



# Organization for Security and Co-operation in Europe

## The Representative on Freedom of the Media

### Analysis of the draft Albanian Strategy for Digital Switchover

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#### Executive summary

This report gives a background to the draft Albanian Strategy for Digital Switchover (from November 2008), summarising the facts described in the strategy as well as in other reports by international experts and similar. After this, the report looks at and analyses the drafts strategy, commenting on selected important matters. Finally, a number of suggestions are made both concerning the strategy as such, the process for finalising it and related issues:

The suggestions are (in summary version):

- Digitalisation does not solve other problems in the broadcasting field such as a lack of plurality and diversity or a weak PSB or regulator. Such problems must be solved separately, before the digitalisation or during the early stages.
- A clear legal basis for digitalisation is very important, including separation of content provision and technical transmission. The legal basis must regulate the existing situation such as it is, including how to deal with the existing digital broadcaster.
- The strategy should be developed in a consultation process.
- There should be a public information campaign.
- The international standards referred to should be used for interpretation of concepts and notions. This could be facilitated by a list of terminology.
- The financing of the process is essential and needs to be clarified in a transparent and sustainable manner at an early stage.
- The inter-institutional cooperation is essential and needs a clear framework.
- The access to transmission facilities is essential and an important licensing condition, where the regulator needs a clear mandate to prevent negative consequences of monopolisation.
- PSB should be strengthened and supported by must-carry obligations.
- The rules on who has the right to subsidised decoders and how need to be clarified and the cost for this process calculated with.

## **Introduction**

Digitalisation has the potential to offer more possibilities for plurality and diversity in the broadcasting field as the spectrum allows more users than with the analogue system. However, especially in the early stages digitalisation entails risks like monopolisation and cementing existing problems in the broadcasting area. Digitalisation will by itself not solve problems of lack of plurality or other problems due to a lack of media freedom or political interference in the media field.

To obtain the benefits of digitalisation it is important to have a planning process that includes all relevant actors. The digital broadcasting environment and the process of digital switchover should have a legal basis that contains safeguards for public interest, freedom of expression and access to information. There are only few binding international rules on the digitalisation process (linked to frequency issues) but even if each state determines the details of the process themselves, there are basic rules and standards that need to be followed as well as international recommendations on how to best achieve the process of digitalisation. Key words include promotion of diversity and plurality; effective public broadcasting service (PSB); universal and affordable access to broadcasting and to other information society services; objective, transparent, non-discriminatory licensing criteria and a fair and transparent licence processes managed by an independent regulatory body.

This report analyses the (draft) Albanian Strategy for Digital Switchover from November 2008 (unofficial OSCE translation). The strategy has been produced by the National Council on Radio and Television (NCRT). It is a good step in the digitalisation process, but it is important that the strategy will be refined and added to in an inclusive, cooperative process involving all relevant actors and taking into account best international practice as well as the Albanian reality. This report does not go into any detail on technical matters, on frequency allotments or related issues.

## **Background**

A first digitalisation plan was prepared in Albania in May 2004. This plan was analysed by the OSCE presence in Albania together with the European Radiocommunications Office (ERO) in September 2004. Among the issues pointed out in the analysis was that digitalisation needs careful planning and it is not suitable to rapidly introduce digital broadcasting in a country where analogue broadcasting is not normalised. In the analysis, the fear was expressed that digitalisation would be introduced too quickly when instead other, established technologies for e.g. multi-channel, multi-point distribution system (MMDS) for subscription based television could be investigated if the desire was to be able to provide subscription based television over the air.

It was suggested in the OSCE/ERO analysis that instead of the proposed rapid change-over, there would be some pilot projects in parts of the country (Tirana). It was also proposed that subscription based MMDS television services could be introduced and digitalisation made later when it could be planned properly.

In May 2007 the Council of Europe ordered a study by an independent expert (Mrs. Eve Salomon) and the European Commission Directorate General for Information Society and Media on the Albanian draft law on digital broadcasting. The draft law aimed at setting up a framework for the licensing and regulation of digital broadcasting in Albania, for terrestrial and satellite television and audio broadcasting. The licensing framework covered both networks (multiplexes) and individual programme services. The experts found that the law in parts was good and in line with international standards but also recommended a number of changes or additions. These included setting a target date for the transition and designing the switch-over so as to ensure financial certainty for broadcasters and avoid monopolisation. Measures should also be undertaken to protect local and regional broadcasting. Support for the public service broadcaster in the digital broadcasting landscape was proposed. The importance of electronic programme guides as well as of open standards and interoperability were highlighted as was the continued relevance of European standards like those reflected in the Television without Frontiers Convention.

OSCE has in different ways supported the NCRT during 2008 with the planning for digitalisation, including with the preparation of a digitalisation strategy. The OSCE help has not only supported the actual work with the strategy but also the process, in order to ensure that it is an inclusive process with participation of all concerned. Such an inclusive planning process can also serve as a model for other areas of policy making. An expert from the French broadcast regulator assisted NCRT with the planning of the digitalisation strategy, including recommendations on the involvement of the sector in the process. The assistance from the OSCE helped to determine that there was a lack of awareness and coordination in the digitalisation process. There were also problems with the level of knowledge of terminology and other issues from many of the relevant partners.

### **International legal instruments**

Principles established in international instruments emphasise the importance of planning the digitalisation, of the principle of technological neutrality and of respect for the audience and consumers. It is not necessary to have special legislation on digitalisation. Some countries have introduced such legislation but it is more common to make amendments to relevant laws like communications legislation, broadcasting and/or telecommunications law. The question whether to have a special law and which legislation to amend differs in every country, depending on the general

legal system. What is important is that there is a proper legal basis for the digitalisation as it includes various issues on which legal certainty is essential.

The frequency planning of the regulator must be in line with international standards and must ensure the best use of the available frequencies for the different platforms so that there is plurality and a guarantee that the PSB reaches (almost) the entire population. The ITU planning for digitalisation is important for all countries as the ITU is in charge of the frequency spectrum. Even if states can decide themselves when and how exactly to digitalise, the ITU planning with an analogue switch-off date of 2015 for Europe and several other regions is binding for ITU members (which are basically all states in the world). Frequency regulation by ITU is binding and member states must ensure that their procedures are in line with these international rules and capable of ensuring their fulfilment.

The European Convention on Human Rights in Article 10 emphasises the freedom of expression but also states that broadcast regulation is not a violation of this freedom. The European Court of Human Rights has stressed that the manner in which the licensing criteria are applied in the licensing process must provide sufficient guarantees against arbitrariness, including the proper reasoning by the licensing authority of its decisions denying a broadcasting licence.<sup>1</sup>

Recommendation (2003)9 of the Council of Europe underlines the need for a well-defined strategy for digitalisation and the adequate legal and economic conditions for the process. The same recommendation says that the process should be done in consultation with the various industries involved and the public. Criteria for granting and renewal of broadcasting licences should be set out in law and clearly defined. They should be applied in an open, transparent and impartial manner. Decisions should be duly reasoned, open for review and available to the public.

Other Council of Europe recommendations remain important in the digital broadcasting landscape. Recommendation (2000)23 on the independence and functions of regulatory authorities for the broadcasting sector is one such recommendation, It recommends that the basic conditions and criteria governing the granting and renewal of broadcasting licenses should be clearly defined in law. The regulations governing the broadcasting licensing procedure should be clear and precise and should be applied in an open, transparent and impartial manner. The decisions made by the regulatory authorities should be subject to adequate publicity.

Recommendation (1999)1 on media pluralism is of special importance in the digital environment because of the risk of concentration especially in the early stages of digitalisation. Resolution 1636 (2008) of the Parliamentary Assembly of the Council of Europe makes transparency of media

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<sup>1</sup> Among several cases are *Glas Nadezhda EOOD and Anatoliy Elenkov v. Bulgaria*, no. 14134/02 and *Meltex Ltd and Mesrop Movsesyan v. Armenia*, no. 32283/04.

ownership and economic influence over media one of the indicators for the media in a democratic society.

Universal access of broadcasting is an important principle in the digital world. Must-carry rules remain essential and mean in the digital environment that PSB must be included in the bouquets offered by providers. As such rules entail a certain infringement of the right to conduct business by private enterprises it is important that the rules are proportionate and reviewed regularly so they always meet the public good and are not more intrusive than needed.

There is no European Union (EU) law on details of digital transition.<sup>2</sup> There are Directives as part of the telecommunications framework as well as recommendations on digital transition e.g. in a Commission Communication COM (2005) 204. The EU has emphasised the principle of technological neutrality by declaring that state aid given only to terrestrial digital television was against EU principles on state aid as it discriminated in favour of one technology. Radio spectrum management must be based on objective, transparent, non-discriminatory and proportionate criteria. This follows from Article 9 of Directive 2002/21/EC. These principles should apply to selection between frequency users but also support the technology neutral position. The open access of decoders is important and international instruments underline the importance of interoperability (Recommendation 2003(9), Directives 95/47/EC and 2002/22/EC and other). The Audiovisual media services directive 2007/65/EC is also relevant (this directive is still in the implementation period).

Albania has a Stabilisation and Association Agreement (SSA) with the European Union, from 2006 which includes cooperation in the audiovisual field. This does however not include that Albania is bound by any EU deadlines for digitalisation..

International bodies that have analysed digitalisation efforts in different countries have stressed the need for consultations (like Open Society Institute (OSI), Article XIX and others). A successful digitalisation process requires involvement of different government bodies as well as of other groups. Consumer protection, media pluralism and competition are issue to be taken into account as also pointed out by the OSI (and Article XIX).

### **The media situation in Albania**

The audiovisual media landscape in Albania includes many players, with a large number of broadcasters (especially television) despite the small size of the country. There is a public service

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<sup>2</sup> This is because such matter mainly fall within the competence of the EU Member States based on the division of competences that follows from the EC and EU treaties.

broadcaster (radio and television). In addition there are 3 national and 73 local television stations. Limited monitoring facilities of the NCRT however limit the existing data on their actual activities. This fact and the geographical structure of the country make for a rather complex broadcasting scene. Albania has a low penetration of internet and a low computer ownership in a European context. This is however rapidly increasing.<sup>3</sup> The internet penetration in 2007 was about 15%.

There is an independent broadcast regulator in Albania, the National Council of Radio and Television (NCRT). This regulator is also the body in charge of the digitalisation process.

The Albanian broadcasting legislation consists of the Law on public and private television in the Republic of Albania (Law no. 8410 from 1998), as amended. In addition there is a special digitalisation law (Law no. 9742 from 28 May 2007). This law should be integrated into the Albanian radio and television law. The strategy states that there are deficiencies in the digitalisation law, such as the absence of distinction between programme providers and transmitters and the risk of monopolisation to a few powerful providers only. The law does not take into account the fait accompli created by the existence of a digital broadcaster, DIGITALB.

There is an ongoing process of drafting a new broadcasting law which would include the regulation of digitalisation. This is happening in the framework of an action plan agreed upon by the Assembly of Albania and the EC Delegation and Council of Europe. The product would be one integral law on European standards. However this process is not completed and the strategy does not mention any date or timeline when it will be.

A special feature of the Albanian digitalisation landscape is the fact that there is digital television since 2004. DIGITALB offers digital television (four fixed and one mobile network) to most of the country. This development took place without any law or strategy on digitalisation. DIGITALB offers both free and paying channels and also produces some programmes. The exact number of subscribers is not known but it is presumed to be quite high. Special equipment is needed to receive the broadcasting. DIGITALB is both a programme provider, digital broadcasting transmitter and runs the commercial operation of the broadcasting- thus combining in one entity functions that in many digital broadcasting environments are separated on two or three separate entities. In addition, DIGITABL also transmits mobile television on an unauthorised frequency. DIGITALB and its activities are part of the broadcasting reality in Albania and regardless of the fact that the company does not have proper legal or licensing background to its operation it must be factored into any development of digitalisation. The situation with digital broadcasters having taken over analogue frequencies must be

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<sup>3</sup> See for example "Spreading the Word on the Internet", Representative on Freedom of the Media, 2003 quoting ITU statistics from 2003 with a PC penetration of 0.76% in Albania, the lowest in Europe.

factored into the planning as this means that the starting point is not in line with licences issued. There are also two other programmes that offer experimental digital broadcasting in the Tirana region, "Super Sport" produced by "Klan TV" and "Tring" produced by Vizion +. In October 2008, the NCRT issued three tenders for digital network operators (initial deadline for applicants being in November, in the meantime postponed to 6 January 2009) without an enforceable law on digitalisation or a national digitalisation strategy. The cut-off date when analogue broadcasting should be fully replaced by digital in Albania has been set at 31 December 2012. The deadline was expended twice, however at the end of the process no applications were submitted. The motivation for these abstention is not clear.

There has been pressure on NCRT to rapidly come up with a digitalisation plan. Such a plan cannot be transferred from one country to another, even if some elements are the same and the experience of other countries will be useful. It is essential not only that the plan is suitable for the country it is made for but also that it is made in an inclusive manner, involving different stakeholders. The pressure on NCRT to develop a plan quickly led to the cooperation with OSCE, which led to first round of consultation with media outlets in spring 2008. Due to the time pressure, NCRT finalised the draft in summer and autumn 2008 without further consultations (including without consultations with the OSCE) and pressed ahead with a rapid process. After some problems with the cooperation and after criticism from the media community in Albania, it was possible to return to consultations in December 2008 and also cooperation with OSCE was resumed. The political pressure remains for a speedy development however.

### **The digitalisation strategy**

#### The approach

One of the recommendations of the Council of Europe and the OSCE is that there should be careful planning of digitalisation and a process that involves different interested parties. There should be consultations, possibilities for interested parties to send comments (suitably using internet) and generally a working method employed that ensures to the greatest extent possible that the final product that will be the outcome of the process is accepted by the sector.

#### Territory and population

It is important in the digitalisation plan to look at population coverage rather than territory. Before analogue broadcasting is switched off, there needs to be as near 100% population coverage as possible so that people are not deprived of broadcasting, thus making access to information more difficult. A popular campaign to create interest for the process is an important feature of the planning. The

strategy includes a detailed overview of the broadcasting situation in Albania including the already operating terrestrial digital television of DIGITALB.

#### The process

The strategy starts by pointing out the need for an inclusive process, involving in the strategy the users of audiovisual services, the industry, network operators and those offering content. It is important that this statement is also followed up in reality with the way the strategy is made and implemented. Under the heading 1.3 the public consultation process is described. It is pointed out that a successful digitalisation process requires consultations and cooperation. Among the partners that should be involved in the operation are mentioned a wide range of partners including the state, legislative and executive structures, media related non-governmental organizations, the operators and the citizens and consumers. It is important to find means to give real effect to such statements of cooperation.

The strategy refers to the consultation process held in cooperation with the OSCE and states that the views thus received have been taken into account. It is not clear what the consultation process means for the strategy in the shape it now has. These document should be sent for consultation and means be available for the partners to comment on it in this (almost) final version. The view of the partners on whether their views have been taken into consideration and not just the opinion on that from the agency are important. Only that would be a genuine involving process. The consultation cannot end with the adoption of a strategy but must continue, especially as this strategy is not very clear on all issues. It is positive that the document clearly states that the process of consultation shall continue.

#### The international context

The statements in the introduction of the strategy on the need for digitalisation and what it is that drives this process are correct but the EU deadline is not binding for Albania. . There is a reference to European standards and practices. Also further on in the document it is stated that the background to proposals are best international standards, EU recommendations and debates as well as the Albanian reality.<sup>4</sup> There is in the document a mixture of binding EU law and recommendations. This is less important for a non-member state as all such instruments may be seen as recommending directions. For EU members (or states about to soon become members) the understanding of the different nature

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of different EU documents is more important. The relevance of references to European and international standards is that in case of a discussion on how to define and interpret concepts and terms, accepted international interpretations should be used. With mention of specific documents this role of assisting in interpretation is even clearer. It is presumed that the content of such documents, where relevant, should be seen to be included in the Albanian strategy. The strategy makes a reference to the ITU and its binding timetable for digitalisation of the frequency spectrum. This is the one example of binding international regulation, see above.

There is a reference to the SSA with the EU. The conclusion that digitalisation must be in compliance with this is correct but does not provide any substantive rules on the details of this process, as there is no EU law as such on details of digitalisation. The directives mentioned (the so called Telecommunications package) include certain basic elements of digitalisation such as technology neutral regulation (Directive 2002/21/EC, the Framework Directive).<sup>5</sup> These elements should be included in the Albanian strategy. However, this still leaves room for Albanian choices including on the timing, within the ITU target..

#### Aims and objectives of the strategy

The document sets out as its aim to anticipate the main objectives and principles of the switchover, define the role of the state and the respective state administration structures for creating the necessary conditions for the digital switchover, provide an assessment of the existing technical and legal situation of the Albanian audio and visual landscape and define the steps, procedures and timelines for completing the switchover process within 2012. The digitalisation shall play a role in the information society; services offered to the public shall increase.

The strategy mentions that the digitalisation law does not seem adequate to guarantee a successful digital switchover in Albania. The said law defines the principle of granting licences to the multiplexes in the context of competition procedures for the network operators, but it does not make a sufficient distinction between the network operators and the program operators. It does not take into consideration that the price offered for the multiplex license may lead to concentration and it does not consider the status of the existing operator DIGITALB.

As for actual introduction of digitalisation different ideas are presented like soft digitalisation, using frequencies that are available or the idea of digital islands. It is generally a good idea to start with pilot projects and develop gradually. However, in Albania there is in reality quite a lot of

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<sup>5</sup> There is a mention of a Directive 2007/11/12 EC. There is no Directive or other EU legislation with this number and directives with numbers 11 and 12 for 2007 contain other issues. The Audiovisual Media Services Directive is 2007/65/EC.

digitalisation already (using frequencies intended for analogue) so the time for individual experiments may in practice be passed. Whichever method is selected, the time for the introduction is limited.

The strategy mentions that there are some initial ideas on ensuring funding for building the digital networks for the public operator, including combined funding with private entities. The strategy says that drafting an accurate proposal on funding the construction of digital networks shall be defined after consulting with other competent government institutions, which will then be followed by detailed implementation stages for the respective funds. This is not specified in the strategy and it appears the ideas are at an early stage while they should really be a background to the digitalisation as such.

The objectives and principles of the strategy are set out as: *The political objective of this Document is to try to use an advanced technology for a general increase of the standard of living, education, and support in establishing an information society, developing the electronic media market by improving the broadcasting quality and pluralism, creating the necessary space for allowing new companies to enter the market, as well as for developing new services. It also aims at supporting the spread and application of new technological facilities related with the digital broadcasting, such as the high-definition television (HDTV), a television designed for “mobile reception” (DVB-H), etc.*

The strategy sets out a number of objectives, as bullet points:

1. To switch from analogue to digital broadcasting platforms by 2012;
2. To legalize and implement the law on the existing digital operators, who operate without a license;
3. To provide a variety of programs enabled by enhanced capacities, which would increase the range of public choice;
4. To improve the service quality and increase the number of new services (HD, interactive services);
5. To apply market mechanisms by regulating access to, and inter-connections in the broadcasting networks;
6. To apply most advanced standards, which would enable electronic communication networks and services to converge;
7. To provide a universal service, which would offer services of a pre-defined quality at reasonable prices despite geographic position.

Simultaneously broadcasting digital and analogue is expensive and the strategy advises against this, which is good.

The aims and objectives are to be commended but the strategy is more a description of the situation and a first step than a means to reach these aims. The positive effects of digitalisation for consumers, providers and the state as set out are correct but the plan is in most cases rather vague on how to achieve these objectives. This is especially so as concerned the convergence and use of other services. Important licensing principles like separation of content licensing and that of transmission are briefly mentioned.

#### The equipment

The plan says that the digital switchover must ensure the compatibility of the equipment *currently owned by the public with the new equipment*, as well as the compatibility of various providers. The overall objective is for the digital switchover to ensure an option applicable to the majority of the population. The meaning of this is somewhat unclear as it is known that additional equipment (set top boxes) is needed for digital terrestrial reception. The need for people to get such additional equipment is indeed one of the problems of digitalisation as there is a risk that the poorest segments of society will not get the equipment and may thus have less access to information than before digitalisation. The existing equipment may be that for DIGITALB but as the weakest segments of society may not have this, it still leaves open the main question of additional equipment. The point about interoperability of the equipment is very important.

#### Digital Islands and timelines

The strategy mentions that digitalisation will be introduced under the principle of region per region, creating digital islands. These will be created taking into consideration available frequencies as well as the socio-economic conditions of different zones.

The time schedule in the strategy is in line with ITU rules and with the EU time schedule. It should be realistic but work must now proceed at a good pace. There is no need for Albania to rush the process more than necessary but to try to meet the set deadlines. The objective to create a proper legal framework is very important. There must be order in the sector preferably before the switch-over. As for the objective to provide a variety of programmes it is important to have concrete ideas on how to do this as choice or plurality do not come automatically and not just from the number of channels. Regulating access and applying standards requires much work of the regulator. Licensing principles for content as well as transmission must be developed.

#### State intervention

Among issues listed for state intervention many very important matters are stressed. These include that there should be a campaign to raise awareness. The regulatory work and legal aspect, including separating transmission and content is mentioned. This is a key aspect and should be given attention in the strategy. The regulator should be given more guidance on how this will be achieved and also on the harmonisation with EU standards through laws and other rules.

#### Roles and numbers of networks and broadcasters

The role of the public service broadcaster is highlighted in the strategy but without detail. The coordination of all interested parties that is mentioned generally elsewhere is again stressed and this is a very important point.

As for the number of networks, the number should be suitable for the country and sustainable. Two public and three private nation-wide is good but quite a lot. The statement that it will be based on market research is good in itself but appears a bit late in the day as there is an actual broadcasting situation. It is important that there is content to fill the different allotments so that the viewers as well as those filling the airwaves with content are taken into account. Digitalisation should not mean a reduction in number of programmes but the number must be realistic for the country. At the same time the situation should not be static but new and interesting programmes must find a place. The strategy recognises that *in the estimation of the capacities of the terrestrial digital platforms that will support existing analogue operators, there should be taken into consideration the measures to be taken to preserve the current licensing area. In cases when this is technically impossible, the area in question may be expanded, but never diminished.*

#### Financing

The financing of broadcasting in the digital environment must be considered. The great number of channels means a fragmentation of the audience and less attraction for advertisers. It is no point planning for very many broadcasters at different levels if there are realistically no programme content providers to fill the broadcasts and no means of financing such programme provision. The strategy is optimistic on the financing of private broadcasters, rather more so than in many European countries. The Albanian market is quite young and may be growing, but there is a risk of stagnation and effects of the general economic downturn will be felt.

#### Inter-institutional cooperation

Inter-institutional cooperation is very important, as mentioned in the strategy. For this cooperation to work, it is important that there is a clear leader for the cooperation. This task is given to NCRT which

is a logical body for such coordination. It is important that they have the authority and resources necessary to manage the coordination. The Technical Group mentioned in relation to the task force is not explained. It is also not clear when and how the task force will be called. The relevant bodies must be obligated to send representatives. It is not clear if NCRT will arrange the secretariat or if this will be separate and how the Task Force is to be financed. The strategy mentions that NCRT has had problems and it is important that the body is strengthened independently of the digitalisation process so that it really is equipped to lead this process while still also performing its regular tasks.

#### The role of the NCRT

The role of NCRT and its strengthening is indeed important but the strategy should be clearer on what is required, giving special advice both on which legal provisions should be changed and what other means for strengthening that are needed (financial, staff etc). There is a risk apparent in the current strategy that the NCRT is given an important role in the digitalisation process while it is known (as mentioned) that the body is actually too weak. Strengthening it should be a separate issue from its added tasks in the digitalisation process. Otherwise there is a real danger that the regulator is not strengthened because of a lack of support for this and that this entails a delay in the whole administration of the digitalisation process. The issues are intertwined in the strategy in a manner that may be confusing. Digitalisation is not a means to solve other problems in the broadcasting area and weaknesses of the regulator should be addressed separately.

As a stylistic point, it may be pointed out that the different factual suggestions in the strategy like the situation with simultaneous broadcasting are not very clear but “hidden” in the text. The language on how long there will be such simultaneous broadcasting is not clear but uses expressions like that it should go on for as short a period as possible. It is mentioned that this period of transition will enable people to get the necessary equipment for receiving digital, but the concrete rules for how this will happen come in completely different places of the strategy. There are also other such examples.

### **Licensing**

#### European Approaches

In Europe several different approaches have been adopted for the allocation of digital spectrum and for the licensing process. The capacity is either licensed to multiplexes (network operators) or directly to channels. What is relevant is how access to this capacity is regulated and that it meets best regulatory standards. The separation of content (programming) and transmission licensing is important regardless of the details of the licensing process. It is possible that the regulator selects channels. The way the selection is done is similar to the analogue licensing process. In other countries (like the UK) the capacity is granted to be managed by the multiplex (network operator) that selects

the channels following special rules like must-carry or capacity reserved by law or regulation to special categories of broadcasters. Rules in some form are needed to preserve public interest objectives such as diversity and pluralism.<sup>6</sup>

#### Particularities of Digital Licensing

Digital licensing of broadcasters in some ways resembles telecommunications licensing but certain special characteristics of broadcasting still remain, like the public interest in the content of the services provided. The idea of a beauty contest procedure is still often applied. In any case the right to transmit digital terrestrial television is awarded under conditions. One condition is that PSB must be carried.<sup>7</sup>

As for the transmission licensing there are many criteria that resemble telecommunications licensing, fees charged for access to transmission facilities must be reasonable and this is monitored by the regulator. Other criteria that may be applied include how quickly a high level of population coverage can be achieved, signal quality, consumer-friendly service (including perhaps a strategy for promoting the distribution of receivers) and other criteria reminiscent of telecommunications licensing as well as the ability to offer a wide range of digital channels that promote diversity of opinion. Special restrictions may apply for dominant service providers.<sup>8</sup>

#### Analogue switch off and terrestrial digital coverage

Most countries switch off analogue broadcasting in regional stages. Digital television is provided in the form of free to air or paid for channels. The regulator makes it part of the licence conditions to ensure that coverage by digital terrestrial television is achieved after switchover to a degree equivalent to that of previous analogue television coverage. Multiplex licence holders carrying public service television channels must obtain a stated, high coverage of the population. To achieve this, they will be required to broadcast from specified sites, normally including such used for analogue transmissions as

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<sup>6</sup> A forthcoming study (Spring 2009) commissioned by the OSCE Representative of the Freedom on the Media on digitalisation principles will deal in more detail with general issues, giving examples from many countries. The authors of this study are Dr. Andrei Richter and the author of this analysis, Professor Katrin Nyman-Metcalf. This author is grateful to Dr. Richter for some of the general information included in this analysis.

<sup>7</sup> Working Group on Digital Terrestrial Television in EPRA Countries. Final Report. June 2<sup>nd</sup>, 2004. See at the official site of EPRA, the European Platform of Regulatory Authorities, at: [http://www.epra.org/content/english/press/papers/DTTWG\\_finalreport.doc](http://www.epra.org/content/english/press/papers/DTTWG_finalreport.doc)

<sup>8</sup> *Rittler R.* Austria: Invitation of Tenders for Multiplex Platform // IRIS 2005-7:8/11. See: <http://merlin.obs.coe.int/iris/2005/7/article11.en.html>

well as additional ones. Lists of sites from which transmissions must be made are included in the conditions. Reports on how progress is achieved is another common criteria in the licence.<sup>9</sup>

#### Future of existing licences

One issue where legal certainty is of the essence is what happens with existing broadcast licences. It is expensive to maintain analogue and digital broadcasting simultaneously so this should not be a solution for any length of time. If there are existing analogue broadcasting licences, these may have to be terminated before their period of expiry. This is a serious interference with the possibility of private subjects to do business and should only be resorted to if absolutely necessary. In such a case it needs to be prepared and carried out in a manner which minimises such inconveniences. A longer time planning of digitalisation, where any analogue licences issued will have a limited validity period is one way of achieving an organised switch-over. A moratorium for new licences for a set period as well as preference for existing licensed broadcasters to get the first digital licences are other methods. The strategy recognises the challenge of supporting all analogue broadcasters in digital platforms by 2012.

A moratorium on issuing licenses for broadcasting may be a necessary step in the digital switchover. It allows the regulatory authorities to make plans and efficiently use the spectrum while making everything ready to start licensing digital broadcasters. It also encourages broadcasters to undertake practical steps to switch their signal from analogue. However, there is a danger in a moratorium as an existing situation is maintained and this may not be the best situation from the viewpoint of diversity and plurality.

It is common to let the existing analogue broadcasters be the first to get digital licences. This helps in the transition issue and it is a good solution if the broadcasting landscape is basically good in the country. If on the other hand it is not, an undesirable situation may be cemented as it takes time before digitalisation positively contributes to plurality.

#### Regulation of frequencies

As for the regulation of frequencies, the close cooperation between different regulatory bodies is essential. In a digital communications environment, a converged communications regulator may have many advantages. It is however up to each country to decide how to design the regulatory body and there is no requirement as such on what type of regulator there should be. There is however a need for careful cooperation with the frequency regulator. As for the specific frequency matter, this is not

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<sup>9</sup> *Prosser T.* Licence Conditions to Achieve Near-Universal Coverage of Digital Terrestrial Television after Switchover // IRIS 2007-2:13/22, see: <http://merlin.obs.coe.int/iris/2007/2/article22.en.html>

commented upon in this analysis save to mention that the ITU planning must be followed and any coordination made with neighbouring states. The allotment suggested appears adequate but this report does not go into detail on this matter. What is important is that population coverage is the main issue, not coverage of territory and that the geography of the country is taken into account. This includes cross-border issues where solutions must be sought in cooperation with neighbouring states. The special situation with analogue frequencies having been taken over for digital broadcasting without proper authorisation needs to be addressed in the planning work.

### **Technical and infrastructure issues**

#### Access to technical facilities

In digitalised broadcasting, access to the technical facilities for broadcasting may act as a bottleneck. The technical facilities are complex and expensive and it will not be like in the analogue system where many broadcasters have their own transmission facilities. Instead, the transmission and the content provision will be separate from both the practical and the legal and licensing perspective. This separation is an important principle. In competition law terminology, the transmission technology is an essential facility without which competition is not possible and to which the regulator must ensure access.

The change-over gradually is good for broadcasters as it gives more time to prepare and it makes the important legal certainty issue (of taking away licences from those who have analogue licences) easier. At the same time this is costly.

The strategy discusses different types of switch-over and provides a lot of detail of coverage and transmission. The optimal method suggested is not very clear and although it is good to discuss this with all involved the time is short. A clearer explanation of pros and cons in the specific Albanian context with the different solutions would have been preferable. The planning for different parts of the country should run consecutively, which is not clear as in one place the time given for the process is added up to 61 months which is more than the time until the completion of the plan.

#### Decoders and financial burdens

The strategy provides detail on the costs for subsidising decoders. The cost is also given for the networks. This detail is positive as it provides a basis for the further work but the respective carrying of costs is not so clear. This is a key issue. Broadcasters are expected to carry some costs, and in Albania there is a broadcaster already broadcasting on digital. The financing by and of private networks is especially unclear in the strategy. The private broadcasters will have to invest in the digitalisation. If they are also to subsidise decoders this is an additional expense. It must be recalled



that in most countries the voluntary interest for decoders has been smaller than was hoped. The fund for broadcasters is a good idea but only if it can realistically be financed.

Many viewers in a poor country such as Albania will not be able to pay additionally for broadcasting. There is a risk that there will be less access to information. Also, people who could pay may be unwilling to do so if they do not really see the need. The definition of families in need and the mechanism for how to select these people and how to support them to get the receivers is important. There is a cost involved in this process and this must also be financed.

Countries have different ideas on how to support the digitalization process. In many countries there is a cut in operating licence fees paid by the commercial television to encourage introduction of digital television (Austria, Estonia and Finland as examples). There have also been increases in the subscription fees paid by the people, but this may not be suitable for other reasons especially in countries with no tradition of paying such fees and problems in maintaining them. Furthermore, PSB subscription fees are normally seen to be for programme content and not for the technical facilities. The justification for taking a subscription fee for public service broadcasting, which normally is compulsory, is that content of public interest should be available, like high-quality news, minority programming and similar. Most European countries do not feel the public service broadcaster as a company should be supported but rather its output. If the PSB is given a role in the digitalisation process, as is common, the financing of this will be seen as a special issue.

#### MPEG 2 or 4?

In relation to the technology used, in some countries the question of using MPEG 2 or 4 has been an issue. Digitalisation will soon be open also to HDTV and then new changes may be needed. If it is possible to leap-frog developments and go immediately to the most modern technology, this can be good for all. However, in Albania there is already digital broadcasting. The suggestion to leap-frog although good as a principle, will only work if it is financed from the viewpoint of service providers and users. If people have the equipment needed for one standard, it may not be feasible to go directly to another one. The problem with introducing MPEG4 is that new receivers would (normally) be needed. The time aspect is important: those who did it early used MPEG2 and those that are behind can consider going immediately for the more modern version. In Albania DIGITALB is on MPEG 2 and it is thus presumed the people have receivers for this standard.<sup>10</sup> The EU is promoting interoperability (see for example COM(2006)37 Commissions Communication) but even in the EU there are no common rules.

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<sup>10</sup> The receivers are only for DIGITALB programmes, but the strategy says they could be unblocked.

The Directive 95/47/EC deals with the essential facility aspect and bottleneck aspect of the conditional access system. It sets up common standards to enable competition. EU recognises that if those who build an infrastructure shall be able to earn a return on their investment, this may lead to some monopoly for a limited period. There are rules in EU law on services of general economic interest (Articles 16 and 86 of the EC treaty) to deal with how such services can be provided in a competitive environment, taking into consideration the special nature of the services.

Network competition with different networks carrying different services and increased convergence of technologies is another feature of the likely future development.

The strategy discusses the idea of one owner of transmission facilities. This may have benefits but it means a state-created monopoly. This must be very carefully monitored by the regulator under the principles of a service of general economic interest under competition law. It puts stress on the regulator and binding rules on this issue as well as guidelines, training, specialised staff, etc., will be needed to minimise the negative consequences of such monopolisation.

### **Programme Content**

Many broadcasting rules can stay the same in the digital as the analogue broadcasting landscape. As concerns broadcasting content standards, there is no need per se to change these. With a wide variety of programmes, monitoring and implementation of standards will be challenging. It is important that the broadcasters are aware of standards and levels of enforcement. If this is not the case, the process will be very difficult. It sounds in the strategy as if the situation until now is not satisfactory but attention will now be paid to these issues in a way that may not have happened yet.

The role of the regulator in the programming bouquet composition is important. There is a need for programme makers though and if the PSB is weak now, it will be difficult to find suitable content to achieve an ideal mix. The strategy recognises this issue.

The statement about audience receiving programmes without added financial burden raises the issue of support to digital receiving equipment. Even if programming is free-to-air, the receiving equipment is needed. Given the large number of television sets in Albania, as mentioned in the strategy, there will either be major costs for the receiving equipment or many people will not be able to use the television sets they are accustomed to.

What is to a large extent missing from the plan is a discussion on the transmission network and platforms and the issue of access. It is mentioned as an important matter but as this is a prerequisite for there to be possible and sustainable digital broadcasting it needs attention, if not in this strategy

then a key issue in the planning work. The ideas put forward are not bad but a careful regulatory work is needed to ensure that those that can afford the work are also those that provide pluralistic programming. The different goals of plurality and diversity, avoiding monopolisation are not reflected in the ideas on financing. Public financing, public-private partnerships etc may be examined and in any case the regulator needs to play a central role.

The plan in many places talks about continued analogue broadcasting. In some places there may be unclear formulations that have to do with continued programme content rather than the analogue transmission, otherwise the issue of transformation is muddled.

### **Public Service Broadcaster**

The strategy states that the PSB does not have the kind of coverage as it should according to law (going from 90% to 99% of the population, it in fact covers about 73%). The same kind of comment can be made about the PSB as about other issues - the transition to digitalisation will not solve structural problems in the media market. The PSB programming and the coverage that should give added value that commercial broadcasters cannot give should be done anyway and not be dependent on digitalisation. If there are problems with PSB it will have even more problems finding its role in a digital environment with more choice for viewers.

The PSB should not need to compete in the commercial environment. Instead it may be better to examine alternative financing ways. It is difficult to ensure a level playing field in the area with a PSB competing for paid TV. Its role and tasks should be clearly set out in law.

The strategy states that the PSB does not meet the requirements in law for its broadcasting, neither in number of channels or the territory/population they should cover. The requirements are now seen to be superseded by the digitalisation and it is not likely analogue terrestrial television will meet the set requirements. The PSB is in a quite difficult situation with outdated equipment and problems with electricity supply as well as other problems, which means the PSB is actually not received in many parts of the country. The financing of the PSB is also an issue as the subscription fee (tax) to be collected is not properly defined.

The NCRT points out in the strategy that it has for some time already suggested to look at the possibility of establishing a digital network instead of building an analogue network for the second PSB program. The digital network would support the first and second program creating at the same time the opportunity for broadcasting several thematic programs. PSB would administer one digital platform on which also private broadcasters could be located. The PSB according to the strategy should already have anticipated the costs for this network in its budget and should thus be prepared

for digitalisation. At the same time, it appears from the strategy that the actual means and methods of the financing are not clear but something that needs to be examined and decided.

The PSB should have the resources for digitalisation and it is suitable that it takes a leading role, if it is capable of assuming such a role. If there are problems with the PSB, for example with what resources it has and how it is financed, these issues should be solved independent of digitalisation and the body should not be given major tasks that it may not be capable of assuming. The actual capacity of the PSB, both to safeguard its position and to assume an important role in the digitalisation process remain a bit unclear in the strategy.

Must-carry obligations are mentioned. It is not very clear (may be partly as a translation issue) but it appears the obligation is rather weak. This is important if the role of PSB is to be preserved or strengthened.

### **Concluding remarks**

The strategy contains many good points like its emphasis on population coverage, the consultation process and references to international and European standards but it is very much an initial document rather than a final strategy.

Digitalisation of broadcasting includes a series of practical, technical and legal issues that must be taken into consideration in any digitalisation plan. In Albania, the reality is that there is already quite significant digital television broadcasting even without support in law or in any digitalisation plan.

In summary and conclusion, the following remarks can be made regarding the strategy:

- Digitalisation does not solve other problems in the broadcasting field such as a lack of plurality and diversity or a weak PSB or regulator. Such problems must be solved separately and preferably before the digitalisation process or at least during the early planning of this process.
- The legal basis for digitalisation is very important. This must be clear and regulate the existing situation as well as set up clear procedures for the digitalisation. The separation of content provision and technical transmission is essential. This aspect is briefly touched upon in the strategy and it is also mentioned as one of the deficiencies of the draft law. Consequently, this aspect needs attention.
- The legal basis must regulate the existing situation such as it is, even if it is not ideal as a starting point. In the Albanian case this means a clear strategy how to deal with DIGITALB, taking into account consumer protection requirements and other issues linked to the fact that

unofficial digital broadcasting is already happening. To just terminate this would have negative consequences for consumers and for plurality.

- The strategy should be developed in a consultation process. The document should be sent for consultation and be available for the partners to comment on. It is important that views of the partners are *taken* into consideration and also *seen to be taken* into consideration. The consultation cannot end with the adoption of a strategy but must continue, especially as this strategy is not very clear on all issues.
- There should be a public information campaign to raise awareness and make people positive to the digitalisation process. This is essential if they are to be interested in obtaining special receiving equipment. Such a campaign is mentioned in the strategy but without detail.
- The international standards referred to (European or other) should be used for interpretation of concepts and notions in the strategy. This could be facilitated by a list of terminology used as part of the strategy or as a separate document issued by the regulator.
- The financing of the process is essential and needs to be clarified in a transparent and sustainable manner at an early stage.
- The inter-institutional cooperation is essential and needs a clear framework. This includes its financing, designated secretariat and a clear obligation for all concerned to designate representatives that have proper mandate to discuss on the issue. NCRT needs to be strengthened to be able to perform its tasks.
- The access to transmission facilities is essential and an important licensing condition, where the regulator needs a clear mandate. If a monopoly transmission provider is created/allowed, the regulator must carefully monitor this and ensure as much access as is possible and the maximum possible application of competition law principles. NCRT needs to be strengthened to be able to perform these tasks.
- Must-carry obligations and general rules on the PSB should be strengthened and more prominent in the strategy. Parallel work on strengthening PSB should continue.
- The rules on who has the right to subsidised decoders and how need to be clarified and the cost for this process calculated with.