



SUBMISSION

regarding

The Digital Switchover in Romania

London
November 2008

ARTICLE 19 · 6-8 Amwell Street · London EC1R 1UQ · United Kingdom
Tel +44 20 7278 9292 · Fax +44 20 7278 7660 · info@article19.org · <http://www.article19.org>

TABLE OF CONTENTS

INTRODUCTION	1
I. INTERNATIONAL STANDARDS.....	3
I.1 Freedom of Expression in International Law	3
I.2 Broadcasting Freedom and Digital Switchover	3
I.2.1 Obligation to regulate digital broadcasting.....	4
I.2.2 Obligation to initiate and stimulate public participation in the radio spectrum management	5
I.2.3 Obligation to ensure that radio spectrum management is based on objective, transparent, non-discriminatory and proportionate criteria.....	5
I.2.4 Obligation to ensure universal access to audiovisual services.....	6
I.2.5 Obligation to manage the digital dividend in the public interest.....	7
I.2.6 Obligation to ensure interoperability	7
I.2.7 Obligation to guarantee pluralism and prevent media concentration	7
I.2.8 Obligations regarding audiovisual content	8
I.2.9 Obligation to facilitate the digital switchover.....	8
I.2.10 Obligation to preserve of the social remit of public service media	9

About the ARTICLE 19 Law Programme

The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation. These publications are available on the ARTICLE 19 website: <http://www.article19.org/publications/law/standard-setting.html>.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme operates the Media Law Analysis Unit which publishes a number of legal analyses each year, commenting on legislative proposals as well as existing laws that affect the right to freedom of expression. The Unit was established in 1998 as a means of supporting positive law reform efforts worldwide, and our legal analyses frequently lead to substantial improvements in proposed or existing domestic legislation. All of our analyses are available online at <http://www.article19.org/publications/law/legal-analyses.html>.

If you would like to discuss this Submission further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at law@article19.org.

INTRODUCTION

This Submission provides information on international standards relating to the issue of digital switchover. ARTICLE 19 welcomes the Romanian authorities' effort to regulate the digital switchover and digital environment. At the same time, it is essential that this is undertaken in a manner that respects human rights and, in particular, the right to freedom of expression. This Submission is intended as a contribution to the ongoing discussion in Romania on the digital switchover with a view to helping ensure that it is achieved consistently with respect for freedom of expression.

Digital switchover is at its height in Europe. A number of international organisations, such as the European Union and the Council of Europe as well as the European Broadcasting Union, are providing guidance and assistance in this complex process. European Union Member States have made a commitment to finalise the switch from analogue to digital television broadcasting by 2012. As of mid-August 2008, Luxemburg, Netherlands, Finland, Andorra, Sweden, Switzerland, Austria, Estonia had already completed this process.

The introduction of digital technology brings new opportunities for free and pluralist communication. It enhances the personal consumption of television and radio. People can enjoy their favourite radio and television programmes on demand and at times other than the broadcast time. They can also watch more channels as a result of the increased number of broadcasters as a result of the distribution of released radio frequencies. From a freedom of expression point of view, the new technological progress will allow people to seek and receive more information and ideas. It will also provide opportunities for media and broadcasters to impart more information to the public.

To achieve these objectives, the process of digital switchover and the digital environment should rest on legislation which contain safeguards essential for public interest, including freedom of expression and access to information. Unless certain rules are adopted, there is a risk of the digital television market being monopolised or hostile to the free circulation of information, media pluralism, cultural diversity and consumer protection.

Although it is within States' powers to regulate the transfer from analogue to digital broadcasting, governments remain obliged under international law to promote, respect and protect freedom of expression. In the broadcasting sector this entails the existence of legal guarantees for editorial independence, promotion of diversity, universal access and affordable access to the means of communication and reception of broadcasting services, fair and clear licence processes overseen by an independent regulatory body, and effective public broadcasters with comprehensive public remits.

This Submission is based on general international standards regarding freedom of expression, as elaborated by the European Court of Human Rights, other human rights courts and constitutional tribunals around the world, recommendations and decisions by the

ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

Council of Europe,¹ and directives and communications of the European Union.² It rests also on recommendations made in the 2005 and 2008 Open Society Institute monitoring reports within focusing on television across Europe,³ and country reports on digital broadcasting developments.⁴ The relevant broadcasting standards are summarised in ARTICLE 19's *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*, a set of standards based on international practice, comparative constitutional law and best practice in countries around the world.⁵

¹ The Council of Europe's recommendations can be found on the CE Media and Information Society website at <http://www.coe.int/t/dghl/standardsetting/media/>.

² The EU digital switchover related directive and communications are accessible on the Internet at http://ec.europa.eu/information_society/policy/ecommm/current/broadcasting/switchover/index_en.htm.

³ The 2005 and 2008 Television Across Europe reports are accessible on the Internet at <http://www.mediapolicy.org/tv-across-europe/>.

⁴ The Submission makes references to several country reports on digital switchover legislative developments published in the IRIS Legal Observations of the European Audiovisual Observatory and State responses to the Groups of specialists on the democratic and social implications of digital broadcasting, Strasbourg, 2 October 2003 MM-S-DB (2003)003. Available at: [http://www.coe.int/t/dghl/standardsetting/media/Doc/MM-S-DB\(2003\)003_en.pdf](http://www.coe.int/t/dghl/standardsetting/media/Doc/MM-S-DB(2003)003_en.pdf)

⁵ London, April 2002. Available at: <http://www.article19.org/pdfs/standards/accessairwaves.pdf>.

I. INTERNATIONAL STANDARDS

I.1 Freedom of Expression in International Law

Article 19 of the *Universal Declaration on Human Rights* (UDHR),⁶ a United Nations General Assembly Resolution, guarantees the right to freedom of expression in the following terms:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The *International Covenant on Civil and Political Rights* (ICCPR),⁷ a legally binding treaty which Romania ratified in 1974, guarantees the right to freedom of opinion and expression, also in Article 19, in very similar terms to the UDHR. Freedom of expression is also guaranteed by the *European Convention on Human Rights* (ECHR),⁸ ratified by Romania in September 1993. The right is also guaranteed by the other two regional systems for the protection of human rights, at Article 13 of the *American Convention on Human Rights*⁹ and Article 9 of the *African Charter on Human and Peoples' Rights*.¹⁰

International bodies and courts have made it very clear that freedom of expression and information is one of the most important human rights. The European Court of Human Rights has held:

Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to [legitimate restrictions] it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”.¹¹

Freedom of expression is not absolute. Article 10(2) of the ECHR provides that, to be permissible, any restriction on freedom of expression must be prescribed by law, pursue one of the aims recognised as legitimate and be “necessary in a democratic society”.

I.2 Broadcasting Freedom and Digital Switchover

The guarantee of freedom of expression applies with particular force to the media, including public, private and community broadcasters. The European Court of Human

⁶ UN General Assembly Resolution 217A(III), adopted 10 December 1948.

⁷ UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976.

⁸ ETS Series No. 5, adopted 4 November 1950, in force 3 September 1953.

⁹ Adopted 22 November 1969, in force 18 July 1978.

¹⁰ Adopted 26 June 1981, in force 21 October 1986.

¹¹ *Handyside v. the United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.

Rights has consistently emphasised the “the pre-eminent role of the press in a State governed by the rule of law.”¹² It has further stated:

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.¹³

This does not imply that the broadcast media should be entirely free and unregulated; Article 10 of the ECHR states that the right to freedom of expression “shall not prevent States from requiring the licensing of broadcasting ... enterprises”. At the same time, as the European Court of Human Rights has stated, the State’s power to regulate broadcasting “must be considered in the context of the Article 10 as a whole and in particular in relation to the requirements of paragraph 2”.¹⁴ Furthermore, national licensing systems are required to give effect to international rules.¹⁵

A number of international standards have already been established regarding digital switchover. The preambles to a number of international standard-setting documents relevant to digital switchover make it clear that they take into account freedom of expression safeguards. Freedom of expression standards have been noted in a number of State obligations concerning digital switchover and digital environment. These include the obligations of the State to regulate digital switchover, to initiate and stimulate public participation in radio spectrum management, to ensure that this is based on objective, transparent, non-discriminatory and proportionate criteria, to ensure universal access to public service media, to manage the digital dividend in the public interest, to guarantee the interoperability of conditional access systems, to guarantee pluralism and prevent media concentration, to ensure that audiovisual content promotes a certain minimum level of public interest objectives, such as the protection of minors and human dignity, and to preserve the social remit of public service media. Below we examine these obligations separately.

1.2.1 Obligation to regulate digital broadcasting

States should develop a legislative framework and strategy for digital broadcasting. This recommendation to all national governments has been set out by independent national experts in collaboration with the Network Media Programme of Open Society Institute (OSI recommendations)¹⁶ and by the Council of Europe in its Committee of Minister’s Recommendation (2003)⁹ to Member States on measures to promote the democratic and social contribution of digital broadcasting (Recommendation (2003)⁹). The latter provides that Member States should “create adequate legal and economic conditions for

¹² *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

¹³ *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.

¹⁴ *Groppera Radio AG and others v. Switzerland*, 28 March 1990, Application No. 10890/84, para. 61.

¹⁵ *Ibid.*, para. 60.

¹⁶ See Open Society Institute, EU Monitoring and Advocacy Programme (2005) *Television Across Europe: Regulation, Policy and Independence*, p. 29 The recommendations were made on the basis of reviews of the national reports on television across Europe. They are accessible on the Internet at <http://www.mediapolicy.org/tv-across-europe/>.

the development of digital broadcasting”. In addition, it provides that States should draw up a well-defined strategy that would ensure a carefully thought-out transition from analogue to digital broadcasting.¹⁷

I.2.2 Obligation to initiate and stimulate public participation in the radio spectrum management

Recommendation (2003)⁹ states that digital broadcasting strategies should be carried out “in consultation with the various industries involved and the public”. It further requires such strategies to seek to promote co-operation between operators.

Similarly, the OSI recommended that the governments of the Czech Republic, Hungary and Turkey stimulate public debate on national digital switchover, including discussions with relevant stakeholders on the national policy and action plans for the transition to digital.¹⁸ In the reports on Albania and Macedonia, the OSI recommended that the discussions take into account issues such as consumer protection, existing investments in digital platforms, and media pluralism and competition.¹⁹ The OSI recommended that the governments of Serbia and Poland establish an inter-ministerial working group, involving non-governmental experts from academia, civil society and the media industry to formulate a plan for the digitalisation of broadcasting.²⁰

I.2.3 Obligation to ensure that radio spectrum management is based on objective, transparent, non-discriminatory and proportionate criteria

Article 9 of Framework Directive 2002/21/EC,²¹ dealing with management of the radio spectrum, states “Member States...shall ensure that the allocation and assignment of such radio frequencies by national regulatory authorities are based on objective, transparent, non-discriminatory and proportionate criteria.” This obligation is applicable to decisions taken by individual Member States on how the digital dividend is to be used. In this respect it is worth noting that the OSI recommended that Italy enact “neutral” policies with respect to the different media, so that cable and satellite are not penalised relative to digital television.²²

The Council of Europe’s Recommendation No. R (2000)²³ to Member States on the independence and functions of regulatory authorities for the broadcasting sector states:

“ . . . The basic conditions and criteria governing the granting and renewal of broadcasting licences should be clearly defined in the law.
14. The regulations governing the broadcasting licensing procedure should be clear and precise and should be applied in an open, transparent and impartial manner. The

¹⁷ 28 May 2003, 840th meeting of the Ministers’ Deputies.

¹⁸ 2005 OSI recommendations for the Czech Republic, Hungary, Turkey. Note. 16.

¹⁹ 2008 OSI recommendations for Albania and 2008 OSI recommendation for the Republic of Macedonia. Note 16.

²⁰ 2005 OSI recommendations for Serbia and 2008 OSI recommendations for Poland. Note 16.

²¹ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

²² 2005 OSI recommendations for Italy. Note 16.

decisions made by the regulatory authorities in this context should be subject to adequate publicity.

...

27. All decisions taken and regulations adopted by the regulatory authorities should be:

- duly reasoned, in accordance with national law;
- open to review by the competent jurisdictions according to national law;
- made available to the public.”

I.2.4 Obligation to ensure universal access to audiovisual services

The Declaration on the allocation and management of the digital dividend and the public interest (Digital Dividend Declaration)²³ provides that governments should pay special attention to the promotion of access for the public to audiovisual services in the allocation and management of the digital dividend. Recommendation (2003)9 proclaims universality as a fundamental principle for the development of public service broadcasting.²⁴

Recommendation (2007)3 of the Committee of Ministers to Member States on the remit of public service media in the information society (Recommendation (2007)3)²⁵ recommends that States “ensure that universal access to public service media is offered to all individuals and social groups, including minority and disadvantaged groups, through a range of technological means”.

The EU’s Television without Frontiers Directive (later renamed the Audiovisual Media Service Directive)²⁶ obliges States to encourage media service providers to ensure that their services are gradually made accessible to people with a visual or hearing disability.²⁷

An important instrument to ensure that the end-user or consumer has access to a wide and varied range of content on all major distribution platforms are ‘must-carry’ rules. The Universal Service Directive requires distributors that retransmit programme services to carry various local and public television stations among the bouquet of channels that they offer.²⁸ It provides that States should ensure that these rules are proportionate,

²³ Adopted on 20 February 2008, 1018th meeting of the Ministers’ Deputies.

²⁴ Recommendation (2003)9, Item 20.

²⁵ Adopted on 31 January 2007, 985th meeting of the Ministers’ Deputies.

²⁶ 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, OJ L 332 of 18 December 2007.

²⁷ Article 3c. Similar obligation on States to take measures to improve access by people with hearing and visual disabilities to digital broadcasting services and related content is set out in Item 10 of Recommendation (2003)9.

²⁸ Article 43 states: “Member States should be able to lay down proportionate obligations on undertakings under their jurisdiction, in the interest of legitimate public policy considerations, but such obligations should only be imposed where they are necessary to meet general interest objectives clearly defined by Member States in conformity with Community law and should be proportionate, transparent and subject to

transparent, kept limited to what is necessary to meet clearly defined general interest objectives, and reviewed regularly.

1.2.5 Obligation to manage the digital dividend in the public interest

The Digital Dividend Declaration call on States to acknowledge the public nature of the radio spectrum released through the digital switchover (digital dividend) and to manage this in the public interest. This means that the technical and legislative choices involved in the switchover to the digital environment should not be determined by economic factors alone but ought also to take account of social, cultural and political factors. Special attention should be paid to the promotion of innovation, pluralism, cultural and linguistic diversity, and access of the public to audiovisual services in the allocation and management of the digital dividend.

1.2.6 Obligation to ensure interoperability

Article 4 of Directive 95/47/EC on the use of standards for transmission of television signals²⁹ provides that “(EU) Member States shall take all the necessary measures to ensure that the operators of conditional access services, irrespective of the means of transmission, who produce and market access services to digital television services offer to all broadcasters, on a fair, reasonable and non-discriminatory basis, technical services enabling the broadcasters' digitally-transmitted services to be received by viewers authorized by means of decoders administered by the service operators, and comply with Community competition law, in particular if a dominant position appears”. This essentially means that they should ensure that these services should work on different technological platforms. Article 33 of Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) includes a similar obligation.³⁰ Similarly, Recommendation (2003)9 provides that “member states should take measures aimed at a high degree of interoperability and comparability of reception, decoding and decrypting equipment and of systems grants granting access to digital broadcasting services”.³¹

1.2.7 Obligation to guarantee pluralism and prevent media concentration

Recommendation (2003)9 recommends that States “create legal conditions for the development of digital broadcasting that guarantee pluralism of broadcasting services”.³² Furthermore, States should “protect and, if necessary, take positive measures to safeguard

periodical review. ‘Must carry’ obligations imposed by Member States should be reasonable, that is they should be proportionate and transparent in the light of clearly defined general interest objectives, and could, where appropriate, entail a provision for proportionate remuneration. Such ‘must carry’ obligations may include the transmission of services specifically designed to enable appropriate access by disabled users.”

²⁹ Directive 95/47/EC of the European Parliament and of the Council, adopted 24 October 1995.

³⁰ Article 33 states: “This Directive therefore ensures that the functionality of the open interface for digital television sets is not limited by network operators, service providers or equipment manufacturers and continues to evolve in line with technological developments.”

³¹ Item 5 of the Appendix to Recommendation (2003)9.

³² Democratic and social digital broadcasting recommendation.

and promote media pluralism”.³³ In this regard, the OSI recommended that Italy pay special attention to pluralism.³⁴

Recommendation No. R(99)1 tackles the development of broadcasting concentrations, which might endanger media pluralism, and suggests that appropriate measures be taken, such as creating special media authorities with powers to take action against market concentrations, where necessary. It also proposes that specific initiatives be taken to prevent vertical concentrations. Similarly, Recommendation (2003)1 calls on Member States to put in place rules that limit concentration of media ownership.³⁵

1.2.8 Obligations regarding audiovisual content

The Council of Europe’s European Convention on Transfrontier Television³⁶ and the parallel instrument of the Audiovisual Media Service Directive seek to secure certain important general interest objectives relating to broadcast content. These include obligations for States to take measures to ensure that:

1. audiovisual services do not contain any incitement to hatred based on race, sex, religion or nationality;³⁷
2. the availability of on-demand audiovisual media services which might seriously impair the physical, mental or moral development of minors is appropriately restricted;³⁸
3. 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 high public interest to the public which are transmitted on an exclusive basis by a broadcaster under their jurisdiction.³⁹

Recommendation (2003)9 calls on Member States to take all necessary measures to protect the privacy of individuals in the digital environment.⁴⁰

1.2.9 Obligation to facilitate the digital switchover

Recommendation (2003)9 provides that “member states should facilitate the public’s change over to digital broadcasting.”⁴¹ They should take measures to provide the public with wide-ranging information on this, with particular attention to the elderly and the less advantaged sectors of the population so that they can understand and use digital technology.⁴²

³³ Democratic and social digital broadcasting recommendation.

³⁴ 2008 OSI recommendation for Italy. Note 16.

³⁵ Item 18 of the Appendix to Recommendation (2003)9.

³⁶ Adopted 5 May 1989. Text amended according to the provisions of the Protocol (ETS No. 171), which entered into force on 1 March 2002.

³⁷ 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.

³⁸ Article 3i. Again, Item 9 of Recommendation (2003)9 also addresses this issue.

³⁹ Article 3k.

⁴⁰ Item 11.

⁴¹ Item 7 of the Appendix.

⁴² Item 8 of the Appendix.

Recommendation (2003)⁹ calls on Member States to encourage broadcasters to produce information on their services to be included in electronic programme guides and to encourage manufacturers of digital set-top boxes to include functions allowing information concerning programmes and services to be displayed.⁴³

1.2.10 Obligation to preserve of the social remit of public service media

Recommendation (2007)³ proposes that Council of Europe Member States guarantee the fundamental role of the public service media in the new digital environment, in particular by:

1. adopting clear remits for public service media;
2. allowing public service media to use new technologies;
3. guaranteeing, via secure and appropriate financing, the conditions for public service media to carry out the function entrusted to them in the new digital environment, in a transparent and accountable manner;
4. establishing an environment in which public service media can best deliver their public service remits in the digital environment. Member States should “pay due attention to the guarantee of the editorial independence and institutional autonomy of public service media and the particularities of their national media systems, as well as organisational changes needed to take advantage of new production and distribution methods in the digital environment”.⁴⁴

With respect to State obligations regarding public service broadcasting in the digital switchover, the OSI has made the following recommendations to States:

1. To continue to ensure that public service broadcasters have a central place in the digital television landscape and on the Internet.⁴⁵
2. To stimulate a public debate on the digital strategy of public service broadcasters with an emphasis on the value of public service broadcasting in an increasingly commercialised environment.⁴⁶
3. To ensure that public service broadcasters are able to operate on all technological platforms in the new digital environment.⁴⁷
4. To adopt policies, in particular for public service broadcasters, to support serious investment in programming for the new platforms.⁴⁸

⁴³ Item 12.

⁴⁴ Similar obligations concerning the preservation of the public service broadcasting remit were included in Recommendation (2003)⁹.

⁴⁵ 2005 OSI recommendations for the UK.

⁴⁶ 2005 OSI recommendations for Germany.

⁴⁷ 2005 OSI overall national level recommendations, p. 29.

⁴⁸ 2008 OSI recommendations for Italy.