



**Organization for Security and Co-operation in Europe
The Representative on Freedom of the Media**



Strasbourg, 27 September 2004

ATCM(2004)027 (English only)

Analysis and Comments

on

**Draft Amendments to Law Nr. 8410, dated
30 September 1998, on Public and Private Radio and
Television in the Republic of Albania**

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FOREWORD

The present review, commissioned jointly by the Media Division of the Council of Europe and the Office of the OSCE Representative on Freedom of the Media, aims at establishing the compatibility of the present amendments with European standards. Given that the digital switchover is a major process of change in broadcasting and general technological development, some consideration must also be given to the social and cultural issues involved in digital switchover plans.

BACKGROUND

General Considerations

It often happens that legislation has to catch up with market developments which take place faster than regulatory frameworks can change. This appears to be the case in Albania, where a market operator has launched digital terrestrial broadcasting even though the law makes no provision for that.

This creates a dilemma for Albanian authorities. This dilemma can only be resolved by grasping the full complexity of the issue and viewing the incidental problem of a company already offering digital services in the context of a much broader set of policy issues involved in planning, preparing and implementing digital switchover.

As the European Commission has put it in its Communication on the transition from analogue to digital broadcasting (from digital 'switchover' to analogue 'switch-off') (COM(2003) 541 final),

Switchover is a complex and long process involving many variables and affecting more or less directly many parties, namely: users/ consumers,⁷ industry and public authorities. (...) Switchover also concerns many industry players, such as content creators, service providers, network operators or equipment manufacturers. Some were already active in the analogue broadcasting market, others look for new business opportunities. Likewise, various departments in national and international administrations are interested in switchover insofar as it affects the achievement of policy objectives.

The European Commission also warns against thinking of the digital switchover only in terms of digital terrestrial broadcasting:

Analogue and digital TV are provided on various networks, mainly cable, satellite and terrestrial (over VHF and UHF frequency bands). Digital audio-visual content can be also supported by the internet and, still marginally, *Digital Subscriber Lines* ('DSL') networks. Each network has specific strengths and weaknesses. So

television switchover is a ‘multi-network’ or ‘multi-platform’ process and digital TV is not synonymous with digital terrestrial TV.

Finally, the European Commission points out forcefully that digital switchover is not only a technological issue: “Considering the role of TV and radio in modern societies, that impact is not only economic but also social and political”.

This is also the approach of the Council of Europe, as expressed in the Recommendation Rec (2003) 9 of the Committee of Ministers to Member States on Measures to Promote the Democratic and Social Contribution of Digital Broadcasting

For this reason, the Committee of Ministers argues in an Appendix to the Recommendation that “it would be advantageous if, before proceeding with the transition to digital environment, member states, in consultation with the various industries involved and the public, were to draw up a well-defined strategy that would ensure a carefully thought-out transition, which would maximise its benefits and minimise its possible negative effects”.

CONCLUSION

Like any other country, Albania needs a comprehensive strategy to implement digital switchover in the context of general modernization of its broadcasting and communications system. The preparation of this strategy is already under way. Resolution of the dilemma created by a market development taking place without a legal foundation should not foreclose the development and adoption of this strategy and of a plan of action that will emerge out of it.

Progress of Digital Switchover in Other Countries

There is no single switchover pattern or formula. Experiences vary according to the local circumstances and from one network to another. There is also no common date for analogue switch-off and each country is free to decide this on its own.

Table 1 portrays the progress of digital terrestrial television in Western European countries.

Table 1. Progress of DTT in Western Europe

	Legislation in place	Soft launch	Full launch	Switch-off date
Operational platforms				
UK	July 1996	Sept. 1998	Nov. 1998	2012
Sweden	May 1997	Apr. 1999	Sept. 1999	2008
Spain	Oct. 1998	May 2000	May 2000	2011
Finland	May 1996	Aug. 2001	Oct. 2002	2007
Germany (Berlin)	Spring 2002	Nov. 2002	I Q. 2003	Ongoing 2010
Netherlands	1999	Apr. 2003	4 Q. 2003	Start 2004
Yet to launch				
Portugal	2000	2004	2004	2010
Switzerland	2003	2004	2005	2015
France	August 2003	2004	2005	2008 +
Norway	March 2002	2005	2005	Start 2006
Austria	2001	2005	2005	2012
Italy	Nov. 2001			2006
Denmark	Dec. 2002			2011
Belgium	2002			2005 (Flanders)
Ireland	March 2001			2010

Source: Alexander Shulzycki (EBU) "DTT in Europe. Market Overview and Assessment". DTT Roundtable, Naples, October 2003.

The analogue switch-off dates must be treated as provisional. The UK originally planned to complete analogue switch-off in 2010, but even though already 55% of homes receive digital television (cable, satellite and terrestrial), the switch-off date has been delayed until 2012. Also in the US, analogue switch-off was originally planned for 2006, but now an effort to set the date for 2009 has been rejected by the US Senate, as too early.

Shulzycki described Eastern European countries as still in planning and testing phases (DVB-T), but none was close to launching. In his view, they face some unique challenges like low GDP per capita and weakened public service broadcasters.

In June 2004, a Working Group on Digital Terrestrial Television of the European Platform of Regulatory Authorities (EPRA) published its report on the subject (http://www.epra.org/content/english/press/papers/AGCOM_DTTWG_finalreport.pdf).

In that report, it divided European countries into three groups:

- A. Countries where DTT has already been launched and where the regulation and policies for the DTT start up and the switchover process have already been drafted.

- B. Countries that are getting ready to launch and where the regulatory framework is at a very advanced stage.
- C. Countries that have not yet established a regulatory framework for the launch of DTT; some of these countries have launched studies or working groups to evaluate different regulatory options, whereas other countries have not yet taken any initiative for regulating a future switchover process.

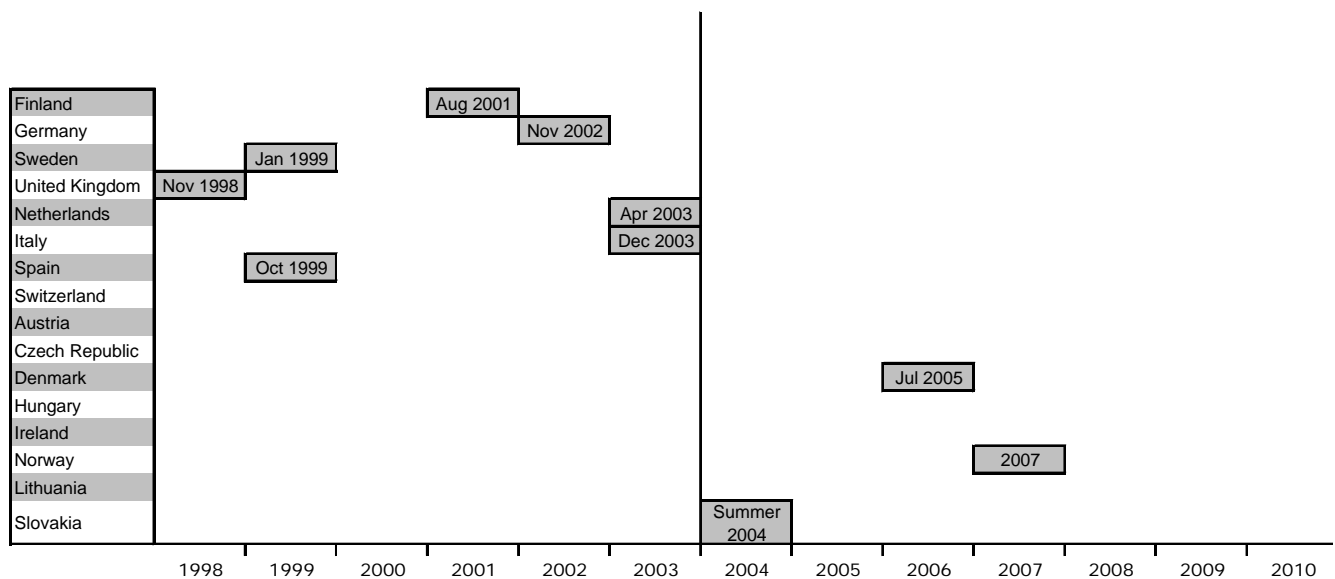
Table 2 shows which countries belonged to which group.

Table 2. DTT development in EPRA countries

Leaders A group	Intermediate B group	Followers C group
		Bosnia-Herzegovina
Finland	Austria	Israel
Germany	Czech Republic	Latvia
Italy	Denmark	Malta
Netherlands	Hungary	Montenegro
Spain	Ireland	Poland
Sweden	Lithuania	Portugal
Switzerland	Norway	Republic of Macedonia
United Kingdom	Slovakia	Romania
		Slovenia

Table 3 displays DTT start-up dates as reported in the EPRA study (see also the Appendix)

Table 3. DTT start-up dates



Note:

Effective/supposed start up date

CONCLUSIONS

1. Only 8 European countries report that they have effectively launched digital terrestrial television. Many others are still in preparatory and planning stage. No country is close to analogue switch-off;
2. The financial impact of DTT on commercial broadcasters is likely to be audience fragmentation and loss of advertising on generalist channel; increasing transmission costs and increase in thematic channel revenue (advertising & subscription);
3. Transmission companies must finance huge investment but may in the long run expect a large potential market.
4. The general trends that have emerged so far could be described as follows:
 - Business model - Pure pay model abandoned (especially after the bankruptcy of ITV Digital in the UK) but some operators have not yet embraced a completely free model.
 - Manufacturers - playing more active role as thriving set-top-box market has emerged.
 - Broadcasters – many commercial players are not fully engaged. PSBs are given leading role but without adequate funding.
 - Cable industry - Battle looming on markets and must-carry rules.
 - Financial impact will be pervasive across the entire industry.

GENERAL COMMENTS AND ASSESSMENT

1.

This draft law appears to be specifically designed to resolve a dilemma created by the emergence of a company which operates digital terrestrial broadcasting without a legal foundation. Legal regulation often fails to keep abreast of market developments, so naturally the legal framework needs to be changed to cover this new situation. The problem with this draft law is that it was initiated by the interested party.

2.

Digital switchover is a complex, long-term operation affecting everyone in the broadcasting and transmission industries and the entire population. The State has a responsibility for preparing a comprehensive strategy for switchover. This amendment would pre-empt a large part of such a strategy and prevent the Albanian State from being able to guide the process to its successful conclusion.

3.

The draft law would create a monopolistic situation in the area of subscription-based digital terrestrial broadcasting. In all the countries which have launched digital terrestrial broadcasting multiplexes have been awarded to different companies, or to consortia of broadcasters and other companies.

Exclusivity eliminates competition and is a threat to pluralism – and these are the two major goals listed by the European Union and the Council of Europe as regards digital switchover.

4.

The draft law would create a special, favourable regulatory regime for the company holding the exclusive licence: a licence of theoretically unlimited duration; renewal of the licence on request; no limit on the number of frequencies allocated to the company; elimination of anti-concentration provisions for that one company; possibly a monopoly on new programme services available on pay digital television, as well as the ability to control all elements of the value chain.

5. The draft law suffers from a number of substantive shortcomings which are listed below.

GENERAL RECOMMENDATION

Albania needs amendments to Law No. 8410, of 30 September 1998, on Public and Private Radio and Television in the Republic of Albania which will serve the public interest, all the listeners and viewers, and the entire broadcasting industry. The law needs to be updated and modernized in many aspects. These draft amendments cannot serve these purposes.

In these circumstances, the Albanian Parliament should certainly expect the Government and specialised bodies to propose an extensive set of amendments which will allow the

country to have a comprehensive, modern and forward-looking regulatory framework for broadcasting.

In any licensing system created by the amended law, the company now operating digital terrestrial broadcasting is certain – as long as it is administered fairly and in accordance with the law – to be able to legalize its operation.

As a pioneer in the field, the company certainly deserves consideration, but this must be part and parcel of a much broader solution, designed to take Albania into the digital era – a major project, requiring the involvement of many institutions and market players.

DETAILED COMMENTS

Article 1

This article envisages the addition of new article 136/2. It contains several provisions which must be discussed separately.

1. Definition of “paid digital television programmes”

It is proposed to define “paid digital radio and television programmes” as “the broadcast of sound, image or both by means of a digital distribution system for simultaneous reception of these programs by two or more subscribers”.

COMMENT

This definition is unnecessary. Regulation should be technology-neutral, i.e. regulations should largely be the same regardless of the technology being used to distribute programme content.

Article 35 of the law already contains a definition of “the radio-television programme”¹, and this definition can apply to digital broadcasting as well².

There is even less justification in defining “paid digital radio and television programmes”. Whether the programme service is free-to-air, or offered on a subscription basis is a different matter from the programme services themselves.

Moreover, as noted above, the business model of digital broadcasting no longer assumes that programme services will be offered on a pay basis. There is no necessary connection between digital technology and subscription-based programme services.

¹ It would be better if it could be a little more precise, as in the European Convention on Transfrontier Television (Art. 2 (d) “Programme service means all the items within a single service provided by a given broadcaster”).

² The UK Broadcasting Act of 1996 does define “digital programme service” (Part I, Section 1 (4)), but this refers to “a service consisting in the provision by any person of television programmes (together with any ancillary services, as defined by section 24(2)) with a view to their being broadcast in digital form for general reception, whether by him or by some other person”, i.e. to the service of broadcasting digital television programmes, and not to the programmes themselves.

Finally, there is no necessity to define a digital programme as one broadcast for “simultaneous reception”. Digital television sets will contain hard disks capable of storing many hours of programming, so a particular programme item can be watched or listened to a long time after actual transmission. Personal Video Recorders do so already today. One of the features of digital broadcasting is that it can be asynchronous, i.e. the content can be stored and retrieved later.

CONCLUSION

This definition should be deleted.

2. Must carry provision

According to this article, “paid digital radio and television programmes” include:

1. Rebroadcast of programmes aired by terrestrial and satellite broadcasters, always including programmes by public and private operators.
2. Rebroadcast of programmes intended for closed television networks.
3. Rebroadcast of audio-visual productions recorded from various means.
4. Broadcast of various self-produced programmes.

COMMENT

This provision seems to combine must-carry rules for digital television with detailed programme obligations for the service provider (i.e. multiplex operator).

It is questionable whether this provision can be implemented strictly, because that depends on the capacity of a particular digital television system and the number of television channels covered by this description is potentially very high.

Description of “rebroadcasts of public operators” as “paid digital radio and television programmes could be a cause for serious concern if that meant that an additional charge were to be imposed for receiving those programme services which are broadcast free to air and – as public service programmes – should always be universally accessible.

The same applies to the item “broadcast of various self-produced programmes”. This implies that any new programme services available on digital television can only be those provided by the operator of the system. This is an anti-competitive provision, and – as such – unacceptable.

CONCLUSION

This part of the Article needs thorough revision. “Must-carry” status for public service channels is acceptable, but other programme obligations should be defined elsewhere and not in the law itself. No additional charge can be levied on users for access to public service channels. Depending on the system chosen for using the capacity of multiplexes, the operator should either treat all broadcasters wishing to have their programme services available on the multiplex in a fair and non-discriminatory manner, or should provides

programme services selected for the particular multiplex by the NCRT – as provided for in this article.

3. Exclusive licence for paid digital radio-television programmes

This provides for just one licence for paid digital programme services, issued for a period of at least 10 years, and renewable at the licence holder's request.

COMMENT

The European Commission's Communication on the transition from analogue to digital broadcasting (from digital 'switchover' to analogue 'switch-off') states that "Member State policy interventions should also be non-discriminatory and technologically neutral". It also states that "Replacing analogue broadcasting with a system based on digital techniques presents huge advantages in terms of more efficient spectrum usage and increased transmission possibilities; these will lead to new services, wider consumer choice and enhanced competition".

In Recommendation Rec (2003) 9 of the Committee of Ministers to Member States on Measures to Promote the Democratic and Social Contribution of Digital Broadcasting, the Committee of Ministers of the Council of Europe:

Recommends that the governments of the member states, taking account of the principles set out in the appendix:

- a. create adequate legal and economic conditions for the development of digital broadcasting that guarantee the pluralism of broadcasting services and public access to an enlarged choice and variety of quality programmes, including the maintenance and, where possible, extension of the availability of transfrontier services;
- b. protect and, if necessary, take positive measures to safeguard and promote media pluralism, in order to counterbalance the increasing concentration in this sector.

This provision contradicts these principles. It is discriminatory and seeks to stifle competition, rather than promote it. Instead of promoting pluralism and access to enlarged choice and counterbalancing concentration, it could have the opposite effect. In fact, as we will see below, this amendment lifts, in relation to the paid digital radio and television operator, the anti-concentration provisions of Article 20 of Law No. 8410, of 30 September 1998, on Public and Private Radio and Television in the Republic of Albania. Thus, a special regulatory regime is being created for one operator on the market that is more favourable than for other operators.

Pursuant to Article 7 (4) of this law, the National Council of Radio and Television is to “Guarantee fair competition in the field of electronic media, ensuring at the same time the existence and further development of the Albanian public radio-television”. Here, however, it is to be prevented from doing that.

True, this exclusive licence would be for paid programmes only, meaning that other licences could be granted for free-to-air digital terrestrial broadcasting. However, any future market entrants would have to compete against an entrenched market player.

CONCLUSION

There is no justification for the law to envisage just one licence of this kind. It is also unacceptable not to define an upper limit of the licence’s duration. This could, in theory, mean that the licence could be awarded in perpetuity. Moreover, it is not clear what this licence covers: just provision of programme services, or also other things: operation of a multiplex, transmission network, electronic programme guide, conditional access system. If the latter is the case, this one licence would create a vertically integrated operation monopolizing all aspects of pay digital television services.

Article 2

This article envisages the insertion of new Article 136/3, covering licensing and other procedures applicable in the case of the licence for paid digital radio and television programmes.

Conditions specified in the second paragraph and the rest of article 20 of the law are not applied to legal subjects operating in the area of paid digital radio and television activities for subscribers.

COMMENT

The procedure and other necessary requirements for receiving a licence, as well as the rights and obligations of subjects, are to be the same as those provided for with regard to licences for radio-television broadcasting by air, described in chapter IV of the law.

Article 21 provides for the National Council of Radio-Television to organise a competition of candidates based on the applications submitted. In this case, it appears that there will be only one applicant. Can a competition be held in this case? And if it cannot, can a licence be granted?

Pursuant to this article, the NCRT is to allocate frequencies for conducting paid digital radio-television activities for subscribers by not limiting their number. Will this not be another case of discrimination in favour for the operator?

According to the amendment, conditions specified in the second paragraph and the rest of article 20 of this law are not to apply to legal subjects operating in the area of paid digital

radio and television activities for subscribers³. These are the only provisions of the law designed to limit and control media concentrations. Therefore, as noted above, the amendments would create a special, favourable regulatory regime for one operator.

CONCLUSION

Such privileged treatment of one operator on the market can hardly be justified.

Article 3

This article provides for the insertion of article 136/4, putting the NCRT under an obligation to define the rules and the distribution methods for radio-television programmes.

³ These provisions are as follows:

“No natural or legal person, foreign or national, may hold more than forty percent of the total capital of the company.

Regular and special shareholders’ meetings of a joint stock company, whose sole purpose is the conduct of radio-television activities, shall be recognized only if no less than two-thirds of shareholders are present.

Any natural or legal person who holds shares in a national radio or television company shall not be permitted to hold shares, directly or indirectly, in a second national radio or television company; nor shall such a person be issued a broadcasting license for local radio or television.

Licenses for local television or radio broadcasts with a modulating in frequency shall be issued to natural or legal persons and non-profit organizations registered in the territory of the Republic of Albania with the sole purpose of conducting radio and television activities. Such license shall not be issued to the same person for more than two local broadcast zones. Licenses for local broadcasts in urban areas with more than 200,000 inhabitants shall not be issued to natural persons.

A person to whom a local television broadcast license has been issued may only be granted a second local radio broadcast license.

A person to whom a local radio license has been issued may only be granted a second local television broadcast license.

The holder of a national radio or television broadcast license shall cover more than seventy percent of the territory of the country. Within six years of issue, such coverage must reach not less than 90 percent of the territory and not less than 90 percent of the population.

The holder of a local radio or television broadcast license must cover that area of the district specified by the license in accordance with technical broadcasting parameters. The implementation of such technical parameters shall be monitored by the NCRT.

For the purposes of this Law, the term “local radio or television broadcast” shall mean any coverage by television or radio signal transmitted by such television or radio operators as have been licensed to do the same across the territory of communes, municipalities, and administrative units of no more than two prefectures (area of coverage), when these constitute a single geographical entity and provide sufficient financial resources for radio and television production and broadcast of programs.

Any natural or legal person, national or foreign, who has applied for a radio or television broadcast license, shall be prohibited from using another name in any manner”.

Article 4

This article provides for the insertion of article 136/5, according to which the NCRT is to issue permission to operate a digital network for radio-television broadcasting within 30 days from the date of the completion of the network and after the control of the implementation of the technical project and equipment.

COMMENT

As noted above, it is not clear to whom the permission is to be issued. If it is to be received by the company holding the exclusive licence for paid digital radio and television programmes, this would create a monopoly in this market.

APPENDIX

Table 3 – DTT development in EPRA countries

	Countries	Degree of DTT development		Degree of DTT regulation					
		DTT platform commercially launched	DTT penetration beyond 0%	Regulation for the start up of DTT already drafted	Digital frequency planning implemented	Capacity already allocated to operators for the launch of DTT	Start up date for DTT of PSB established	Switch off of analogue frequency set by the law	
A	Finland	☑	☑	☑	☑	☑	☑	(3)	A
	Germany	☑	☑	☑	☑	☑	☑	☑	
	Italy	☑	(6)	☑	☑	☑	☑	☑	
	Netherlands	☑	☑	☑	☑	☑	☑	(4)	
	Spain	☑	☑	☑	☑	☑	☑	☑	
	Sweden	☑	☑	☑	☑	☑	☑	☑	
	Switzerland	☑	☑	☑	☑	☑	☑	☑	
	United Kingdom	☑	☑	☑	☑	☑	☑	(5)	
B	Austria			☑	☑				B
	Czech Republic								
	Denmark			☑	☑	☑	☑		
	Hungary	(1)			☑				
	Ireland			☑	☑	☑			
	Lithuania	(2)		☑	☑				
	Norway			☑	☑	☑	☑		
	Slovakia			☑	☑				
C	Bosnia and Herzegovina								C
	Israel								
	Latvia								
	Malta								
	Montenegro								
	Poland								
	Portugal								
	Republic of Macedonia								
	Romania								
	Slovenia								

(1) DTT experimental channels launched in 1999

(2) DTT experimental channels launched

(3) Not yet officially set - presumably 31.8.2007

(4) ATO in preparation

(5) Not yet officially set - it will be probably set between 2006 and 2010

(6) Penetration above 0 but no official data available at 31 Dec 2003