



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

## **Analysis of the Concept Paper on migrating to digital radio and TV broadcasting system in Armenia**

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# CONTENTS

<b>Executive Summary.....</b>	<b>5</b>
<b>Conclusions and Reccomendations.....</b>	<b>7</b>
<b>A. Methodology and Introduction.....</b>	<b>9</b>
<b>1. Background.....</b>	<b>10</b>
<b>2. Access to broadcasting.....</b>	<b>12</b>
<b>3. Financing of the digitalisation process.....</b>	<b>14</b>
<b>4. Infrastructure issues.....</b>	<b>19</b>
<b>5. Regulatory issues.....</b>	<b>22</b>
<b>6. Programming.....</b>	<b>23</b>
<b>7. The role of Public Service Broadcasting.....</b>	<b>27</b>
<b>8. Other services and digitalisation.....</b>	<b>30</b>
<b>B. The Process.....</b>	<b>31</b>
<b>1. The digitalisation plan.....</b>	<b>31</b>
<b>2. Legislation.....</b>	<b>32</b>



## **Executive Summary**

The analysis examines the Concept Paper on migrating to digital radio and TV broadcasting system (hereinafter – the Concept Paper) approved by the Government of the Republic of Armenia on 12 November 2009. The analysis is made from the viewpoint of international obligations as well as best international and European standards. It also uses earlier reports related to the digital switchover in Armenia and the Guide to Digital Switchover commissioned by the OSCE Representative on Freedom of the Media and published in March 2010. Best European practice is seen in different instruments issued by the Council of Europe and the EU.

From a freedom of the media point of view, digital broadcasting can contribute to more choice for the audience and more opportunities for broadcasters to impart information. Unless certain rules and principles are taken into account by national governments and regulators, there is a risk of negative effects of the digital switchover, including monopolization and less media pluralism. The initial investment costs are high and the return may come later. Digitalisation does not solve other pre-existing problems in the media sector but may even add to them. In the digital era, the importance of public service broadcasting (PSB) increases and the PSB must be able to carry out the tasks entrusted on it. Access to information and reduction of inequalities do not come automatically through a multitude of channels – it is important that there is real diversity.

Technical/Frequency spectrum: Armenia should digitalise by 2015. Analogue broadcasting should not be switched off until almost the entire population (not just territory) can receive digital broadcasting, as is said in the Concept Paper. It is expensive to have parallel analogue and digital broadcasting, so this period should be as short as possible. As for the technology to use, different MPEG standards from MPEG 2 to experimental use of MPEG 12 are discussed but one should be clearly selected. It is not sensible to use more advanced than the normal standard in the region.

Access to broadcasting: It is important to avoid exclusion in particular from free-to-air services and transnational television. The question of subsidising decoding equipment is important. This is mentioned in the Concept Paper and the realisation in practice must be developed with clear and fair criteria. Industry can and should be encouraged to provide different types of decoding devices, at low cost. At the same time the decoders should be interoperable.

Financing of the digitalisation process is a big challenge for broadcasters and the Government. The Concept Paper fails to include all switchover costs for broadcasters. It is reasonable that private broadcasters carry some of the costs, but more concrete incentives may be needed. The Concept Paper makes a reference to longer duration of licences but is generally not clear on incentives for investment. The need for the public financial support is well-acknowledged in Europe but needs to be in line with state aid rules including not giving undue preference to certain companies. Monopolisation of the market must be avoided, by public or private companies. Privatisation of transmitter network ownership, which can be a means of financing digital switchover should take place.

Infrastructure issues: Broadcasters in the digital system are no longer normally the owners of their infrastructure, but use infrastructure held by someone else. Rules for access to infrastructure and for interconnection are important. The Concept Paper mentions free and equal access to infrastructure. Centralized distribution networks like TRBNA in Armenia may be a way to support broadcasters. Multiple broadcasters use a single multiplex for

transmission - the license grants a broadcaster rights to offer a particular programming line-up at a particular channel number, with the frequency license given to the third-party company running the multiplex. There is a need in the Concept Paper for rules on rates and conditions for multiplexes to outlaw cross subsidies as digitalisation should not permit to abuse a dominant position. Transmission ownership should never mean any interference in broadcasting content or in deciding which channels can be broadcast.

Regulatory issues and licensing: Licences will be divided for content provisions and for transmission. The Concept Paper sets out the differences in the licences but the process how this will happen needs clearer rules and some detail, especially as the Concept Paper is built upon a strategy that was first elaborated several years ago. It is reasonable to have a moratorium of analogue licences, which helps to deal with issues of legitimate expectations of the broadcasters, but a moratorium on tenders for broadcasting licenses should not be the first step in the digitalization process nor be used to limit diversity and must at all times be used without discrimination. In the Concept Paper the independent regulator, the National Commission on Television and Radio (NCTR), is mentioned, but its role remains somewhat unclear.

Programming: Digital broadcasting should not just entail an increase of the number of programmes, but an increase of pluralism. In the Concept Paper's main goals "Promotion of competition and pluralism" is correctly mentioned. At the same time there is concern about a point in "Objectives" which stipulates that programmes ensure protection of spiritual legacy, cultural diversity and pluralism, which is not suitable for all programmes. It is important that the regulator takes steps to increase pluralism of content in addition to preventing concentration. The Concept Paper proposes to introduce one free social package and several paid packages. The Concept Paper fails to explain the method of formation for the social package.

In the switchover period with a wide variety of content, the regulator should be particularly vigilant to ensure respect for broadcasting content standards. There are no such requirements in the Concept Paper.

The role of Public Service Broadcasting: Balanced coexistence of public and private broadcasters is pointed out in the Concept Paper. What is the essence of the "balance" is not clear. In Armenia issues remain on financing of the PSB.

The Concept Paper mentions the need for changes in the laws but is not very clear on the substance of such changes. The kind of legal acts needed or that should be changed depends on the existing structure of the broadcasting legal framework in the country. It is not necessary to have a special digitalisation law but the strategy must be supported by a proper legal framework. Transitional issues need to be dealt with so that changes in existing Statute on Broadcasting (2000) and the Statute on the National Commission on Television and Radio (2001) can be introduced without sacrificing legal certainty. The matters that must be regulated in law are:

- The licensing process and the different parts of the licence
- The status and role (the independence) of the body dealing with licensing
- The criteria for selection of programmes to permit for diversity and plurality
- Infrastructure issues (access, interconnection)
- Special role of undertakings with a significant market power, avoiding abuse of dominant position

## Conclusions and recommendations

- The Concept Paper sets out good aims and objectives that should be promoted but very little on how such promotion shall be made. As the process with drawing up a strategy started already several years ago there should now be more detail.
- The proclaimed aims of the Concept Paper are good as they stress maximum availability as well as free competition. Absence of censorship and editorial freedom are also underlined.
- The Concept Paper recognises the importance of access to networks and similar but provides very little detail on this.
  
- Balanced coexistence of private and public broadcasters is mentioned and should be achieved through the content of the strategy.
- The digitalisation strategy should not be drafted and adopted as a result of closed-door negotiations between the businesses and the government, but be under constant scrutiny of a wide public discussion to guarantee the pluralism of broadcasting services and public access to an enlarged choice and variety of quality programmes. Consultations with broadcasters, civil society groups and individuals on the digitalisation process should follow internationally accepted guidelines.
- It is preferable that the adopted strategy leads to new legislation introduced to and adopted by the parliament, rather than governmental decisions of presidential decrees.
- The Government should be transparent in the lengthy proceedings of digital dividend that designate specific parts of the airwaves for different types of telecom services. The Concept Paper is weak on convergence and other technologies and on how to benefit from the digital dividend.
- The Concept Paper should clearly select one of the available technological standards, most probably MPEG 4.
- The Concept Paper mentions a regional approach, which is good but this should be elaborated to give it more content and clarity.
- Support for decoding equipment is an important issue as satellite and cable penetration is low and this needs to be paid attention to in practice so that population is not deprived of broadcasting at the analogue switch-off. In cases where viewers face significant financial burden in obtaining digital converter boxes, the Government should consider subsidizing purchase of the boxes. Work with determining who will get assistance with receiving equipment and how this will be handled should be dealt with as a priority. The related research (on what people are willing and able to pay for) must also be carried out as a priority so the related work can proceed.
  
- It is recommended to deal with digital radio after switchover process in digital television is complete in Armenia.
- The Concept Paper mentions the work of the independent regulator in selecting programmes, etc., which is positive but the regulator in Armenia, the National Commission on Television and Radio, needs to be strengthened. The regulator should be closely involved with or probably even lead the digitalisation process including the planning for it.
- Competition authorities (as well as the telecommunications regulator) should be involved in the process.

- The necessary changes to the licensing regime are recognised but need more detail, in Broadcasting Law and/or by the regulator. Such detail must be transparent and clear as well as objective.
- The Concept Paper contains deadlines (20 July 2010) for legislation – although a bit unclear what exactly in the context of legislation – as well as for standards. The deadlines should be realistic but at the same time it is important to have proper timelines and avoid further delay. There is now some urgency and a strict timeline should be established. Reasons for delays up to now should be analysed so the same kind of reasons can be avoided in the future.
- Licences need to be issued in a transparent, objective and non-discriminatory fashion and for a reasonable length of time. The statements made in the Concept Paper in this regard are good but need to be specified.
- Incentives for the private sector to digitalise and how public sector money shall be used should be elaborated.
- If introduction of licence fee is delayed in the transition period then some other financial incentives should be put into force to ease the switchover process for the Armenian Public Service Broadcaster.
- The Government should proceed on the assumption that all existing analogue broadcasters will be licensed for digital signals. These broadcasters should not have to make the case from scratch for rights to be on the air. While preserving existing licences, the Government should strive to use additional channels to bring new voices to the airwaves.
- The centralized transmission networks for digital TV must have safeguards to assure that all broadcasters have fair and reasonably priced access and that the transmission networks are not misused for political purposes.
- The Government and broadcasters should immediately begin public education and awareness programs to ease disruption to viewers when the transition takes place.



## **Methodology and Introduction**

The Concept Paper on migrating to digital radio and TV broadcasting system (hereinafter – the Concept Paper) was approved by Protocol Decree of the Government of the Republic of Armenia No. 47 dated 12 November 2009. Analyzed was the unofficial English translation of the document provided to the experts by the OSCE office in Yerevan in February 2010.

The Concept Paper was reviewed by them from the point of the international obligations of the Republic of Armenia as a member of the OSCE, international standards and practice of the switchover process. In this regard we took note that in the Introduction to the Concept Paper special reference was made to Recommendation Rec(2003)9 of the Committee of Ministers of the Council of Europe to member states on measures to promote the democratic and social contribution of digital broadcasting.

Also taken into account were earlier analyses of the draft plan of Digital radio and television broadcasting implementation (hereinafter – Implementation Plan) and draft law to amend the Statute on Broadcasting (hereinafter - Broadcasting Law) made in 2006-2009 by the OSCE experts Prof. Katrin Nyman-Metcalf and Prof. Andrei Richter.

The authors also were guided by the report commissioned on them by the OSCE Representative on Freedom of the Media and published in March 2010.<sup>1</sup> From a freedom of the media point of view, the technology of digital TV would allow audiences to seek and receive more information and ideas via the broadcast media. It could also provide more opportunities for broadcasters to impart information to the public. But – as the above-mentioned report states – unless certain rules and principles are taken into account by national governments and regulators, there is a strong risk of negative effects of the digital television switchover, including further monopolization of the media market by the state or other players, less media pluralism, new barriers for cultural and linguistic diversity and for the free international flow of information.

The report underlined that in the digital era, the importance of advertisement-free public-service broadcasting (PSB) only increases. Indeed, digital technologies provide for the possibility of expanding the spectrum of PSB programmes available. Pluralism, and not just a multitude of channels, is of importance here. Access to information and reduction of inequalities do not come automatically through a multitude of channels – it is important that there is real diversity. Therefore, providing PSB, with its mandatory internal pluralism, is recommended as an integral part of the digitalisation reform.

For those countries that only take the first steps in the process, that is adoption of a digitalisation plan, the guide suggests that prior to its approval, the draft must be open to public, civil and professional scrutiny.

The potential of digital television is to bring the information society into every home. Therefore, it is important to avoid exclusion, and in particular exclusion from free-to-air services and transnational television programmes.

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<sup>1</sup> Guide to the digital switchover by Katrin Nyman-Metcalf and Andrei Richter / OSCE Representative on Freedom of the Media, 2010. See: [http://www.osce.org/documents/rfm/2010/03/42898\\_en.pdf](http://www.osce.org/documents/rfm/2010/03/42898_en.pdf) (pdf) or [http://www.osce.org/documents/html/pdftohtml/42898\\_en.pdf.html](http://www.osce.org/documents/html/pdftohtml/42898_en.pdf.html) (html)

There are a number of key issues linked to introduction of digital broadcasting. These include:

1. Technical/Frequency spectrum that involves international decisions (ITU, EU etc.)
2. Access to broadcasting i.e.: social and economic issues, democratic and social contribution of digital broadcasting.
3. Financing of the digitalisation process: with such issues as financing for the broadcasters, fragmentation of the advertising markets, etc., financing of the Public Service Broadcaster, infrastructure financing, state support
4. Infrastructure issues and how to avoid monopolisation and access to infrastructure.
5. Regulatory issues such as transition for the regulator, licensing (separate licences for the transmission and the programming content), the licensing process (tenders, moratorium, special process initially or not), competition issues.
6. Programming: selection of programmes especially for the free-to-air platform to ensure diversity and plurality; ownership rules, codes of content in a digital environment (protection of minors, protection against incitement, etc).
7. The role of Public Service Broadcasting.
8. Other services and digitalisation (making use of possibilities for convergence).

Special attention is provided for the *process* of the digital switch-over. It includes work on both the *digitalisation plan* and the *legislation*.

This analysis deals with all these key issues, commenting on the Concept Paper from the viewpoint of best European practice, in particular concerning licensing and access of current broadcasters and content producers, how to ensure public access to the new digital channels, regulatory issues including legal provisions, as well as concerning timing and financing for the digitalisation reform.

The authors are not sure in what way the Concept Paper under this review relates to the Implementation Plan that was to be adopted by a Decree of the Government of Armenia. The latter act reviewed by Prof. Katrin Nyman-Metcalf in October 2006 upon request of the OSCE Representative on Freedom of the Media is not dissimilar to the Concept Paper. Despite many years that took the Implementation Plan to be transformed into the Concept Paper this document keeps most of the weak points and even unnecessary information (like the number of foreign-made TV sets in Armenia) despite criticism of the earlier OSCE-sponsored review and the fact that the text of the document eventually became shorter and less precise. This cannot but disappoint the experts.

## 1. Background

Because radio waves do not respect national borders, consultation over frequency assignments emerged more than a century ago as an early form of global cooperation. Today this activity is overseen by the International Telecommunication Union (ITU), a United Nations agency based in Geneva, Switzerland. In 2006 delegates from 104 countries in Europe, Africa, and the Middle East met there to craft a grand plan for the switchover to digital broadcasting in their parts of the world without creating havoc on the airwaves. Current technical plans as to the introduction of digital terrestrial broadcasting in Armenia are based on international accords and first and foremost the Regional Agreement GE-06 (Geneva 2006)<sup>2</sup> which is a binding international treaty

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<sup>2</sup> See its text in different languages at the web-site of the International Telecommunications Union: <http://www.itu.int/md/R00-CR-CIR-0262/en> GE-06 takes into account 72,761 country requirements for the

signed by national administrations and registered with the United Nations. This Agreement served as a stimulus for adopting national policies in the switch-over to digital broadcasting in Europe.

The GE-06 Agreement sets 17 June 2015 as the date when all countries in the Europe will no longer need to protect the analogue services of neighbouring states and can freely begin using the frequencies assigned to them for their digital services. This date is not a guarantee that analogue switch-off will then take place throughout a given country. But because analogue services will no longer be possible along its borders, it could serve as an impetus to switching off analogue services completely.

In this respect, Armenia is bound to follow the ITU plans and it aims to fulfil this accord. The allocation to different uses is decided by the ITU, but the assignment to different users is a domestic matter. One important issue mentioned is that attention should be paid to non-broadcasting organisations and the spectrum they use. Another thing not really brought up in the Concept Paper is that convergence of technologies may mean that other new users will be interested in the same spectrum as the digital broadcasters. Furthermore, digitalisation may also open possibilities to use other services. Although the Concept Paper mentions this phenomenon it provides little elaboration.

The ITU timetable matches the recommendations made by the European Union. In a communication published in May 2005, the European Commission recommended that its member states phase out analogue terrestrial broadcasting by 2012.

By the beginning of 2010 digital terrestrial television (DTT) services have been entirely implemented in six European countries where switch-off of analogue terrestrial broadcasting is now complete (Germany, Denmark, Finland, Luxembourg, the Netherlands and Sweden). Switch-off has taken place in regions of Austria, Belgium (Flemish Community), the Czech Republic, France, Italy and the UK. Switch-off is due to take place in 2010 in Austria, Malta, Spain and Slovenia.

DTT was launched in 2009 in Latvia, Poland, Portugal and Slovakia and will be launched in Bulgaria, Estonia, Ireland and Romania in 2010. Pay DTT services were launched in 2009 in Germany, Latvia and Spain.

At the end of 2009 the European Audiovisual Observatory (EAO) estimated that out of the total of 7200 European television channels there are more than 730 channels being broadcast over European DTT networks, and of these more than 300 are local and regional channels. This compares with approximately 500 DTT channels in April 2009.<sup>3</sup>

The Concept Paper deals both with digital television and digital radio as a package, given that many issues are similar. Generally the digital television switchover is seen to be of greater impact for society. However, it must be noticed that digital radio has problems that are different from those of television, like that analogue radio receivers are often very cheap, people have many of them, programmes are abundant, and there is very little interest in more expensive digital ones. The freeing of spectrum through digital radio is also less important. For example, in

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transmission of DVB-T and T-DAB services in frequency Band III (174-230 MHz) and DVB-T services in frequency Bands IV/V (470-862 MHz). Generally, countries have been allocated 3 T-DAB and 1 DVB-T “coverage layers” in the Band III and 7-8 DVB-T layers in Bands IV/V. In Europe GE-06 replaces the existing Stockholm 1961 (ST-61) Plan which regulated frequency usage in an analogue broadcast environment.

<sup>3</sup> See: [http://www.obs.coe.int/about/oea/pr/mavise\\_end2009.html](http://www.obs.coe.int/about/oea/pr/mavise_end2009.html)

France digital terrestrial radio broadcasting will begin only in 2010 and only in areas with some 30 percent of the population. Here it is considered as an additional digital service. The idea in the Concept Paper to deal with digitalisation of radio after the digitalisation of television has been completed is acceptable and in line with international standards.

## **2. Access to broadcasting**

### Receiving equipment

Digitalisation provides many benefits both for the audience and the broadcasters, as it allows more information to be fitted onto the radio frequency spectrum. The benefit for free competition in the communications sector is mentioned in the Concept Paper together with benefits for development of this sector. The Concept Paper underlines that extensive access and availability are aims for digitalisation in Armenia, which is positive. However, there are certain potential obstacles to these positive effects. Such possible obstacles affect both audience and broadcasters. For the audience, the main potential obstacle to enjoyment of the benefits of digitalisation is that special equipment is needed in order to be able to receive broadcasting. For persons that receive broadcasting via cable, satellite or broadband, they will not normally have to change anything themselves, but the changes related to the switch-over will be handled by the service provider. However, for terrestrial television the viewers themselves will have to procure new devices. In Armenia the Concept Paper mentions that the penetration of cable and satellite are low so the question of decoding equipment will be an important one. This was mentioned already in the previous strategy and the importance of this issue was stressed in the comments made to the earlier plan but it is unclear if the matter has been developed in any detail in the intervening time.

The objectives of the Concept Paper include that “Before final termination of analogue broadcasting provide the needy and vulnerable population of Armenia with digital TV and radio broadcasting receiving and decoding equipment”. This is a valuable and important objective (presuming it relates to the special decoding equipment needed) and the work with defining who is covered by this description and how the selection of those to receive assistance will be made (and by whom) should be a priority. This is important also in order to be able to decide the cost of this measure. The Paper mentions research to be made on what the audience is able and willing to pay for and as such research is a prerequisite for other decisions and plans, it must be carried out as a priority. The criteria and system for how to distribute free or subsidised boxes may be complicated and there is likely to be a cost in the administration of this. Regular rules for social security may not be the best or adequate criteria for deciding who gets support. It is essential that people are not cut off from broadcasting when the digital switch-over takes place. The countries that have digitalised early (like Finland and Sweden) did not provide any free set-top boxes. Instead, in line with EU policy the countries promoted that industry made different versions available at different costs (by promoting maximum interoperability etc.). However, the socio-economic standards of the country must be kept in mind when considering this issue.

### Switch-off of analogue broadcasting

Analogue broadcasting should not be switched off until almost the entire population can receive digital broadcasting. It is important to calculate with population and not territory. This is correctly done in the Concept Paper and the requirement mentioned there is adequate. The Concept Paper mentions coverage for at least one minimum social multiplex in the whole of Armenia before analogue is switched off. This is good, but it needs to be kept in mind that it is expensive to have parallel analogue and digital broadcasting, so the period of this should be as

short as possible. Coverage must thus be achieved as quickly as realistically possible. The work with providing or supporting the provision of receiving equipment will go on in parallel with the work by broadcasters to move to digital transmission.

In the analysis of the end of 2006/early 2007, it was pointed out that although a strict timeline is good, what the plan then suggested appeared overly optimistic for Armenia. It appears that this plan was not followed and perhaps the timeline is now more realistic. The reasons for delays with the earlier plan should be analysed so the same obstacles can be avoided. The Concept Paper correctly discusses the realities in Armenia, setting out in some detail the different existing broadcasters and their coverage. This is the correct approach in order to deal with the coverage and possible switch-over in the specific realities of Armenia. Only few programmes have coverage of the whole country and the differences between Yerevan and the country-side is quite marked.

The Armenian Broadcasting Law contains an article on the right to receive television broadcasting. Although this is presumably more of a general principle, it is still important to ensure that technical developments do not make sure receiving of programmes so difficult that in reality this legal right is violated. It may in this context also be relevant to add something about digital broadcasting although the rules for support to receiving equipment fit better in special rules or transitory provisions than in the law as such.

#### Technical standards

As for the technology to use, the Concept Paper discusses the different MPEG standards from MPEG 2 to experimental use of MPEG 12. However, in the strategy it is necessary to select which one to use. The countries and regions that digitalized early (like Finland and Sweden) chose the MPEG 2 standard but as technological developments have been fast, most other European countries have opted immediately for MPEG 4. MPEG 4 allows use of equipment for MPEG 2 but not the reverse. This means that if people already have equipment, it may be difficult to go to the more advanced standard as this would mean additional cost for viewers. If however not many viewers have any form of digital receiving equipment and it is not yet widely distributed in the market, it is sensible to opt for the more advanced standard immediately. It would however not be sensible to go for more advanced than what is the current normal standard in the region, as it is expensive and complicated to be alone with one standard as this reduces the market for the receiving equipment, which in turn may make prices higher and availability more difficult.

#### Special needs

People with special needs can in many ways benefit from digitalisation, as not only more broadcasting but also other services will be available and persons with special needs (like impairments of hearing or vision or limited mobility) may be extra much helped by such services. However, this will not be an automatic effect but requires a thought-through policy and should be part of the plan.

#### Council of Europe instruments on media

The Council of Europe has issued a number of instruments on media, which either directly mention benefits and changes for media of the process of digitalisation or stress general issues that must be kept in mind in the process of digitalisation. The Committee of Minister's Recommendation (2003)<sup>9</sup> to member states on measures to promote the democratic and social

contribution of digital broadcasting provides that member states should “create adequate legal and economic conditions for the development of digital broadcasting”. The Recommendation states that there should be well-defined strategies drawn up by Member States to ensure a carefully thought-out transition to digital broadcasting. Such a strategy should promote co-operation between operators, complementarities between platforms, the interoperability of decoders, the availability of a wide variety of content, and generally exploitation of the opportunities offered by digitalisation. Media pluralism is an important goal for digitalisation.

Among general instruments is the “*Declaration on protecting the role of the media in democracy in the context of media concentration and Recommendation on media pluralism and diversity of media content*” (31 January 2007, Committee of Ministers). The Declaration concerns separation of the control of media and the exercise of political authority and highlights the importance of transparency of media ownership through appropriate regulatory measures. Adequately equipped and financed public service broadcasting can counterbalance the negative consequences of strong media concentration. The Recommendation reaffirms that media are essential for the functioning of a democratic society as they foster public debate, political pluralism and awareness of diverse opinions. This Declaration and Recommendation are relevant in the process of digitalisation as there is a risk, at least initially, that because of the cost involved for broadcasters to digitalise, there may be more concentrations.

Recommendation No. R(99)1 of the Committee of Ministers specifically deals with broadcast concentration, which might endanger media pluralism and suggested measures like creating special media authorities with powers to take action against market concentrations. Recommendation (2003)1 called on Council of Europe states to put in place rules that limit concentration of media ownership. Resolution 1636 (2008) of the Parliamentary Assembly makes transparency of media ownership and economic influence over media one of the indicators for the media in a democratic society.

Specifically for Armenia the Council of Europe Parliamentary Assembly in June 2008 in Resolution 1620 (2008) urged Armenia to ensure “open, fair and transparent licensing procedure”. The reasons for the Parliamentary Assembly to stress this was e.g. a decision of the European Court of Human Rights, upholding an application of an independent TV station critical of the Government, which controversially lost its broadcast license in 2002. In this case, concern for the licensing process in Armenia was raised and these concerns were not effectively dealt with in the years after the decision was passed.

### **3. Financing of the digitalisation process**

The big challenge for broadcasters and the national Government will be financing the switchover, especially today, during the economic recession. Becoming a full-blown digital station able to broadcast on its own can mean acquiring or renting a new transmitter, special cables that carry signals, complex computerized equipment, etc.

Britain’s so far uncompleted conversion of more than 1,150 transmitters will cost an estimated 500 million pounds. The U.S. National Association of Broadcasters estimates there was a \$5 billion infrastructure price tag for the United States’ roughly 1,750 full-power stations. U.S. commercial stations paid their own way; public ones got grant help from the federally funded Corporation for Public Broadcasting and the governments of the 50 states.

Financial challenges of conversion can be particularly serious for special categories of stations that transmit weak signals. Many of these low-power stations exist to offer original programming just to very small areas of city or countryside. The United States has a particularly large collection of low-power stations, approximately 2,800, and chose to let them continue in analogue to ease their financial strain. From a signal engineering point of view, the decision was correct because their signals do not carry far and definitely do not cross the national borders. U.S. full-power stations, of course, got no such exclusion, but only a handful responded by closing down.<sup>4</sup>

But the impact of switchover in Armenia, where many stations have weak advertising bases and cannot tap government or investors for help with capital costs, might be much stronger. And stations that could shut down may disproportionately be the ones that are small and privately owned, the very stations that tend to bring diversity and local coverage to broadcasting, whether it is in courageous reporting or ethnic music that the large broadcasters do not carry.

The Government can suggest and implement different incentives for the private broadcasters to ease the switchover process for them. The Concept Paper makes a reference in Part VIII that “considering the need of returning financial investments for digital transition it is planned to extend validity of digital broadcasting licenses as compared to the analogue ones.” We understand this provision as a sign that the duration of licences for private broadcasters will be longer than today if they switch to digital broadcasting. In other words, digital licences will be issued for a long enough periods so that the licensees feel secure enough to make the necessary investments. In this regard, a positive example can be brought from France where the licence term for a broadcaster that intends to migrate from analogue to digital television becomes extended from current 15 years up to 30 years (if the station develops coverage of 95 percent and above of the population in the country). In addition every broadcaster migrating to DTT gets permission to a new service (up to 7 such permissions) and a further permission when it switches off analogue broadcasting in accordance with the pre-arranged schedule.<sup>5</sup>

Though the initial investment costs for digitalisation are high, the return may come later in the form of *digital dividend*. Digital dividend denotes the unprecedented amount of spectrum that will be freed up in the switchover from analogue to digital terrestrial TV. A fair and well-balanced reallocation of the spectrum between the mobile broadband, broadcasting, and information and communication technologies (ICT) industries will ensure that society reaps the full social and economic benefits of the digital dividend.

The Concept Paper correctly states: “Another important advantage of digital broadcasting systems is release of some part of frequency resource band, which enables to introduce other services such as cellular communication and terrestrial broadcasting” (Part VIII). The way the cleared spectrum will be used in the future should be done rather earlier than later as investments from potential buyers of the spectrum can also be used to finance the switchover process today. It is even more important if, as the Concept Paper states in Part VIII, expected is “a flow of foreign investors to Armenia”.

Speaking of the digital dividend it is necessary to mention the European Commission’s consultation document “Transforming the digital dividend opportunity into social benefits and

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<sup>4</sup> See: Burgess, John. Throwing the Switch: Challenges in the Conversion to Digital Broadcasting. A Report to the Center for International Media Assistance. November 19, 2009. Washington: National Endowment for Democracy, 2009. P. 18.

<sup>5</sup> Presentation by Thierry Vachey, Head of Television Department at the Superior Audiovisual Council, in Kiev, 19 February 2010.

economic growth in Europe” which was published by the Information Society and Media Directorate-General on July 10, 2009<sup>6</sup>. This paper recommends identifying common bands that can be optimised by enabling “clusters” of services using a similar type of communications network: broadcasting, mobile multimedia and mobile broadband. These bands would be planned and harmonised in some form at EU level.

At the national level, for example, the way the U.K. Government discusses the future use of digital dividend in Great Britain can be monitored through the Digital Dividend Review (DDR), the project releasing the spectrum freed up by digital switchover for new use.<sup>7</sup> A major trend in this regard is involvement – through consultations and seminars – of the public and the businesses in the process of debate and decision-making. Consultation has been an essential element of governmental proposals that generated over 750 responses from a wide variety of stakeholders expressing a wide range of views.<sup>8</sup>

As a result of this process it was decided to auction cleared spectrum in the U.K. This reflects the view that an auction is the fairest and most transparent way to award rights to use spectrum and that market mechanisms are the most effective tool available to encourage efficient use of spectrum and should be used unless there is a compelling case to the contrary. Since the auctions will be held by public (state) bodies the revenues will fill the national budget. This may pay back the state involvement in financing of the digital transfer which is normally needed and is foreseen in the Concept Paper.

The mixture of private and public investment is good in principle but the investment incentives for private companies are not very clear. There must be a careful balance so as not to give undue preference to certain companies. Monopolisation of the market must also be avoided, by public or private companies. Privatisation of transmitter network ownership – another important means of financing digital switchover – should not be delayed because of digitalisation and any holder of the transmission network must observe access rules as well as not influence broadcasting content or which channels are broadcast.

Effective use of the digital dividend in Armenia should be very well foreseen in the Concept Paper with the use of good examples in Europe.

The ratio of the financial contributions expected from private companies and the respective governments for the switch-over period depends on the possibilities of the market and on the wealth of the country. To show two opposite (in this regard) approaches we suggest comparing the following examples from Russia (with mostly public spending) and Ukraine (with high expectations of private investments) (see Table 1).

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<sup>6</sup> See:

[http://ec.europa.eu/information\\_society/policy/ecomms/radio\\_spectrum/\\_document\\_storage/consultations/2009\\_digitaldividend/2009\\_0710\\_0904\\_digitaldividendconsultation.pdf](http://ec.europa.eu/information_society/policy/ecomms/radio_spectrum/_document_storage/consultations/2009_digitaldividend/2009_0710_0904_digitaldividendconsultation.pdf)

<sup>7</sup> See: <http://www.ofcom.org.uk/radiocomms/ddr/>

<sup>8</sup> See: <http://www.ofcom.org.uk/consult/condocs/ddr/statement/>



Table 1. Expenses for the Digital Switch-over in 2009-2015 (planned)<sup>9</sup>

	Public expenses (million EUR)	Private investments (million EUR)	Total (million EUR)
Russia	1 716	1 036	2 752
Ukraine	0.76	364.24	365

The need for the public financial support for the switchover process is well-acknowledged in most parts of Europe. The European Commission recognises that the switchover may be delayed if left entirely to market forces. It also recognises that public intervention can be beneficial through regulation, financial support to consumers, information campaigns or subsidies, in order to overcome a specific market failure or to ensure social or regional cohesion. The onus is on the EU member states to demonstrate that aid is the most appropriate instrument, it is limited to the minimum necessary, and it does not unduly distort competition. Acceptable forms of public support for the digital switchover may be:

- funding for the roll-out of a transmission network in areas where there would be insufficient coverage;
- financial compensation to a PSB in order to reach the entire population with its digital signal;
- subsidies to consumers for the purchase of digital decoders (but not digital TV sets!) as long as they are technologically neutral, especially if they encourage the use of open standards for interactivity;
- financial compensation to broadcasters which are required to discontinue analogue transmission before the expiry of their licences, provided this takes account of granted digital transmission capacity.

In a number of cases the EU interfered in the matters that concerned state financing of digital switchover. While it is not completely prohibited, under the EU law policy intervention is possible under certain circumstances so long as it contributes towards general interest goals. However, further clarification of “general interest goals” may be necessary.

Recommendation (2003)<sup>9</sup> of the Committee of Ministers of the Council of Europe to member states on measures to promote the democratic and social contribution of digital broadcasting is very specific as to the principles applicable to public service broadcasting in the new environment. One of the principles in it deals with issues of *financing* public service broadcasting:

“In the new technological context, without a secure and appropriate financing framework, the reach of public service broadcasters and the scale of their contribution to society may diminish. Faced with increases in the cost of acquiring, producing and storing programmes, and sometimes

<sup>9</sup> See Development of Digital Terrestrial Television in Russia and Ukraine by Andrei Richter and Taras Shevchenko. IRIS-Plus, 2010-1. Strasbourg: European Audiovisual Observatory, 2010. P. 10.

broadcasting costs, member states should give public service broadcasters the possibility of having access to the necessary financial means to fulfil their purpose”.<sup>10</sup>

Industry can and should be encouraged to provide different types of decoding devices, at low cost. At the same time the decoders should be interoperable, so that there will be no exclusion in the reception of competitors’ signal. The Concept Paper sets an ambitious objective to “provide the needy and vulnerable population of Armenia with digital TV and radio broadcasting receiving and decoding equipment” (Part VI). Unless the translation is bad, we would suggest provision of the poor families with decoders only and refrain from supply of digital TV and radio sets.

Around the world, governments have conceded that it is unfair to expect everyone to shoulder expenses on purchase decoders alone. The U.S. government, for example, underwrote a costly coupon program that took \$40 off the retail price of converter boxes.<sup>11</sup>

The Concept Paper fails to include all major costs for broadcasters to make the switch-over. This is reasonable that private broadcasters are expected to carry some of the costs, but it must be recognised that more concrete incentives may be needed in order for them to be willing to make investments. Advertising revenues generally have dropped with the ongoing economic stagnation and when there is low penetration as well as fragmentation of the audience (as happens with the introduction of DTT), the market is rather unattractive, which means that digitalisation may mean less advertising revenue for each participating station. Apart from entailing a limited possibility for private broadcasters to make money from advertising, in order not to create worse conditions for private broadcasters, this may also have consequences for broadcasting legislation on issues such as the ban or restriction of the public service broadcaster’s right to disseminate commercials, so that the market is not even more disturbed.

Although there are various players that stand to gain from the digitalisation, like companies that may get the spectrum cleared, manufacturers and traders of equipment, providers of other services, etc, these are unlikely to be those entities that have to carry the initial costs. Competition issues such as concentration and cooperation issues, if a certain concentration may lead to dominance that is likely to be abused, must take into account the special needs like very heavy infrastructure investment. It may be possible that certain concentrations are the only way to prevent that the process goes bankrupt. Fair access rules are crucial.

Centralized distribution networks like Television and Radio Broadcasting Network of Armenia CJSC, or TRBNA, may be a way to ease broadcasters’ financial pain. In this model, a government-owned corporation or a private company operating on a government license builds and operates a national network of transmitters and rents capacity to broadcasters. Multiple broadcasters use a single multiplex for transmission. The multiplex is essentially an over-the-air version of a cable TV system, which carries the content of other parties, whether they are terrestrial stations or companies offering cable-only shows.

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<sup>10</sup> Appendix to Recommendation Rec (2003)9 of the Committee of Ministers to member states on measures to promote the democratic and social contribution of digital broadcasting. See <https://wcd.coe.int/ViewDoc.jsp?id=38043&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>

<sup>11</sup> See: Burgess, John. *Throwing the Switch: Challenges in the Conversion to Digital Broadcasting*. A Report to the Center for International Media Assistance. November 19, 2009. Washington: National Endowment for Democracy, 2009. P. 23.

Many countries are establishing strict rules on rates and conditions concerning multiplexes to outlaw cross subsidies. In 2006, the Finnish Communications Regulatory Authority issued a detailed set of rules governing pricing and profits for the multiplex company Digita Oy. Pricing must be “cost-oriented and non-discriminatory,” it said. Rules for depreciation were laid out down to the level of how to treat the value of cooling units. Thus providing for competition by licensing more than one multiplex is a safeguard.<sup>12</sup>

#### **4. Infrastructure issues**

##### Access to infrastructure

Digitalisation changes the broadcasting landscape for broadcasters, in that they are no longer normally the owners of their infrastructure as usually is the case in the analogue system, but use infrastructure held by someone else. This means that rules for access to infrastructure and for interconnection are very important, which resembles telecommunications law. The licences will be divided into licences for content provisions and licences for the transmission. Rules and conditions for access need to be developed early in the planning process. These rules and their application must be transparent and objective.

The Concept Paper mentions free and equal access to infrastructure. This is not very clear as it is not evident how and if the access should be free in the sense of not costing anything. It is however a good aim to have equal access and the same possibilities for all to get access on fair terms.

Infrastructure investment for introduction of digital broadcasting will be a major issue and the Concept Paper is a bit unclear and not very convincing about the incentives that the responsible operators will get if they make the necessary investments (Part VIII). What must be recognised when estimating costs and investment readiness of private entities is that the initial costs are high and the increased attractiveness and investment potential of digital broadcasting comes only after a time and at a cost. Advantages (or positive outcomes) will materialise later as is said in the Concept Paper (Part VIII) but the time and scale of such advantages is not known and the issue is too new everywhere to be able to make any exact comparisons.

##### Concentrations in the area of infrastructure

The infrastructure for digital broadcasting is quite complex and expensive, which means that there is likely to be only few owners of infrastructure. These firms will thus have significant market power and legislation is needed to ensure that such power is not abused. Digitalisation often strengthens the already existing dominance of operators and this effect must be considered by both the plan for digitalisation and the regulator. If a process of structural separation and privatisation is going on, this should proceed and digitalisation not be allowed to delay or stop it. Such a process should be taking place in Armenia. The Concept Paper on the one hand mentions that because of the cost involved in digitalisation, some state resources will be necessary, but on the other hand the same high cost means there is a need for private funds. This is a correct statement but in the Concept Paper incentives for private investment remain unclear as mentioned above.

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<sup>12</sup> See: Burgess, John. Throwing the Switch: Challenges in the Conversion to Digital Broadcasting. A Report to the Center for International Media Assistance. November 19, 2009. Washington: National Endowment for Democracy, 2009. P. 19-20.

We understand that in Armenia the dominant network operator is the state-owned or previously state-owned company, Television and Radio Broadcasting Network of Armenia CJSC, or TRBNA, but digitalisation should not be seen as a means to cement the dominance of this body. The involvement of the telecommunications regulatory body is important. Privatisation in the broadcasting network sector should proceed nevertheless and digitalisation not be used as an excuse to maintain a higher state involvement. In Armenia, the broadcasting transmitter network is separate from the broadcasters. Regardless of possible public ownership of the transmission network, access provisions must be strictly applied and transmission ownership should never mean any interference in broadcasting content or in deciding which channels can be broadcast.

In this regard we note that among the countries that completed the switch-off of analogue TV and have only digital broadcasting, the number of multiplex operators today is 3 in Switzerland and in Finland, 2 in Netherlands, in Denmark, Norway, Sweden, and 11 in Germany.<sup>13</sup>

Bad practice of a single national operator should be avoided in Armenia. For example, in Romania, the audiovisual council and broadcasters have been at odds over who should nominate the country's multiplex operator. In Slovenia in 2009, the country's sole multiplex dropped three commercial channels in a pricing dispute. The channels' owner, Central European Media Enterprises Ltd., felt that the prices that the Slovenian multiplex was demanding were too high. So it is sticking with still legal analogue broadcasting in Slovenia and hoping that by the time those transmissions must be shut off, Slovenia will have a second multiplex that will bring competition and lower prices.

Competition law deals with issues such as these mentioned here, but in almost all countries regular competition law is combined with specific communications law to take into account special issues relevant to a service of general economic interest such as broadcasting. In whichever way the details of this are regulated, legislation as well as a regulatory authority to apply it are needed. Otherwise there is a risk that the positive effects of digitalisation are lost and there is instead abuse of dominance to the detriment of the broadcasters.

The Broadcasting Law contains a general and very brief prohibition on concentration. It should be evaluated if this is clear enough in the digital environment where the role of the broadcaster somewhat changes and where concentration for the content providers and for the owners of transmission facilities are two separate issues that both need to be dealt with by law.

### The role of the regulator

Even if market principles are the best to create a vibrant market that keeps prices down and quality high, in situations where there are reasons why the market cannot function fully or efficiently, regulators need to step in and make sure competition can work as well as possible without for that reason sacrificing other important goals. One such goal in the area of broadcasting is the universal access to broadcasting, especially public service broadcasting. In the period of digital switch-over it is especially important that authorities keep an eye on the functioning of the market. This shall be done from the viewpoint of the audience (monitoring costs and service provision) but also from the viewpoint of undertakings active in the field (through price controls of infrastructure usage prices).

Those owning and/or operating the technical facilities will have to provide access in a transparent, fair and objective fashion. If content providers cannot get access at reasonable terms

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<sup>13</sup> See Development of Digital Terrestrial Television in Russia and Ukraine. IRIS-Plus, 2010-1. Strasbourg: European Audiovisual Observatory, 2010. P. 40-41.

to infrastructure, the benefits of plurality that digitalisation can provide will be lost. For practical and environmental reasons as well as costs it makes sense to use existing infrastructure where possible and also to share infrastructure between different users and uses. These matters are best dealt with by the market, but it is very likely that the market will not at all times be able to deal with them in the best manner in which case there is an important role for the regulator. The parties (private undertakings) shall negotiate access conditions and similar and the regulator will only step in if the parties are not able to agree. This should be the case also for digital broadcasting but it is important that the regulator is up to this.

The large costs for infrastructure, who will invest in this and why remain unclear as has been pointed out earlier. It is reasonable that broadcasters carry some of the cost of digitalisation but they must be realistically able to do this.

The Concept Paper outlines benefits as well as costs (in a broad sense) of the digitalisation process for different concerned parties. This is good as it makes concerned parties aware of these issues in a transparent fashion. At the same time, as mentioned several times, the incentives for private broadcasters to invest are not clear. The benefits are too far in the future as well as too insecure to be clear incentives now. The incentives should be as clear as possible as otherwise too much state intervention will be needed to push the development.

The OSCE Guide sets out in more detail the importance and content of the issue of infrastructure and risk of bottleneck problems.<sup>14</sup>

### EU Directives

The EU Directives, especially the Access Directive 2002/19/EC as amended (Directive 2009/136/EC and 2009/140/EC) and Framework Directive 2002/21/EC provide a basis for the requirements that is of interest also for non-Member states. These Directives show modern communications rules shall be designed and thus provide a model also outside of the EU. In addition, for a country like Armenia with close links with the EU, it is relevant to have compatible rules. The Concept Paper mentions the benefit of a regional approach, which is positive. Among the content of the directives can be mentioned the EU Framework Directive 2002/21/EC, which includes the provision that interoperability of digital interactive television services and enhanced digital television equipment at the level of the consumer should be encouraged in order to ensure the free flow of information, media pluralism and cultural diversity. The Universal Service Directive 2002/22/EC (in an annex) stated that interoperability of digital television equipment for consumers shall be ensured. These provisions are now in an annex to the amending Directive 2009/136 The Directives are based on the idea of technological neutrality – the means of transmission shall not be determining but it is the service as such which matters. Member States shall ensure that services work on different technological platforms.

The Audiovisual Media Services Directive 2007/65/EC which to some extent is similar (or an updated version of) to the content of the 1989 Convention on Transfrontier Broadcasting, which has a wider membership, deals mainly with broadcasting content. These instruments do not particularly deal with digitalisation but at the same time the principles for broadcasting content shall apply to the same extent in the digital media landscape. In the OSCE Guide to Digital Switchover<sup>15</sup> it is stated “It is obvious that in the switchover period, which provides access to a wide variety of content, the governments and national regulators should be particularly vigilant to ensure respect for the protection of minors and human dignity and the non-incitement to

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<sup>14</sup> OSCE Guide to the Digital Switchover, especially Chapter 2.

<sup>15</sup> Ibid, at p. 25.

violence and hatred. The development of new technical means for parental control must not reduce the responsibilities of broadcasters and providers.”

However, EU Directives do not set out details on the digitalisation process - even not for Member States. The aims of the process and general principles are mentioned but Member States must design the exact process as well as the timeline themselves. The Commission can (according to Directive 2009/140/EC) issue some rules for the process, but as can be seen from the different time scale in EU Member States, it remains a matter for each country – whether an EU Member or not – to develop the details within the international framework of which the ITU deadlines form the main basis, as mentioned in the Concept Paper. EU Directives can thus be used for inspiration but do not provide detailed solutions.

## **5. Regulatory issues**

In the comments in 2006/2007, it was stressed that the role of the independent regulator was too weak in Armenia generally and also in the context of the digitalisation plan. In the Concept Paper the independent regulator, the National Commission on Television and Radio (NCTR), is mentioned, which is positive, but its role remains somewhat unclear. From now on the regulator should be closely involved with the digitalisation process. Some amendments on appointment and other matters have been made in legal changes in 2009. In general, the regulator needs to be strong and independent in order to efficiently and objectively carry out its duties in the digitalisation process, including the important selection of which content providers will be placed on platforms, especially the free to air platform. The regulator should be closely involved with or probably even lead the digitalisation process including the planning for it. This way it takes place in France, U.K., Ukraine, etc.

The regulator will streamline the roles between the technical side (close to telecommunications regulation) and the content side. In the Concept Paper it appears that not so much attention has been paid to the regulator. In the earlier comments it was pointed out how important it is that the regulator plays an important role in the process of digitalisation. The Concept Paper does mention that an independent regulator will select programmes for the multiplexes, which is good. However, the regulator in Armenia may need general strengthening. Digitalisation does not solve other pre-existing problems but may even add to them, so the regulator needs to be strengthened in order to be able to manage the additional and different tasks that digitalisation entails.

### Licences

As was mentioned above, in some ways the regulator for digital broadcasting resembles more a telecommunications regulator than a classical broadcasting one, in that access to infrastructure is an important issue. Licences will have to change as there will be separate licences for content and for transmission facilities, normally held by different entities.

The Concept Paper is good in setting out the differences in the licences as different issues will be licensed. The process how this will happen needs clearer rules however, as it is a big difference from the current system and thus must be very clear at an early stage in the process. This is the kind of issues on which a Concept Paper such as this one should contain some detail rather than just to make a general mention, especially as this Paper is built upon a strategy that was first elaborated several years ago. As compared with the previous strategy it is now clearer what the licence should look like but there is still no detail. The stressing of the need for a long enough

licensing time is also good and follows suggestions made in the comments 2006/2007. What exactly this period should be remains to be stipulated and the view of the regulator should be important in determining this. Longer periods as incentives for investment have been pointed out above.

Open tenders as a basic provision is good, but details including the difference compared with current regulatory practice is not clear. The law will need to be amended in this respect.

### Moratorium

It is reasonable to have a moratorium of analogue licences. However, this should never be used to limit diversity and it must at all times be used without discrimination. In comment made in 2008 to a proposed moratorium it was pointed out that although a moratorium is good as it is one step in the process of the switch-over and helps to deal with issues of legitimate expectations of the broadcasters, it is essential to not apply a moratorium in a non-objective fashion. As there will be issues of previous licence-holders not having licences extended, which can always have an importance from the viewpoint of legitimate expectations, transparency in the process and careful planning are essential. The process cannot take too long so such transitional issues will arise. In many countries that have digitalised the holders of analogue broadcasting licences have been among those selected for digital broadcasting, which is positive from the viewpoint of legitimate expectations. At the same time, if there are problems of lack of diversity this can cement this situation, so a balance between allowing those broadcasting in the analogue system to carry on and a chance for others to get licences must be considered. Diversity will be dealt with more in detail below, but it may be pointed out here that the role of the regulator is important in dealing with this issue as digitalisation at least in a transitory phase risks to make worse the pre-existing lack of diversity.

A moratorium as such is needed as there is a question of legitimate expectations for broadcasters that have a licence that needs to be terminated. At the same time it is expensive to maintain parallel broadcasting for a long time so there needs to be a clear cut-off date.

On 19 September 2008, the OSCE Representative on Freedom of the Media asked the Government of Armenia to review the adopted amendments to the Broadcasting law that introduced a moratorium on issuing new broadcasting licenses until the planned digital switchover of 20 July 2010. This moratorium makes it impossible for Armenia to comply with the June 2008 decision of the European Court of Human Rights (ECHR), which found that denials of licenses for television station *AI+* violated Article 10 of the European Convention on Human Rights, and urged the country to allow the station to apply for a new license. The moratorium effectively contravenes the decision of the ECHR. While the digital broadcasting switchover is cited by the Armenian authorities as the reason for the amendment, a moratorium on tenders for broadcasting licenses should not be the first step in the digitalization process.

## **6. Programming**

The essence of digital broadcasting is not just an increase of the number of programmes, as the Concept Paper states in its Introduction, but an increase of pluralism of the programmes. Therefore we would like to underline the importance of goal 6 of the “Main goals of the strategy” as it is stipulated in Part II of the Concept Paper: “Promotion of competition and pluralism”.

At the same time there is concern about point 4 of Part IV “Objectives” of the Concept Paper which states: “In the digital broadcasting process of TV and radio programmes ensures protection of spiritual legacy, cultural diversity and pluralism.” Should each of the programmes ensure “spiritual legacy, cultural diversity and pluralism” or should all of them represent such heritage and pluralism? While such a demand may be appropriate if addressed to the PSB, it is hardly a democratic principle if introduced towards every private channel. While the licensing body, the National Commission on Television and Radio, should strive to establish such broadcasting landscape in Armenia that will “ensure protection of spiritual legacy, cultural diversity and pluralism” it is unlikely that each of these principles should apply to each broadcasting programme.

It is appropriate to remember here that OSCE participating States have pledged to “take every opportunity offered by modern means of communication... to increase the freer and wider dissemination of information of all kinds”.<sup>16</sup>

Thus, in the switchover process it is important that the NCTR as the national regulator takes steps to increase pluralism of content in addition to preventing of concentration of property in broadcasting. In particular, measures are to be introduced to influence or limit the freedom of the network operator to compose the multiplex. The “Guide to the digital switchover” published by the OSCE Representative on Freedom of the Media in March 2010<sup>17</sup> and other sources provide the following examples from the current practice in Europe:

1. Must-carry rules for PSBs and other terrestrial channels are imposed in the Netherlands and Austria, whereas such measures are not necessary in the UK, Spain or Italy or whenever terrestrial broadcasters are allocated their share of the digital capacity. Of particular interest is an example of Ukraine where the Statute “On Television and Radio Broadcasting” (as amended in 2006) foresees that any terrestrial broadcaster has the right to have its licence reissued for digital broadcasting without a new competition, though for a special fee (Art. 31 para. 4).<sup>18</sup>
2. In Norway the multiplex operator reserves some capacity for the so-called “open channels” and should local channels require access to the platform, the network operator is forced to find an adequate solution.
3. In Italy specific measures are adopted to guarantee access to the platform for “independent channels”, i.e. channels not owned by the broadcasters, which will operate through DTT capacity.

These measures are relevant as the capacity has not been allocated through a regular procedure, but has been more or less “purchased” by broadcasters willing to operate on the DTT network. Such measures are aimed at avoiding bottlenecks created by the vertical integration of the DTT network operators that have their own channels.<sup>19</sup>

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<sup>16</sup> Para (35) of the Concluding Document “Cooperation in Humanitarian and Other Fields” of the OSCE Vienna Follow-Up Meeting in 1986 / Freedom of Expression, Free Flow of Information, Freedom of Media: CSCE/OSCE Main Provisions 1975-2007. Published at: [http://www.osce.org/fom/item\\_11\\_30426.html](http://www.osce.org/fom/item_11_30426.html)

<sup>17</sup> See [http://www.osce.org/documents/rfm/2010/03/42898\\_en.pdf](http://www.osce.org/documents/rfm/2010/03/42898_en.pdf) P. 22

<sup>18</sup> See Development of Digital Terrestrial Television in Russia and Ukraine by Andrei Richter and Taras Shevchenko. IRIS-Plus, 2010-1. Strasbourg: European Audiovisual Observatory, 2010. P. 15.

<sup>19</sup> Working Group on Digital Terrestrial Television in EPRA Countries. Final Report. 2 June 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)



The situation with the structure of analogue television in Italy may be close to that in the post-Soviet countries like Armenia. Therefore, it is of interest to look into the efforts to provide plurality of content in the switchover process in Italy.

Good practice in relation to this issue seems to be the decision of the *Autorità per le garanzie nelle comunicazioni* (Italian Communications Authority - AGCOM) of 6 July 2005. The decision itself followed relevant provisions of the Broadcasting Act of 2004. AGCOM set the terms for the independent content providers to be carried on a reserved quota of 40 per cent of the capacity DTT multiplexes of the two major players in broadcasting, RAI and R.T.I. S.p.A. (part of Mediaset Group), until the complete implementation of the national digital frequency plan takes place. The content providers must:

- Respect the principles of pluralism and objectivity and offer programming with a wide coverage of various genres, so as to satisfy the tastes of different categories of viewers, especially during prime time;
- Respect fundamental human rights and refrain from transmitting violent or pornographic programmes;
- Offer attractive programming both in order to increase the audience share and the advertising revenues on DTT frequencies and comply with at least two of the following:
  - 1) Entertainment programming, such as talk-shows, games, programmes dealing with particular events (sports, social issues, culture, music);
  - 2) Programmes of general interest that deepen awareness of scientific, cultural, historical or musical issues;
  - 3) Fiction, TV-films, shows, sit-coms and cinematographic works, in addition to the existing obligations regarding European works;
  - 4) Programmes devoted to children and young people.

Should the available capacity prove to be insufficient to satisfy all applications, priority has to be given to those who provide most of the above-mentioned genres. Capacity has to be assigned on fair, transparent and non-discriminatory conditions in order to ensure pluralistic programming. For this reason, RAI and R.T.I. must inform the public at least 60 days in advance on their websites about their intention to assign DTT capacity, specifying the technical and economic conditions they intend to apply. All agreements between RAI/R.T.I. and the interested content providers must be submitted to AGCOM in advance, in order to verify their compliance with the above-mentioned obligations. AGCOM is also competent to deal with any dispute resolution that may arise during the validity of these agreements.<sup>20</sup>

Other regulatory measures adopted to guarantee access are enumerated in a report by the European Platform of Regulatory Authorities. For example, network providers may be required by regulation to offer fair, transparent and non-discriminatory conditions. Network providers, as well as platform operators, may be required to publish a price list for the technical services offered to the content providers. When the network/platform operator is also a broadcaster, it could be required to keep separate accounting for its different activities.<sup>21</sup>

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<sup>20</sup> Cappello M. Italy: 40% of DTT Capacity on the Multiplexes of RAI and RTI for Independent Content Providers // IRIS 2005-9:15/26. See: <http://merlin.obs.coe.int/iris/2005/9/article26.en.html>

<sup>21</sup> See Table 5.4 in: Working Group on Digital Terrestrial Television in EPRA Countries. Final Report. 2 June 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)

The Recommendation on media pluralism of the Committee of Ministers of the Council of Europe further suggests that member states evaluate, at a national level and on a regular basis, the effectiveness of existing measures to promote media pluralism and content diversity, examining the possible need to revise them in light of economic, technological and social developments.

At the conference devoted to the future of public-service broadcasting and the digital switchover held under the auspices of the OSCE Representative on Freedom of the Media in Tbilisi (5th South Caucasus Media Conference, 13-14 November 2008), participants expressed concern that small local provincial private broadcasters that operate over-the-air would not be able to afford entry into market without outside help (e.g. stations like GALA-TV in Gyumri, Armenia). Such broadcasters are popular among the local audiences, they are important for informational and political pluralism of the media, but the government leaves them alone in the face of the mounting costs of switchover. Concern was raised that governments seemed to be satisfied with the inability of small private broadcasters to reach their audience.

The Council of Europe recommends that while encouraging a rapid changeover, governments should ensure that the interests of the public, as well as that of broadcasters, particularly non-commercial, regional and local broadcasters, are taken into account. In this respect, an appropriate legal framework and favourable economic and technical conditions must be provided.<sup>22</sup>

It is worthwhile mentioning in this context that in the number of just local digital terrestrial channels available to viewers today is, for example, 196 in Denmark, 25 in Norway, and 16 in Austria.<sup>23</sup>

The Concept Paper mentions a social multiplex (or social package of programmes) (see Part IX). The idea of the social package is that it will ensure that broadcasting of a public service nature is available to all people. The task of the public service broadcaster to provide such broadcasting remains with digital switchover. More channels and numerically more choice does not necessarily mean more plurality so the task of the public service broadcaster to cater for other needs than what private broadcasters do is still there. In most countries, at least one new programme like 24h news will be added to existing public broadcasting programmes at the time of digitalisation. The social package should also include some free commercial channels that complement the public broadcasting ones. The Concept Paper fails to explain the method of formation for the social package.

The Concept Paper suggests that “among conceptual issues in the digitalisation process is selection between paid or free delivery of TV and radio services”, that is establishment of either free-to-air (FTA) or pay TV digital channels in Armenia (Part IV). This is not in line with the current state of affairs in Europe where the business models are either a combination of FTA and PayTV, or just a FTA DTT. Fortunately the Concept Paper proposes to introduce in Armenia “one free social package (5 to 6 channels) and several paid packages” (Part VI).

The Convention on Transfrontier Television<sup>24</sup> of the Council of Europe (not signed by Armenia) and Audiovisual Media Services Directive<sup>25</sup>, its parallel instrument in the European Union,

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<sup>22</sup> See: Appendix to Recommendation Rec(2003)9 of the Committee of Ministers to member states on measures to promote the democratic and social contribution of digital broadcasting.

<sup>23</sup> See Development of Digital Terrestrial Television in Russia and Ukraine. IRIS-Plus, 2010-1. Strasbourg: European Audiovisual Observatory, 2010. P. 40-43.

enumerate certain important general interest objectives related to audio-visual content. These include obligations for member states to take measures to ensure that:

- Audio-visual services do not contain any incitement to hatred based on race, sex, religion or nationality;<sup>26</sup>
- The availability of on-demand audio-visual media services which might seriously impair the physical, mental or moral development of minors is appropriately restricted;<sup>27</sup>
- For the purpose of short news reports, any broadcaster established in the community has access on a fair, reasonable and non-discriminatory basis to events of interest to the public which are transmitted on an exclusive basis by a broadcaster under their jurisdiction.<sup>28</sup>

It is obvious that in the switchover period, which provides access to a wide variety of content, the governments and national regulators should be particularly vigilant to ensure respect for the protection of minors and human dignity and the non-incitement to violence and hatred. The development of new technical means for parental control must not reduce the responsibilities of broadcasters and providers.

Unfortunately there are no such content requirements in the Concept Paper. At the same time, just as for any broadcast regulation, content regulation can never mean prior censorship or undue restrictions on freedom of speech. For the guidance on what is legitimate broadcast regulation, existing law and principles as shown not least in the case law from the European Court on Human Rights concerning Article 10 of the European Convention on Human Rights remains relevant.

## **7. The role of Public Service Broadcasting**

The Concept Paper in Part II “Main goals of the strategy” points that balanced coexistence of public and private broadcasters” is one of the 7 principles of regulating relations in the area of broadcasting. What is the essence of the “balance” is not clear from the document. Meanwhile the Council of Europe has stated that public service broadcasting is a vital element of democracy. Whether run by public organisations or privately owned companies, public service broadcasting differs from broadcasting for purely commercial or political reasons because of its specific purpose: to operate independently of those holding economic and political power. It provides society with information, culture, education and entertainment; it enhances social, political and cultural citizenship and promotes social cohesion. To that end, it is typically universal in terms of content and access; it guarantees editorial independence and impartiality; it provides a

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<sup>24</sup> Adopted 5 May 1989. Text was amended according to the provisions of the Protocol (ETS No. 171), which entered into force on 1 March 2002. Now under new revision.

<sup>25</sup> Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32007L0065:en:NOT>

<sup>26</sup> Article 3b. Item 9 of Recommendation (2003) 9 also addresses the issue of non-incitement to hatred and violence of racial and religious origin in digital broadcasting.

<sup>27</sup> Article 3i. Again, Item 9 of Recommendation (2003)9 also addresses this issue.

<sup>28</sup> Article 3k.

benchmark of quality; it offers a variety of programmes and caters to the needs of all groups in society; furthermore, it is publicly accountable.<sup>29</sup>

These principles apply and should be taken into account in whatever changes may have to be introduced in Armenia to meet the requirements of the digital television and radio. Organized by the Office of the OSCE Representative on Freedom of the Media in 2008, the 10th Central Asia Media Conference declared that public service broadcasting is one of the basic tools of democracies – indispensable in ensuring the freedom and transparency of elections, in fighting against hate speech, and in protecting the minority cultures of a country by offering objective news reporting and by broadcasting high quality programs.

The OSCE further stresses that in the digital era, the importance of advertisement-free public service broadcasting with high-quality and objective programming only increases.<sup>30</sup> This viewpoint is in line with the position of the Council of Europe stating that “the specific role of public service broadcasting as a uniting factor, capable of offering a wide choice of programmes and services to all sections of the population, should be maintained in the new digital environment”.<sup>31</sup>

Recommendation Rec (2007)3 of the Committee of Ministers of the Council of Europe to member states on the purpose of public service media in the information society of 31 January 2007 provides a focus on the implications of the new digital environment and the specific role of public service broadcasting in the information society. It states that public service purpose is all the more relevant in the digital era and can be offered via diverse platforms resulting in the emergence of public service media.

The Recommendation suggests that member states guarantee the fundamental role of the public service media in the new digital environment; include provisions in their legislation/regulations specific to the purpose of public service media, covering in particular the new communication services; guarantee public service media the financial and organizational conditions required to carry out the function entrusted to them in the new digital environment, in a transparent and accountable manner; enable public service media to respond fully and effectively to the challenges of the information society, respecting the dual structure of the European electronic media landscape of public and private broadcasters and paying attention to market and competition questions; and ensure that universal access to public service media is offered to all individuals and social groups.<sup>32</sup>

Recommendation (2003)9 of the Committee of Ministers of the Council of Europe to member states on measures to promote the democratic and social contribution of digital broadcasting is very specific as to the principles that the member states should apply to public service broadcasting in the new environment.

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<sup>29</sup> Recommendation 1641 (2004) Public Service Broadcasting of the Parliamentary Assembly of the Council of Europe at: <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta04/erec1641.htm>

<sup>30</sup> 10th Central Asia Media Conference “The future of public-service broadcasting and the digital switchover in Central Asia”. Almaty, 16-17 October 2008. See: [http://www.osce.org/documents/html/pdftohtml/34491\\_en.pdf.html](http://www.osce.org/documents/html/pdftohtml/34491_en.pdf.html)

<sup>31</sup> Recommendation Rec(2003)9 of the Committee of Ministers to member states on measures to promote the democratic and social contribution of digital broadcasting.

<sup>32</sup> Recommendation Rec (2007)3 of the Committee of Ministers of the Council of Europe to member states on the purpose of public service media in the information society (Adopted by the Committee of Ministers on 31 January 2007 at the 985th meeting of the Ministers’ Deputies). See: <https://wcd.coe.int/ViewDoc.jsp?id=1089759>

“Member states should create the financial, technical and other conditions required to enable public service broadcasters to fulfil this purpose in the best manner while adapting to the new digital environment. In this respect, the means to fulfil the public service purpose may include the provision of new specialised channels, for example in the field of information, education and culture, and of new interactive services, for example EPGs<sup>33</sup> and programme-related on-line services. Public service broadcasters should play a central role in the transition process to digital terrestrial broadcasting”.

The act deals with the issue of **universal access** to public service broadcasting:

“Universality is fundamental for the development of public service broadcasting in the digital era. Member states should therefore make sure that the legal, economic and technical conditions are created to enable public service broadcasters to be present on the different digital platforms (cable, satellite, terrestrial) with diverse quality programmes and services that are capable of uniting society, particularly given the risk of fragmentation of the audience as a result of the diversification and specialisation of the programmes on offer. In this connection, given the diversification of digital platforms, the must-carry rule should be applied for the benefit of public service broadcasters as far as reasonably possible in order to guarantee the accessibility of their services and programmes via these platforms”.<sup>34</sup>

In terms of the role played by the PSB, in most cases under the study by the European Platform of Regulatory Authorities (EPRA), the public broadcasters have been allocated one or more multiplexes, rather than the capacity to simulcast only existing terrestrial channels. In most cases, PSBs have been free to decide how to compose the multiplex.<sup>35</sup>

Indeed, digital technologies provide for the possibility of expanding the spectrum of public service broadcasting programmes. This will serve the governments’ general goals of promoting both digital and public broadcasting. At the same time, such a possibility typically supported by the license fee or public funds should not represent unfair competition to private broadcasters and prevent the development of an independent television sector. Such expansion should be considered to be distinctive and to have a clear public service value. Therefore it should be approved subject to conditions.

The Concept Paper does mention the special role of public service broadcasting but does not contain much specifically about how this role will be fulfilled.

Last but not the least is the issue of practical steps to ensure financial independence of the public broadcaster in the digital era (see also above). Like all other post-Soviet countries with public broadcasting Armenia has not yet introduced licence fee to provide for the financial independence of the PSB. At the same time objective 5 of the Concept Paper states to “Ensure regulation of fees for public services for digital broadcasting and propagation of TV and radio programs”. While we do not propose immediate introduction of the licence fee, more clear objectives in this regard must be part of the Concept Paper.

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<sup>33</sup> EPG is an Electronic Programme Guide.

<sup>34</sup> Appendix to Recommendation Rec (2003)9 of the Committee of Ministers to member states on measures to promote the democratic and social contribution of digital broadcasting.

<sup>35</sup> Working Group on Digital Terrestrial Television in EPRA Countries. Final Report. 2 June 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)

We believe that the norm introduced in 2009 to the Statute “On Television and Radio Broadcasting” (Art. 35) which says that “every year in the expenditure part of the state budget of in the Republic of Armenia, in case of growth of budget revenue part as compared with the previous year, for the Public TV-radio Company the State shall envisage allocations not less than approved by the state budget of the previous year” is not sufficient to facilitate transition of the PSB to digital. Earlier in the analysis of the changes in the Statute one of the authors stated: “No mention is given in the bill as to whether or when the allocations will decrease and under what circumstances. There is no guarantee, especially today, that there will be a tendency of an increase of the revenue side of the state budget over the previous year. If the case is the opposite will the public broadcaster and NTRC suffer? If yes, why? Why funding of the public broadcasting and independent regulatory body be dependent on the revenues of the state and to what degree? It is clear that the proposed scheme provides for the majority in the parliament to sanction or support them at ease, thus making dependent on such majority. In this way instead of following public duty “independent public broadcaster” and “independent regulator” will exercise self-censorship.”<sup>36</sup> Thus mechanisms ensuring financial independence of the PSB should be conceptualized in the Concept Paper.

At the same time neighbouring countries strive to implement other types of guarantees for the stable financial state of the PSB. In Georgia, the Parliament has just amended the Law on Broadcasting, which now stipulates that annual funding of the Georgian Public Broadcaster should be equal or superior to 0.12 per cent of the country's gross domestic product. Georgia had a similar system until 2008, with 0.15 per cent of GDP guaranteed as the broadcaster's revenue. Prime-time advertisements are banned on Georgian public television, except during sport events.<sup>37</sup> In Azerbaijan there is a legal provision to introduce a licence fee from 2014 (although original deadline was in 2010). Study of good and bad examples with financing PBS abroad could help find the best option for Armenia.

If introduction of licence fee is delayed in the transition period then some other financial incentives should be put into force to ease the switchover process for the Armenian PSB. One option could be that the first multiplex is operated by the *Public Television and Radio Company*. In this regard we underline the importance of the provision of the Concept Paper (Part VII) that

“corresponding legislative modifications need to be made, which will allow the provision of the public television and radio broadcasting company with a license preserving public broadcasting in the digital environment and the formation of operators unifying companies dominant (conglomerate) in the digital broadcasting environment – digital multiplexes, TV stations, TV programme producers and software vendors.”

## **8. Other services and digitalisation**

In a digital environment gains can be made by having other services than broadcasting on the airwaves. This is one aspect of the digital dividend, which is discussed above in relation to financing of digitalisation. In the earlier comments it was pointed out that not much attention appeared to have been given to this issue in the Armenian plan and the same opinion remains.

In the beginning of the Concept Paper the benefit of interactivity is mentioned as one of the potential benefits of digitalisation. The Concept Paper however does not mention other technologies and possible benefits of convergence. Such additional benefits of digitalisation

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<sup>36</sup> See [http://www.osce.org/documents/rfm/2009/04/37230\\_en.pdf](http://www.osce.org/documents/rfm/2009/04/37230_en.pdf)

<sup>37</sup> This step was welcomed by the OSCE Representative for Freedom of the Media on 19 January 2010, see: [http://www.osce.org/fom/item\\_1\\_42400.html](http://www.osce.org/fom/item_1_42400.html)

should be examined more in the process. This should not be left too late in the process as other services and their use of spectrum should be part of the planning for digital switch-over. There may be income from such other services that can support the process, as elaborated above.

As pointed out in the OSCE Guide<sup>38</sup> an additional benefit of digital broadcasting – additional to the possibility for a multitude of channels – is the possibility of delivery of other information services to people through the convergence of technologies as various kinds of services can be distributed through the same transmission means. Such services can be collectively delivered or at least use (some of) the same infrastructure and terminal equipment. If handled well, digitalisation can help eliminate inequalities of availability of such services and increase access to information. To know how this can apply in Armenia, an analysis would be needed of the status of different information society services in the country. This is treated only summarily in the Concept Paper and should be an issue for research at an early stage. Only if the need for services is known can it be determined how best to make use of possibilities for convergence. The availability and use of high-speed internet is one factor that should be known as this both may influence how people received broadcasting and what other services they may be looking for.

## **B. The Process**

### **1. The digitalisation plan**

The authors are not sure in what way the Concept Paper under this review relates to the Implementation Plan that was to be adopted by a Decree of the Government of Armenia. We appreciate that according to the protocol of the meeting of the Government of Armenia of 12 November 2009 there should be public discussion of the Concept Paper. We hope this analysis contributes to such a discussion.

The digitalisation strategy should not be drafted and adopted as a result of closed-door negotiations between the businesses and the government, but be under constant scrutiny of a wide public discussion to guarantee the pluralism of broadcasting services and public access to an enlarged choice and variety of quality programmes. It is preferable that the adopted strategy leads to new legislation introduced to and adopted by the parliament, rather than governmental decisions of presidential decrees. This will also help manage the transition without compromising legal certainty.

The legislation process of Hungary can serve as an example. Digital terrestrial television broadcasts have taken place since 2004. A first draft of the strategy was published in early October 2006. This was followed by two months of public consultation. The Prime Minister's Office finalised the strategy in line with the outcome of the consultation, which was transposed into an official policy document. On 7 March 2007 the Government adopted the National Strategy for Digital Switchover and decided to take the regulatory measures necessary for its implementation. Later, in June 2007, the Parliament of Hungary adopted a statute on rules of broadcast transmission and digital switchover (Digital Switchover Act) (see below).

Recommendation of the Committee of Ministers of the Council of Europe (2003)<sup>9</sup> on measures to promote the democratic and social contribution of digital broadcasting provides that a digitalisation strategy should definitely foresee the following elements:

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<sup>38</sup> At page 35.

- co-operation between operators,
- complementarity between platforms,
- the interoperability of decoders,
- the availability of a wide variety of content, including free-to-air radio and television services,
- widest exploitation of the unique opportunities which digital technology can offer following the necessary reallocation of frequencies,
- interests of the public as well as the interests and constraints of all categories of broadcasters, particularly non-commercial and regional/local broadcasters.<sup>39</sup>

An Implementation Plan or Digitalisation Concept Paper can have other important components. For example, in Serbia the Strategy and Action Plan for the Transfer from Analogue to Digital Broadcasting adopted in 2009 includes the following items: a place within the multiplexes shall be guaranteed only to broadcasters having valid licenses at the time of the analogue switch-off; the application of equal, non-discriminatory conditions relating to quality, availability and fees for all broadcasters shall be guaranteed by the future network operator, whereas the fee amount shall be based upon the cost-covering principle; a special simulcast fee shall not be introduced by the operators; the maintaining of the same service zones as provided by the existing broadcasting licenses is guaranteed.<sup>40</sup>

In Ukraine, the key document that provides an outlook on the switch-over process is the *State Programme of Introduction of Digital Television and Radio Broadcasting* approved by the Resolution No. 1085 of the Cabinet of Ministers on 26 November 2008. As part of this programme the government also plans to facilitate the production of digital TV sets and signal adaptors for analogue TV sets, and other elements and parts of hardware for digital broadcasting. This plan includes the provision of financial and technical assistance to research institutions in order to lay the “scientific and technological grounds for Ukraine’s participation in international activities aimed at introducing digital terrestrial broadcasting.” Conceptual guidelines for the transition to digital broadcasting were also provided by the National Council of Ukraine on TV and Radio Broadcasting. The National Council is a special supervising and licensing body with the mandate to implement legislative provisions on television and radio broadcasting and to monitor compliance of both state and private broadcasters with such rules. These guidelines took the form of a “Plan for the Development of the National Television and Radio Sphere of Ukraine”. This Development Plan set a number of basic rules according to which the National Council promised to act during the digital switch-over process. It undertook, among others, “to guarantee that the licence-holders, who at this time provide analogue terrestrial broadcasting, will keep their right to broadcast with the switch-over to digital standards without any loss of their audience.”<sup>41</sup>

## 2. Legislation

The Concept Paper mentions the need for changes in the laws but is not very clear on the substance of such changes. There is a deadline of 20 July 2010 for development of the legal framework. It is not clear if this refers to the framework being ready and in force then or if the proposal will be presented then. If it means the former, the timeframe may well be unrealistic

<sup>39</sup> See Appendix to Recommendation Rec (2003)9 of the Committee of Ministers to member states on measures to promote the democratic and social contribution of digital broadcasting.

<sup>40</sup> See Development of Digital Terrestrial Television in Russia and Ukraine. IRIS-Plus, 2010-1. Strasbourg: European Audiovisual Observatory, 2010. P. 33.

<sup>41</sup> See Development of Digital Terrestrial Television in Russia and Ukraine by Andrei Richter and Taras Shevchenko. IRIS-Plus, 2010-1. Strasbourg: European Audiovisual Observatory, 2010. P. 9.



unless the proposal is ready now or very soon, at least if there will be changes to or introduction of new laws (as opposed to other forms or regulatory instruments), as legislative procedure normally takes time. The national standards should be adopted until this same deadline. Presuming these do not need to be as laws but can be in some other form of act, this timeline should be realistic if the standards are already developed and in any case, there is now a need to generally speed up the process a bit.

It is important to remember in relation to legislative work what has been pointed out also in a different context, that digitalisation does not solve other problems that may exist in the broadcasting sector such as government interference, monopolies, structural problems or problems with a weak regulator or public service broadcaster. Such problems must be solved before digitalisation and/or parallel with the digitalisation process. For the legislative work this means that laws may need to be amended to cope with such general issues (like the increased risk of concentration) rather than with digitalisation as such, for which other instruments than laws may be sufficient.

What kind of legal acts that are needed or that should be changed depends on the structure of the broadcasting legal framework in the country. It is not necessary to have a special digitalisation law and only few countries have this. As mentioned above, such a law or a special law to implement a digitalisation strategy may be a good idea as it should provide for a transparent process, but it is equally possible to deal with digitalisation through amendments to existing laws. The strategy for digitalisation should however be supported by a proper legal framework and for reasons of democratic accountability, transparency and access to information as well as legal certainty it is better to have legislation adopted by the normal legislative procedure (by the parliament), rather than governmental decisions or presidential decrees. Digitalisation should be permitted and preferably also promoted by the legal framework. What is needed is a proper legal basis for the process and for the different components of it (like for the new licensing regime, for access to infrastructure, for how to give support to receiving equipment, etc.). It is generally better not to have too many special laws but instead to make sure relevant legislation is brought up to the current situation and that every issue is properly founded on law. As for what laws can promote may be mentioned co-operation between operators and complementarity of platforms as well as interoperability of decoders. Through the licensing system the regulator can promote availability of a wide variety of content, including both free-to-air and paid broadcasting services. If the public service broadcaster is given a special role for the digitalisation process, the law must support this and the broadcaster be given the adequate resources.

Many transitional issues need to be dealt with so that changes can be introduced without sacrificing legal certainty. Such issues may be in special transitory parts of the law or in some cases in other forms of regulatory instruments.

The matters that are likely to be regulated in law are:

- The licensing process and the different parts of the licence for DTT;
- The status and role (the independence) of the body dealing with digital licensing;
- The criteria for selection of programmes to permit for diversity and plurality;
- Infrastructure issues (access, interconnection);
- Special role of undertakings with a significant market power, avoiding abuse of dominant position.

A key consideration in legislation is that attention should be given to how to ensure and support diversity and plurality through law. This will be relevant in relation to criteria for selecting

programming but also in the licensing process. The Armenian legislation and especially the regulator needs to have more emphasis on plurality and diversity, as set out further below.

Transparency of media ownership is recognized in Resolution 1636 (2008) of the Parliamentary Assembly of the Council of Europe to be one of the indicators for the media in a democratic society. Its text notes that *“legislation must be enforced against media monopolies and dominant market positions among the media. In addition, concrete positive action should be taken to promote media pluralism”*.

Issues of undertakings with significant market power and access issues may be found also in competition law and/or (tele)communications law. Such legislation in Armenia will need review so that all legal issues are covered and that there is no negative duplication that could lead to confusion.

For example, as was mentioned above, the Parliament of Hungary adopted in June 2007 Digital Switchover Act, or a statute on rules of broadcast transmission and digital switchover. This law introduces a clear separation of content regulation and regulation of broadcast transmission. It contains a set of provisions aimed at promoting the diversity of the media. In this respect the act introduces several obligations for cable operators and similar service providers for preserving and promoting the national culture, cultural diversity and pluralism of opinion. This includes the re-definition of “must-carry” rules.

The most important feature of the Digital Switchover Act is the defining of the legal framework necessary for the introduction of digital terrestrial television services. This includes the introduction of interpretative provisions such as the notions of “multiplex”, “application programme interface”, “electronic programme guide”, or “interactive digital television service”. The Act also provides a clear framework for the utilisation of frequencies for broadcasting purposes and a series of rules promoting competition as well as specifies the tendering procedure for operators of terrestrial digital broadcast transmission services. Implementing the Digital Switchover Act is the task of the regulatory authority and a special parliamentary committee to elaborate and publish the call for tender for multiplex operators.<sup>42</sup>

In another example the Spanish Parliament adopted on 14 June 2005 an Act on the promotion of digital terrestrial TV. Here it basically amended some previous Acts related to the media and telecommunications. In particular the new Act reserved local governments up to two digital terrestrial TV programme services in a local multiplex. The duration of the local terrestrial TV concessions (licenses) was extended from 5 to 10 years. No legal or natural person may own more than one concession in a certain area. The new Act included provisions related to the access to digital terrestrial TV by disabled people and to the promotion of the use of regional languages by the digital terrestrial public broadcasters. It was then agreed that it was necessary to draft a new general bill on radio and TV, which should unify the existing regulation of the audiovisual sector; set up the basic principles concerning licensing, public broadcasting and safeguarding of pluralism. Drafting of the bill took more than 4 years and such a bill was submitted to the Parliament only in late 2009.<sup>43</sup>

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<sup>42</sup> Lengyel M. Hungary: Act on Digital Switchover and Amendment of the Broadcasting Act // IRIS 2007-8:14/23 See: <http://merlin.obs.coe.int/iris/2007/8/article23.en.html>

<sup>43</sup> Alberto Pérez Gómez. Spain: New Act on the Promotion of Digital Terrestrial Television // IRIS 2005-7:11/18 See: <http://merlin.obs.coe.int/iris/2005/7/article18.en.html> and Laura Marcos and Enric Enrich. Spain: Audiovisual Draft Law// IRIS 2010-1:1/19 See: <http://merlin.obs.coe.int/iris/2010/1/article19.en.html>

The Armenian Broadcasting Law of 2000 (and a number of related laws) was amended in 2009, but digitalisation is not mentioned in these amendments. In this regard we would like to refer to the earlier recommendations stated in the comments on the draft broadcasting law of the Republic of Armenia released by the Office of the Representative on Freedom of the Media of the OSCE that were adopted by the National Assembly in 2009.<sup>44</sup>

For example, according to the amendments, candidates to the Council could not ensure ideological and political pluralism that is the essence of any public broadcasting. By definition they do not represent political and ideological minorities, although are supposed to ensure pluralism (according to their oath). They do not represent pluralistic views by the method of appointment (by the President).

The selection process of the candidates to the NTRC has a basic flaw in that none of the tests taken by candidates and requirements subscribed to them demand their integrity, their high moral standing, or the understanding of their mission.

The scheme of financing public broadcasting and regulatory bodies in the sector provides for the majority in the parliament to sanction or support them at ease, thus rendering them dependent on such majority. In this way, instead of following public duty, the “independent public broadcaster” and “independent regulator” exercise self-censorship.

The amendments in a number of articles put public broadcasting under control of the National Commission on Television and Radio. It makes the broadcaster dependent on two overseeing bodies – the Council and the Commission, appointed (elected) differently and as a result possibly issuing different or even conflicting orders. There is not enough clear division of their competence in regards to public broadcasting thus leading to further conflicts over boundaries of such a division.

Given the importance of public service broadcasting in the digital environment, the law needs to clearly set out the tasks and responsibilities as well as guarantee the broadcaster independence and sufficient resources for these tasks.

The amendments also ignore an acute problem of the moratorium introduced in 2008 by amendments to the law on broadcasting already adopted by the National Assembly.

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<sup>44</sup> See [http://www.osce.org/documents/rfm/2009/04/37230\\_en.pdf](http://www.osce.org/documents/rfm/2009/04/37230_en.pdf)