian Republic.

²⁸ Venice Commission, Urgent interim opinion on constitutional reform in Belarus, CDL-AD(2022)008, para. 23.

²⁹ Venice Commission, Revised Guidelines on the Conduct of Referendums, para. 5.

³⁰ Revised Guidelines on the Conduct of Referendums, para. 9, and references.

... of an authority other than parliament, the latter must be able to give its opinion, of an advisory nature, on the text submitted to the vote".³¹

58. During the discussions with the rapporteurs, one interlocutor explained the need to introduce a new order in Tunisia through a constitutional break, given the impossibility of following the constitutional revision procedure provided for in the constitution,³² which would create the risk that the future constitutional court would annul the new text on the basis of the irregularity of its adoption, as in Ukraine in 2010.³³

C. The prospect of a return to normal functioning of the institutions

59. Decree-Law No. 2022-22 undermines the prospect of a return to normal functioning of the Tunisian political institutions. Indeed, the "exceptional measures" taken by the Tunisian president since the summer of 2021 (and, in particular, since Presidential Decree no. 2021-117 of 22 September 2021) were based, according to the official justification, on a state of political crisis calling for emergency measures, temporary and intended to allow a return to normal democratic play at the end of this "parenthesis". It should be recalled that under the terms of this decree of 22 September 2021, the emergency measures were to be aimed at redefining institutions guaranteeing "the establishment of a genuine democratic regime in which the people are effectively the holders of sovereignty and the source of powers, exercising them through elected representatives or by means of a referendum", and that this democratic regime was to be based "on the separation of powers and the real balance between them", enshrine the rule of law and guarantee "public and individual rights and freedoms" as well as "the achievement of the objectives of the 17 December 2010 revolution relating to work, freedom and national dignity".

60. This theory of political crisis justifying a state of emergency – assuming its pertinence - could possibly justify temporary exceptional measures such as the reinforcement of the prerogatives of the executive power and the obliteration of the Parliament. Even the dissolution of parliament (which took place last March) could, in this context, be seen as a measure that would eventually restore a renewed and re-legitimised democratic functioning. The approach adopted by the Tunisian President until the intervention of the Decree-Law of 21 April was open to criticism (as the successive statements of the Presidents of the Venice Commission have clearly underlined), but it could claim, at least in appearance, to be consistent with the fundamental principles of the rule of law: to ensure, by means of exceptional provisional measures made necessary by a serious crisis, the gradual return to democratic equilibrium.

61. This argument and this consistency are clearly challenged by Decree-Law No. 2022-22, which deprives the ISIE of its independence, and which is not an exceptional and temporary measure but a permanent one.

D. A possible way out of the crisis

62. In the opinion of the Venice Commission, Tunisia would have everything to gain from a different approach, which however could not be limited to the ISIE, but should be included in the reflection on the future of Tunisian democracy, in the light of the already mentioned provisions of the Presidential Decree No. 2021-117 concerning the need to respect the rule of law and the separation of powers.

³¹ Revised Guidelines on the Conduct of Referendums, III.6.

³² Chapter VIII, Articles 143 and 144

³³ On the Venice Commission's analysis of the decision of the Constitutional Court of Ukraine of 30 September 2010, see Venice Commission, Opinion on the constitutional situation in Ukraine, [https://venice.coe.int/webforms/documents/?pdf=CDL-AD\(2010\)044-f](https://venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)044-f).

63. The most important element for reflection concerns the Assembly of People's Representatives. The decision to hold parliamentary elections on 17 December 2022, i.e. about eight and a half months after the dissolution of the former Assembly and six months after the constitutional referendum, deserves special attention. The principle of continuity in the functioning of representative bodies, which is one of the most important principles of a constitutional democracy, has been violated. There is an urgent need to give the people a voice through parliamentary elections. Logic dictates that the parliamentary assembly should first be revived and its renewal planned as soon as possible. The Presidential Decree of 21 April should therefore be repealed.

64. In the opinion of the Venice Commission, if the electoral law is to be amended before the parliamentary elections, a broad consultation of political forces and civil society should be carried out in order to reach a consensus on the new electoral rules. The elections should be organised by the ISIE in its composition prior to Decree-Law No. 2022-22.

65. In his comments on this urgent opinion, the Minister of Foreign Affairs, Migration and Tunisians Abroad affirmed that "while reiterating his irreversible attachment to universally shared values, the constitutional system established since 2014 has been ill-suited to the national socio-political and economic realities and has led the country into a serious global crisis of governance". The Minister of Foreign Affairs, Migration and Tunisians Abroad stressed that it is up to Tunisian women and me "to decide their political future in full sovereignty". The Venice Commission fully recognises the sovereign right of the Tunisian people to reform or amend the 2014 Constitution. The Venice Commission has already stressed that it is not its role to take a position on the political choices inherent in any major constitutional revision. The mission of the Venice Commission is to examine the conformity of the contents and processes of constitutional reform with international standards and the values of democracy, the rule of law and respect for fundamental rights that its member states, including Tunisia, have committed themselves to respect. The Commission notes in this respect that the Minister of Foreign Affairs, Migration and Tunisians Abroad recalls that Tunisia "continues to reiterate its irreversible commitment to the universally shared values of free political participation, respect for fundamental freedoms and anchoring in the community of democracies". The Venice Commission welcomes this commitment.

66. The Minister also stressed that "a democratic transition remains a long process of deconstruction-construction, revision, adaptation and evolution in a difficult national context, but also in an even more difficult global reality today." The Venice Commission does not underestimate the difficulties of achieving any democratic transition, especially in difficult conditions such as those experienced by the country. Nor does it underestimate the extent of the political crisis that hit Tunisia before 25 July 2021, which was acknowledged by all interlocutors. Several of the Commission's member countries have been confronted with the need to adapt their constitutional and legal frameworks on several occasions, including in response to sometimes very deep political, economic and social crises. The Venice Commission has supported and accompanied these reforms, while recalling the need to respect the Constitution and international standards.

67. The Commission recalls in particular that "The provisions outlining the power to amend the Constitution are not a legal technicality but they may heavily influence or determine fundamental political processes. In addition to guaranteeing constitutional and political stability, provisions on qualified procedures for amending the constitution aim at securing broad consensus; this strengthens the legitimacy of the constitution and, thereby, of the political system as a whole. It is of utmost importance that these amendments are introduced in a manner that is in strict accordance with the provisions contained in the Constitution itself. Equally important, a wide acceptance of these amendments needs to be ensured."³⁴ The

³⁴ Venice Commission, Joint Opinion on the Draft Law "On Introduction of changes and Amendments to the Constitution" of the Kyrgyz Republic, CDL-AD(2015)014, § 23,

Commission can only underline, as it already did in the past, that the adoption of a new and good Constitution should be based on the widest consensus possible within society and that *"a wide and substantive debate involving the various political forces, non-government organisations and citizens associations, the academia and the media is an important prerequisite for adopting a sustainable text, acceptable for the whole of the society and in line with democratic standards. Too rigid time constraints should be avoided and the calendar of the adoption of the new Constitution should follow the progress made in its debate"*.³⁵ Furthermore, "transparency, openness and inclusiveness, adequate timeframe and conditions allowing pluralism of views and proper debate of controversial issues, are key requirements of a democratic Constitution-making process".³⁶

68. The newly elected Assembly could set about amending the Constitution, or preparing a new Constitution, through debates in which some of the elements prepared by the National Consultative Commission for a New Republic could be taken into account. This would be crowned by a referendum organised according to pre-determined rules, in accordance with international standards.

69. The Venice Commission is convinced that only a consensus among the political forces on possible new electoral rules to be applied to the parliamentary elections and the organisation of the elections by a truly independent body can justify a departure from the principle of stability of electoral law, and give legitimacy to the electoral process, in the hope that the candidates and citizens will accept the results of the elections. In this context, the Commission also stresses the importance of allowing international observation of these elections.

VI. Conclusions

70. The Venice Commission expressly reserves its position on the compatibility of all presidential decrees and decree-laws adopted by the President of the Republic as of 26 July 2021 with international standards and with the Constitution of Tunisia (in the absence of a constitutional court).

71. The purpose of this opinion is to express an opinion on Decree-Law No. 2022-22 in the light of the Constitution, the legal framework currently in force in Tunisia and international standards. The Venice Commission has reached the conclusion that Decree-Law No. 2022-22 is not compatible with the Constitution, Presidential Decree No. 2021-117 or international standards. It is therefore of the opinion that Decree-Law No. 2022-22 should be repealed.

72. The Commission is of the opinion - irrespective of the question whether it is legitimate to amend the Constitution outside the procedure foreseen by the Constitution which is still, at least partially, in force - that it is not realistic to plan to hold a constitutional referendum on 25 July 2022 in a credible and legitimate way, in the absence - two months before the planned date of the consultation - of clear rules, established well in advance, on the modalities and consequences of the holding of this referendum and especially in the absence of the text of the new Constitution which will be submitted to the referendum.

73. The Commission considers that before any constitutional referendum, legislative elections should be organised as soon as possible, in order to restore the existence of parliamentary power which has disappeared since the suspension and subsequent dissolution of the Assembly of People's Representatives. If the electoral law is to be amended before the parliamentary elections, a broad consultation of political forces and civil society should be conducted in order

³⁵ Venice Commission, Opinion on the draft new Icelandic Constitution, CDL-AD(2013)010, § 17.

³⁶ Venice Commission, Opinion on three legal issues arising in the drafting of the new Hungarian Constitution, CDL-AD(2011)001, § 18.

to reach a consensus on the new electoral rules. The elections should be organised by the ISIE in its composition prior to Decree-Law No. 2022-22.

74. The new Assembly of People's Representatives will, of course, be able to amend and improve the rules applicable to the ISIE and also the 2014 Constitution.

75. The Venice Commission is of the opinion that the repeal of Decree-Law No. 2022-22 is essential for the legitimacy and credibility of any electoral or referendum process.

76. If the President of the Republic does not agree to postpone the constitutional reform process, which seems to be the case, the Venice Commission considers that at the very least it would be necessary:

- to extend (as far as possible) the deadlines for the preparation of constitutional amendments and postpone the date of the referendum accordingly;
- to set up a commission truly representative of all political forces and of the whole of Tunisian society and to entrust it with the preparation and adoption of the text to be submitted to the referendum;
- clarify whether the referendum is decision-making or consultative, and what the consequences will be; in the Commission's view, it is necessary to provide expressly that in the event of the rejection of the new draft constitution, the 2014 Constitution will remain in force until it is amended by the newly elected Assembly of People's Representatives;
- to consider a threshold for approval of the referendum;
- to entrust the ISIE in its composition prior to the Decree-Law No.2022-22 to organise the referendum;
- to implement the conditions for the conduct of a referendum campaign which allows the free formation of the will of the voters (see revised guidelines on the conduct of referendums);
- to allow international observation of the referendum.

77. The Venice Commission remains at the disposal of the Tunisian authorities and the European Union.