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Progress in the Must-offer Debate?

Exclusivity in Media and Communication

by Alexander Scheuer and Sebastian Schweda

EDITORIAL

"We're in a good position!" This increasingly popular phrase is meant to transmit a sense of optimism; optimism that a company or branch of industry is in a position to spot opportunities in new markets or optimism that success will continue despite changes in the market. The markets involved may be defined according to geographical, technical or content-related criteria. In the audiovisual sector, for example, broadcasters are currently battling it out for a share in the various forms of distribution of audiovisual media services and the new markets that are being created as a result.

In order for a company that wants to provide audiovisual media services to be well positioned, what it needs more than anything else is content that is of interest to consumers. The key to success for such a company is its ability to offer such content on an exclusive basis, in other words if it owns an exclusive right to distribute it. At the same time, however, it must also position itself in the distribution market, for it needs to send the content to the customer in order to convert its exclusive right into financial reward. This is the theme tackled by this IRIS *plus*, which looks at the various dimensions of exclusivity in media and communication.

This IRIS *plus* considers the current debate on whether the obligation to transmit (*must-carry*) certain content should be replaced or at least supplemented by an obligation to offer such content (*must-offer*). The first legislative steps have already been taken in this direction. The article examines this question particularly with regard to the assessment under competition law of such a paradigm change, but also in view of the tension between competition law and copyright law. This very important IRIS *plus* is also closely linked to IRIS *plus* 2008-4 on media windows, which dealt with audiovisual media chronology, another aspect of exclusivity.

Strasbourg, October 2008

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IRIS *plus* is a supplement to **IRIS,** *Legal Observations of the European Audiovisual Observatory*, **Issue 2008-10**

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Exclusivity in Media and Communication

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I. Introduction

1. Types and Meaning of Media Exclusivity

Exclusivity is a central theme for the media and communication sector, particularly from an economic point of view. In the written press, for example, newspapers are always very keen to stand out from their competitors by publishing an "exclusive story". Particularly in investigative journalism, special efforts have always been and continue to be made throughout the information-gathering process, until the report is finally published, to take all necessary steps to ensure that competitors do not get wind of the story. Attempts have also been made to guarantee exclusivity by acquiring exclusive rights to report the experiences of witnesses of spectacular events.[1] It is therefore largely a case of excluding competitors from particularly attractive content in order to gain a competitive advantage. Of course, these considerations also apply to the relationship between the press, broadcasting and the Internet, insofar as these information and entertainment media compete with one another.

As in the press, the desire for exclusivity is also – at least it has been up to now – an important phenomenon in the audiovisual sector. A television broadcaster, for example, will aim to secure exclusive "output deals" with a production studio which has been successful in the past and/or looks likely to be so in the future. For their part, film producers are keen to work exclusively with certain screenplay writers, cameramen, actors and directors. In the exploitation of audiovisual works – a subject examined in this series recently[2] – one exclusivity model dominated for a very long time. Its main characteristic was the clear definition, in chronological order, of forms of exploitation in different media ("media windows"). Distributors can apply discriminatory or abusive practices in their business dealings with different cinema operators and can therefore make it easier or even harder for every individual competing cinema operator to access screening rights for new films.[3]

Copyright law forms the legal basis for the exclusivity of audiovisual media content that can be considered a "work". Authors have the exclusive right to determine how their work should be exploited and therefore to prevent other people from using it. This law is supplemented by provisions on the protection of other types of performance carried out in connection with works. These include, for example, the rules on broadcasters' (exploitation) rights.[4]

Looking at the subject from a competition law point of view, it is clear that, in the programme content market, exclusive rights to broadcast premium films and major sports events on pay-TV and free-TV represent an important key to success. The same is increasingly true for new distribution methods such as the Internet and mobile telephony.

Interestingly, the "new media" exploitation of cinema films currently seems to be turning away from exclusivity and the music sector appears to be following suit. In the video-on-demand (VoD) sector. Studios are not demanding that their content should only be available through a single provider. Instead, they are granting non-exclusive licences. In addition, as already reported, chronological exclusivity is being restricted so that DVD and VoD exploitation can run simultaneously under the so-called *"Day and date"* system.[5]

2. Exclusivity in the Electronic Communication Sector/Relevance to Audiovisual Media Distribution

In the communication sector, exclusivity existed for many decades because certain services were only available via a certain network. As a result of the convergence of transmission methods and services precipitated by digitisation, this model has now been almost completely superseded. Nevertheless, certain types of exclusion remain. One example is in the mobile telephony sector, where the subsidisation of handsets is linked to an exclusive contract between the customer, service user and a particular network operator for a previously agreed period ("SIM lock"); when particularly desirable mobile phones are launched, agreements sometimes allow only one network operator in a particular national market to sell the handsets in conjunction with a service contract.[6]

Terrestrial transmission was the original and, for a long time, the only transmission method[7] for broadcasting. Alternatives have since been provided by satellites and cable networks, followed more recently by the (open) Internet, IPTV (Internet Protocol Television, principally via DSL) and mobile telephony. However, broadcasters have, as a rule, been keen to also take advantage of new transmission methods. For public service broadcasters, this has mainly resulted from their (technical) remit to provide a basic service, i.e. their obligation to provide a service accessible to viewers and listeners, regardless of their preferred means of supply. The interest of private broadcasters, which are predominantly funded through advertising, in new transmission

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methods arose from their desire for the best possible technical coverage. It was hoped that this would help boost the potential and actual accessibility of viewers/listeners as targets of the advertising industry, the broadcasters' number one customer.

Subject to the sector-specific or general provisions of competition law, a telecommunications network operator can normally decide, as the network owner, which services offered by which providers it wishes to carry. As long as the network was owned either by the broadcasters themselves (as is the case, for example, with the terrestrial transmitters owned by many public service broadcasters) or by the state (postal and telecommunications authorities), it used to be relatively simple to take into account broadcasters' interests under constitutional and media law when providing access to infrastructure. Wherever shortages resulted in insufficient capacities for all (potential) providers, a selection process was carried out, often already during the process of licensing private broadcasters. A degree of exclusivity could therefore result if, for example, certain TV channels were not carried equally on all transmission platforms. In the broadcasting sector, the exclusion of some viewers can even appear desirable, at least temporarily, if the development of one means of transmission is to be particularly promoted by offering especially attractive content via that platform only.

Conversely, however, many European states have, for many years, had rules in place, requiring networks to carry channels that are particularly relevant to society (must-carry rules). The EC Universal Service Directive[8] contains provisions on this (Art. 31); the Court of Justice of the European Communities (ECJ) has also recently had an opportunity to give its opinion on the related issues of compatibility with the freedom to provide services.

A relatively new phenomenon is the more intensive debate over the possible mirror-image of "must-offer" obligations, i.e. the requirement for certain content providers (programme providers or aggregators) to offer their channels or channel packages to a network or platform operator or aggregator which is interested in distributing and/or marketing them. This idea is also largely rooted in (European) competition law. The infrastructure providers are keen to obtain access to content that they consider to be highly popular and that they think their customers would like to watch via their platform.

Here it may appear logical that the focus is no longer on individual content in the sense of a *programme*, such as the broadcast of the final of the Olympic women's handball tournament, for example, but on a complete channel or "package". Although rules on the right to short reporting and the broadcast of events of particular importance to society on free-TV can now be considered a standard component of media regulation, must-offer obligations would represent a more extensive challenge to exclusivity. No time-frame has yet been set for this.

3. Question

The present article describes how exclusivity is dealt with in media and communication with reference to the debate on must-offer obligations.

It begins by looking briefly at the rules on must-carry obligations, before examining the background and development of this specific kind of regulation, which is on the borderline between electronic communication law and broadcasting law. It investigates whether any lessons can be learned when considering the question of must-offer obligations (see II, below). The reasons for and against introducing such obligations are then considered with reference to current technological and market developments (see III, below). The broadcasting legislation of some European countries contains general rules on the subject. Alongside these are the provisions of competition law that are applied in individual cases. The introduction of must-offer obligations has been discussed (and often approved) by European and national competition authorities, usually in connection with mergers between companies from the telecommunications and media sector (see IV, below). Nevertheless, the imposition of such obligations, however they are imposed, does not necessarily answer the question of what form they might take. As well as the aspect of financial compensation, it is necessary to consider the fundamental question of whether, in view of copyright law, content providers are able to offer their channels or packages for distribution via other transmission networks or platforms (see V, below). The report cannot assess the consequences of must-offer measures that have already been taken, nor does it aim to suggest what political steps should be taken in this area. Rather, it seeks to demonstrate the importance of the theme of exclusivity in media and communication, which has grown in recent years, using the example of must-offer obligations (VI).

II. The Must-carry Concept as a Connecting Factor?

In the early years of analogue cable transmission, the possibility of a bottleneck in terms of network capacity was, in Germany at least, never even considered. The number of channels that were even available for (re-)transmission via cable was still very small[9] and did not rise significantly until it became possible to feed other channels, received via satellite, into the cable TV network. As well as the possibility of transmitting foreign channels, conditions were now suitable for the emergence of additional private (special interest) channels. In the 1990s, this led to an increasing shortage of available cable capacity; it seemed only a matter of time before maximum capacity, which was limited to

around 33 channels due to the use of amplification technology, was reached.[10]

As a result, many EU Member States adopted national regulations on the allocation of available cable capacity, which were meant to take into account the increasing scarcity of resources.[11] Priority was given to channels that were of general interest or particular value to the public. The main objective was to ensure that, as a whole, the content transmitted was sufficient to provide the diversity of programming that most national legislators hoped to achieve by imposing must-carry obligations.

For example, Art. 52 (1) sentences 3 and 4 of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement – *RStV*) agreed between the German *Bundesländer* enabled the *Land* legislators to introduce regulations concerning the allocation of analogue cable channels in order to achieve public interest objectives. In many *Länder*, such allocation is now regulated by means of must-carry obligations.[12] Since 1999, Art. 52 (2 and 3) *RStV* has required the necessary transmission capacities for public service television channels to be available, including in cable networks with at least some digitally transmitted television channels or telemedia. The same applies to the capacities for commercial television channels with regional windows. In addition, these networks must make available the capacity of one analogue TV channel for regional and local TV channels as well as public access channels.

The adoption of the Universal Service Directive in 2002 created an EU-wide standard for sector-specific competition law, which seeks, in Art. 31, to harmonise these must-carry provisions.[13] In the United Pan-Europe Communications case, the ECJ recently examined the Belgian regulations on cable must-carry obligations in the bilingual Brussels-City region and their compatibility with the EC Treaty's provisions on the freedom to provide services.[14] In its judgment of December 2007, it found that even a rule requiring the transmission of a total of 20 named television channels did not disproportionately restrict the free movement of services, as long as the rule:

"- pursues an aim in the general interest, such as the retention, pursuant to the cultural policy of that Member State, of the pluralist character of the television programmes available in that territory, and

- is not disproportionate in relation to that objective, which means that the manner in which it is applied must be subject to a transparent procedure based on objective non-discriminatory criteria known in advance."

The ECJ expressly did not evaluate the national legislation with reference to Art. 31 of the Universal Service Directive, referring instead to Art. 49 of the EC Treaty, since the Directive was not yet in force when the relevant Belgian ministerial orders were issued.

The question of the correct implementation of this Directive was and remains the subject of infringement and preliminary ruling procedures, through which the Commission and courts of the Member States wish to have clarified whether national legislation on cable must-carry obligations is compatible with Art. 31 of the Directive.[15]

As the digitisation of transmission networks began, cable operators could look forward to being able to provide an increasing number of channels. As a rule, the compression technology used in digital signal transmission based on DVB standards – not only via cable (DVB-C), but also terrestrial (DVB-T) and via satellite (DVB-S, DVB-S2) – means that four or five digital programmes can be carried on a single analogue channel.

Following this development, the argument that must-carry obligations were necessary due to insufficient capacity disappeared into the background. In addition, the liberalisation of the networks that took place in the 1990s in line with the EC telecommunications framework, together with increasing convergence, meant that more networks were becoming available for broadcasting. Even the networks that were previously used exclusively for telecommunications services in the narrow sense (i.e. telephony, fax and data transfer across closed networks) were now permitted by law to carry television signals and, thanks in particular to the use of IP[16]-supported DSL, had the technical capability to do so. A further means of transmission has been available for some time in the form of the frequencies set aside for mobile television.

In view of these developments in the markets, as well as in legal and technological matters, it has been debated for some time whether must-carry obligations are still necessary.[17] Although content providers are still searching for new transmission methods,[18] a bigger challenge at present is the one facing network and platform operators, who need to provide their customers with sufficiently attractive content.

Must-carry obligations are therefore increasingly being used to ensure that programme providers have access to a scarce resource. They can therefore also be seen as providing sector-specific rights of access to attractive content. However, the real motivation for broadcasters lies elsewhere: for them, it is a question of access to viewers, or at least to their preferred means of transmission. The EU legislator's main aim in obliging networks to carry certain channels is "to meet clearly defined general interest objectives" (Art. 31 (1) 2nd sentence of the Universal Service Directive). These objectives are determined by the media laws of the Member States where, in turn, aspects linked to the viewers' right to programme diversity regularly play an essential role.

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Although must-offer obligations are often portrayed as a mirror image of the must-carry concept, such an approach ignores the extent to which the two models share the same objectives. There is no doubt that must-offer obligations serve to promote the development of new transmission methods. Another question is whether and to what degree the introduction of such obligations can help to achieve the diversity that is required under media law.

III. Must-offer as a Reaction to Current Developments?

At European level, the debate on the introduction of a must-offer rule has already provoked an initial response, with the Committee of Ministers of the Council of Europe adopting a recommendation in 2007,[19] urging Member States to consider introducing must-offer obligations in their national legislation. However, copyright restrictions would have to be taken into account:

> „[…] Member states should explore the relevance of a must offer obligation in parallel to the must carry rules so as to encourage public service media and principal commercial media companies to make their channels available to network operators that wish to carry them. Any resulting measures should take into account copyright obligations."

This recommendation expresses the notion that, if a fundamental decision is taken to introduce such rules ("whether"), it must also be determined under what conditions this can happen ("how"). Copyright issues are relevant here. It may also be necessary to decide whether – as with must-carry obligations[20] – any remuneration should be paid and, if so, how much.

Programme providers are often sceptical about the idea of new transmission methods. Internet TV platform *Zattoo* found it difficult to negotiate with some well-established broadcasters because they did not want their programmes to be broadcast via new platforms. This was certainly due in part to unresolved questions concerning the extent of the exploitation rights involved. The broadcasters' remuneration for making their content available also had to be agreed. A competitor, *Joost*, also had some problems negotiating with European TV broadcasters.[21] For the public service broadcasters financed through licence fees, *Joost's* plan to show advertising,[22] which forms a crucial part of the service's business model, represents a critical issue.

The launch of the German platform for mobile television using the DVB-H standard was also delayed at first. The successful bidding consortium, Mobile 3.0, was not immediately able to meet its obligation to produce agreements with the broadcasters on the transmission of their programmes before a certain deadline.[23]

In some cases, network and platform operators have even "applied" for must-carry obligations to be imposed in order to prevent other operators from signing exclusive agreements with the broadcasters and to obtain access to the channels they consider to be attractive.[24]

IV. Must-offer Obligations

1. Media Law Provisions

Some countries, such as France, the Czech Republic and the United Kingdom, for example, have adopted must-offer rules that oblige certain broadcasters to offer their channels to transmission platforms under non-discriminatory conditions.[25]

a) France

Under Art. 34-1-1 of the Freedom of Communication Act (*Loi n° 86-1067 relative à la liberté de communication*), as amended by Act no. 2004-669, terrestrial programme providers are not allowed to refuse permission for their programmes to be retransmitted via cable networks. Unless it is extended by law, this rule will expire five years after the promulgation of Act no. 2004-669, i.e. on 10 July 2009.

In a decision of 8 July 2008, the French regulatory body, the *Conseil supérieur de l'audiovisuel* (*CSA*), imposed a must-offer obligation for the first time on a television broadcaster, in favour of a satellite platform operator.[26] Within a six-week period, the TV broadcaster *Métropole Télévision* was obliged to submit an offer for the transmission of its TV channel *M6* via *AB Sat's* direct-to-home (DTH) platform, *Bis Television*. According to complaints by *AB Sat, Métropole* had refused to negotiate with the platform operator, even though it had granted transmission rights to all other platforms. The *CSA* decided that the company could not refuse on the grounds of freedom of contract, but had to offer *M6* to *AB Sat* under similar, non-discriminatory conditions. Art. 34-1-1 was not applicable in this case because *Bis Television* was not a cable network. Rather, the *CSA* based its decision on Art. 3-1, which requires it to balance the freedom of audiovisual communication (amongst other things) with the objectives of free competition and non-discriminatory legal relations between programme providers and transmission service providers. Art. 17-1 permits the *CSA* to issue decrees in order to create this balance.

Must-offer obligations also apply to certain public service broadcasters (*France 2, France 3, France 4, France 5, Arte*), regardless of the transmission network used.[27]

b) Czech Republic

Under Art. 54 (3) of the Broadcasting Act,[28] all public service broadcasters must offer their freely available chan-

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nels to the cable networks free of charge. At the same time, the network operators are obliged to carry these channels in their basic programme packages, also free of charge.

Before the law was amended on 25 April 2006, the must-offer rule applied not only to the public service channels, but also to private channels broadcast throughout the country and local channels which shared a frequency with such a channel. In addition, the obligation did not apply only to cable network operators, but to all network operators.

c) United Kingdom

The must-offer provisions are found in Articles 272–276 of the Communications Act 2003, which state that the Office of Communications (Ofcom) must ensure, through the licences of public service broadcasters and other must-carry services, that their digital services are offered as available to be distributed by means of every appropriate network and that they are actually distributed via these networks. According to Art. 272 (7) of the Communications Act 2003, "appropriate network" means an electronic communications network by means of which public electronic communications services are provided that are used by a significant number of end-users as their principal means of receiving television programmes. Ofcom must also guarantee, through the wording of licences, that programme content is made available to as many potential viewers as possible and that the programme providers do not demand a fee for the provision of their content.

d) Countries without Must-offer Legislation

Most European countries have not yet introduced any must-carry legislation. In many countries, however, must-offer obligations are a de facto consequence of the public supply remit of public service and, in some cases, private broadcasters.

2. Competition Law Aspects

In Community law, a must-offer obligation may, in principle, be based on either the provisions of general competition law contained in the EC Treaty (Art. 81 *et. seq.*) and the EC Merger Regulation[29] or on sector-specific competition law such as the regulatory framework for electronic communications.

a) Sector-specific Competition Law

While the EC legal framework, in Art. 31 of the Universal Service Directive, makes provision for must-carry obligations to be imposed on network operators, obliging them to transmit certain channels, provided such obligations are "necessary to meet clearly defined general interest objectives" (Art. 31 (1) (2) of the Directive), it does not currently impose a "reverse obligation", requiring broadcasters to offer their content to network operators. It is highly unlikely that this situation will change following the forthcoming adoption of a revised regulatory framework ("telecoms review").[30] Nevertheless, a Member State can impose its own must-offer obligations (see IV.1, above) either as part of its national policy to guarantee open, fair competition (as long as it does not contravene Community law) or in order to promote diversity (based on its own legislative powers).

b) General EC Competition Law

At Community level, the Commission can, as part of its general responsibility for monitoring competition, impose must-offer obligations in accordance with Art. 81 *et.seq*. of the EC Treaty or the EC Merger Regulation. The Commission may firstly take action in order to prevent concerted practices under Art. 81 of the EC Treaty (cartel law), including vertical selective distribution structures that can result from the conclusion of exclusive agreements between programme providers and certain network or platform operators. Such agreements may infringe the ban on cartels.[31] However, the present article will concentrate on the examination of measures to combat market abuses under Art. 82 of the EC Treaty and the conditions for the approval of mergers between undertakings set out in the EC Merger Regulation.

Before going any further, we should point out firstly that, when a must-offer obligation is imposed as part of abuse proceedings, the proportionality principle laid down in Art. 7 of Regulation (EC) No. 1/2003[32] must be respected. Secondly, in order to resolve any competition-related problems, voluntary commitments offered by a content provider (see Art. 9 of Regulation (EC) No. 1/2003 in cases of market abuse or Art. 6 (2) and Art. 8 (2) (2) of the EC Merger Regulation regarding concentrations between undertakings) can also be taken into consideration. Such commitments may involve the content provider either putting an end to the exclusivity of its distribution channel or promising to offer its channels to all network and platform operators under non-discriminatory conditions.

aa) Abuse of a Dominant Market Position, Art. 82 of the EC Treaty

Article 82 (2) of the EC Treaty lists situations in which an undertaking abuses a dominant market position by harming fair competition. This list is not exclusive; abuses are only committed in the situations listed "in particular". It is accepted that one way of discriminating against other trading parties, as mentioned in Art. 82 (2) (c) of the EC Treaty, is the refusal to enter into a business relationship with a fellow undertaking. In the sector we are concerned with, such conduct mainly takes the form of a refusal to grant a licence for programme content. If a programme

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provider refuses to make its programme content available to a network or platform operator whose competitors do receive the relevant distribution rights, this could be considered abusive behaviour, which could particularly be corrected by means of a must-offer obligation (see the Magill case and the subsequent ECJ case-law, V., below).

bb) Merger Controls: *Stream/Telepiù (SkyItalia)*

One example of the European Commission imposing must-offer obligations is its decision on the merger between *Stream*, an Italian pay-TV provider owned by American company *Newscorp*, and *Telepiù*, another Italian pay-TV service.

The Commission noted that the merger, which resulted in the creation of the combined *SkyItalia* platform, would lead to a monopoly in the Italian pay-TV market.[33] At the same time, a monopsony would be created in the premium content market. Such a situation would not have been permissible under normal market conditions. However, the particularly high costs of European pay-TV markets, due in particular to the high cost of rights to premium content, represented significant barriers to entry for new providers and a heavy burden for the providers already active in the market.[34] *Telepiù* and *Stream* had both suffered heavy losses between 1991 and 2001. The Commission took this unusual market situation into account, particularly *Newscorp's* argument that, without a rescue merger, *Stream* would be forced out of the market for profitability reasons. It decided that authorising the merger subject to appropriate conditions would be more beneficial to consumers than the market disruption that would be caused by the closure of *Stream*.

The Commission authorised the merger subject to conditions designed to keep the markets concerned open to competition. The conditions, which were accepted by *Newscorp*, concerned the company's structure and activities. For example, *Newscorp* was obliged to offer premium content on a wholesale basis to third parties who broadcast on platforms other than DTH satellite communication. These offers had to be non-exclusive, non-discriminatory and unbundled. This was meant to make it easier for non-satellite pay-TV providers, who would otherwise be prevented from acquiring this content by high fees or lengthy exclusive contracts between established market players and content providers, to remain in or enter the market. They should not be denied access to content (mainly football matches and films) that they needed for a successful pay-TV operation.[35]

In its decision, the Commission did not, therefore, merely oblige the combined entity to make content available. While requiring the offer to be made "on a wholesale basis", it also made remuneration compulsory and defined how it should be calculated. It therefore set out exactly how the must-offer obligation should be implemented. In principle, it stated that the wholesale price was based on the retail price at which the content was sold via the *Newscorp* platform, minus a margin representing the costs that *Newscorp* would have incurred through direct marketing.[36] At least once a year, *Newscorp* had to publish a "rate card" and submit it to the Commission.[37]

Finally, para. 10.8 of Part II of the Annex to the decision is worth noting. This provision obliges *Newscorp*, when acquiring new content for inclusion in a DTH premium channel, to endeavour to acquire from the rightsholder all the rights for other pay-TV platforms. If it is unable to do so for certain content, *Newscorp* must take all reasonable steps to provide third parties with a full package of content, including the provision of suitable alternative content where it does not hold the non-DTH rights.

At this point, it is apparent that programme providers/aggregators on whom must-offer obligations are imposed face a dilemma, which will be discussed below: on the one hand, they may be obliged under competition and media law to offer their programmes to network or platform operators, while at the same time they may be prevented from doing so by copyright law.

c) Application of Competition Law at National Level

aa) Spain

In 2002, the *Consejo de Ministros* (Spanish Council of Ministers) authorised the merger between *Sogecable S.A.* and *DTS Distribuidora de Televisión por Satelite S.A. (Vía Digital)*, operators of the two leading Spanish pay-TV platforms, subject to a series of conditions[38] and must-offer obligations[39]. For example, *Sogecable* had to offer to third parties, over a five-year period, at least one premium channel showing films from the major studios as well as all theme-specific channels produced directly by or on behalf of *Sogecable* under reasonable, transparent and non-discriminatory conditions.[40]

Sogecable was also obliged, if it owned or acquired exclusive rights to show matches in the Spanish football league or King's Cup (*Copa del Rey*) and the respective highlights programmes, to grant sub-licences allowing free-to-air and pay-TV channels to show this content.[41]

bb) France

(1) *Canal+*

Must-offer obligations also played a major role in the decision of the *Ministère de l'Économie, des Finances et de l'Industrie* (Ministry for the Economy, Finance and Industry) on the merger of the two satellite TV platforms *CanalSat* and *TPS* in August 2006. The new company was expected to have more than 10 million subscribers.[42] The Ministry based its decision on the opinions of the *CSA* and

the *Conseil de la concurrence* (cartels authority). Particular consideration was given to the assurances offered by *TPS* and *CanalSat* limiting the risks to competition created by the merger, which affected numerous markets. The total of 59 different conditions that were accepted for a period of five to six years included some that are relevant to the theme of this report: on the one hand, *Canal+* undertook to limit the duration of contracts with film producers to three years and promised not to use exclusive VoD rights; on the other, it guaranteed its competitors access to its catalogue on a non-discriminatory basis. The group also agreed to make available the rights for the unencrypted broadcasting of TV series and sport. It also promised to make the following seven channels available to other pay-TV service providers: *TPS Star, CinéStar, CinéCulte, Cinétoile, Sport+* and children's channels *Piwi* and *Télétoon*. This was meant to enable other platform providers to create new, attractive channel packages.

(2) *Neuf Cegetel / Eurosport*

In October 2007, the 14th chamber of the *Cour d´appel de Paris* (Paris Court of Appeal) had to issue an interim ruling on a dispute between Internet service provider *Neuf Cegetel* and sports broadcaster *Eurosport*, in which pay-TV provider *Canal+* was also involved. Although must-offer obligations were not directly discussed in this case, which involved contract law rather than competition law, it clearly illustrates the conflicting interests relating to exclusivity in the media and communications sector.

Eurosport and *Canal+* had signed contractual agreements under which *Canal+* acquired the exclusive right to market the sports channel on satellite and IPTV as well as the non-exclusive right to distribute it via a DVB-T platform. This gave *Neuf Cegetel* the opportunity to sign an agreement with *Eurosport* concerning digital terrestrial transmission of the channel. In its press release concerning this agreement, however, *Neuf Cegetel* announced in particular that it wanted to offer its ADSL subscribers a multi-theme package, including the *Eurosport* channel, that could be accessed with a special decoder. By redirecting the terrestrial signal and broadcasting it via the Internet, *Neuf Cegetel* would have infringed the exclusive right of *Canal+* to broadcast *Eurosport* via IPTV. *Canal+* initially protested; *Eurosport* subsequently announced that it would suspend the signal for terrestrial transmission and terminate its contract with *Neuf Cegetel*. The Internet service provider then applied for an injunction to force *Eurosport* to meet its contractual obligations.

The Paris Appeal Court held that *Neuf Cegetel* may have signed the agreement with *Eurosport* with no intention of distributing terrestrial pay-TV itself. Indeed, it seemed more likely that it had wanted to include an attractive channel in its ADSL package.[43] The first instance decision to refuse an injunction was therefore upheld.

(3) *AFORST / France Télécom* and *France Télévisions*

This case, ruled on by the *Conseil de la concurrence* in May 2008, dealt precisely with the issue of access rights, under competition law, to content over which TV broadcasters and Internet access providers have signed exclusive agreements.[44] The companies *France Télécom* and *France Télévisions* had signed a contract under which certain content from the public TV channels of *France Télévisions* would be made available for later viewing exclusively to *France Télécom* subscribers via a platform called "*Rewind TV*". The *Association française des opérateurs de réseaux et de services de télécommunications* (an association of fixed network telecommunications providers competing with *France Télécom – AFORST*) complained about this to the *Conseil de la concurrence*. It thought the exclusivity agreement would damage competition and argued that it would prevent its members from putting together their own attractive programme packages. It also complained that the established operator could use the agreement to put pressure on the broadband market.

However, the *Conseil de la concurrence* rejected the complaint and also dismissed the application for deferral of the implementation of the agreement.[45] In its explanation, it stated that the content made exclusively available via "*Rewind TV*" was limited to programmes initially broadcast between 6 pm and midnight, except cinema films. In addition, the agreement was only valid for two years. Finally, the exclusive content was not essential for the creation of a successful rival package, since ADSL operators could offer other attractive interactive services such as online music catalogues or sign agreements with other providers or even *France Télévisions* itself concerning programmes that were not covered by the disputed exclusive agreement.

cc) United Kingdom

We should also mention two decisions taken by the *Office of Fair Trading* (OFT) at the end of December 2005 in merger proceedings under the *Enterprise Act 2002*.[46]

(1) *BSkyB Broadband/Easynet*

The first case concerned the acquisition of the *Easynet Group* by *BSkyB Broadband Services*. This takeover would enable *Sky* to offer so-called triple play products – a bundled pay-TV, Internet access and traditional telecommunications service – via Digital Subscriber Line (DSL) for the first time. Third parties involved in the proceedings had been concerned that *Sky* might be able to block the supply of pay-TV content to its emerging competitors in the DSL market, given its market power in premium content provision and its significant buying power in non-premium content. However, the OFT decided that *Sky* already had the power to do this and that the merger did not create any new incentives for such anti-competitive behaviour.

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(2) *NTL/Telewest*

The second decision concerned the merger between *NTL* and *Telewest*, the only two remaining British cable operators. Since their local networks did not overlap geographically, they represented two separate markets. There was strong competition in other markets (wholesale telecommunications services and narrowband Internet). However, both companies were buyers of pay-TV content and *Telewest* owned a pay-TV provider, *Flextech*. The OFT had to consider fears that the merged company could, on the one hand, cease to supply *Flextech* content to DSL rivals and, on the other, use its buying power to block the supply of third-party pay-TV content to its rivals by obtaining exclusivity over such content.

The OFT's decision to authorise the merger was based firstly on the fact that *Flextech* had only a relatively small share of viewers (10–15% of viewers of non-premium pay-TV channels) and that alternative content was available. Failure to offer "*Flextech* content" would not therefore impede growth. Secondly, other market players did not share the view that the merger would create a content blockage; the OFT had accepted a similar level of market power when considering previous mergers.

dd) Hungary

In Hungary, the *Versenytanács* (Competition Council) authorised the takeover of *Sport1 TV M sorszolgáltató Zrt.* by *Chellomedia Programming B. V.*, subject to a must-offer obligation.[47] Following the 2006 merger, the authority had expressed concern that *Sport1 TV* could refuse to grant access to its channels *Sport1* and *Sport2* to competitors of the *Chellomedia* affiliate, *UPC*, which operated the DTH satellite platform. At the time, *Sport1 TV* had a share of around 70% in the Hungarian-language specialist sports channel market. Particularly in view of the developing Hungarian IPTV market, the Competition Council had feared there would be negative effects on competition if competitors were denied access to the sports channels produced by *Sport1 TV*. *Chellomedia* said it was prepared to offer competitors access to the channels on a non-discriminatory basis until 2010.

3. Interim Conclusion

A comparison of the regulations outlined above shows that media laws and decisions taken in accordance with media law concerning must-offer obligations deal with the relationship between television broadcasters and the operators of the distribution infrastructure (network or platform operators). However, competition law was used as the basis for assessing the relationships among different pay-TV providers (*SkyItalia* and *Canal+* with their respective rivals) and between them and free-TV providers or "third parties" (*Canal+, Sogecable/Vía Digital*); only the *Chellomedia* case represents an exception in some respects.

Clearly, the predominant idea in media law is that must-offer obligations serve primarily to provide infrastructure providers with access to attractive content. However, cases relating to national and EC competition law demonstrate that the question of who should be obliged to offer what content to whom may arise in a whole range of other situations.

V. Aspects of Copyright Law

The response to the question concerning appropriate media and/or competition law regulation is influenced by another, external factor: copyright law. For example, a (sector-specific) competition or media law provision which obliges programme providers to offer their content under specific, non-discriminatory conditions to all carriers should not disregard the limitations that result from the scope of the exploitation rights and other intellectual property rights owned or acquired by the programme providers. Depending on copyright provisions in the relevant Member State and contractual agreements,[48] a broadcaster's rights to distribute certain content via the various transmission networks may be restricted.[49]

Despite this fundamental question, it is necessary to clarify in a general manner whether competition law takes priority over copyright law, for example in a situation where, after an abuse of market power[50] is established, competition law requires network or platform operators to be granted access to content.

The ECJ has previously looked closely at the possible conflicts of aims that can arise from the application of competition law in situations involving intellectual property rights. It has issued judgments in cases where the abuse of a dominant market position has been investigated in accordance with Art. 82 of the EC Treaty.

The ECJ defined abstract conditions and requirements for the establishment of abusive conduct in this context for the first time in its ruling on the Magill case.[51] The case concerned the refusal of three Irish and British TV companies to make their copyright-protected programme information available to the Magill company for use in a weekly listings magazine. While they allowed the information to be published in their own TV guides and in daily newspapers, the TV companies did not grant Magill a licence. The Commission considered this to be an abuse of market power under Art. 82 of the EC Treaty. Nullity actions against the Commission's decision were rejected by the European Court of First Instance in all three cases.[52] In the appeal proceedings, the ECJ agreed with the Commission's view and upheld the ruling of the Court of First Instance.[53] The ECJ thought that the mere refusal to grant a licence did not constitute abusive

conduct, since the author had the exclusive right of reproduction. In addition, in the absence of harmonisation of laws, the protection of intellectual property rights was a matter for national legislation. Nevertheless, abusive conduct could be involved in "exceptional" circumstances.

The Court listed three such circumstances which were present in this case. Firstly, the refusal to grant a licence prevented the creation of a new product (a comprehensive weekly programme guide), for which there was no actual or potential alternative and for which there was a potential consumer demand. Secondly, there was no justification for such a refusal. And thirdly, the refusal excluded all competition from a secondary market, which the copyright owners were therefore able to reserve for themselves.

In subsequent rulings,[54] these circumstances have been sometimes clarified, sometimes expanded and sometimes restricted. In the *IMS Health*[55] case, the ECJ finally explained that all the conditions had to be met cumulatively in order for abusive conduct to be established.

An essential key to understanding this case-law is the distinction between the upstream and the (secondary) downstream market. According to the ECJ, "it is determinative that two different stages of production may be identified and that they are interconnected, inasmuch as the upstream product is indispensable for the supply of the downstream product".[56]

If these conditions are applied to cases in which a content provider such as a programme provider or aggregator refuses to offer content over which it owns the copyright – either because it is the author or because it has acquired them from the author – to a third party for (re-)distribution, the following picture emerges: in the upstream content market, the third party applies for a licence from the content provider, who itself wishes to provide that content in the secondary market.

As described above (see IV.3), there are many possible situations. For example, the third party may be a network or platform operator hoping to enter the market successfully by offering access to premium content. But it may also be another content provider (e. g. a rival pay-TV operator) which is acting in a different (secondary) market from the distribution rights market.

A content provider's simple refusal to grant distribution rights over its content to a third party cannot be considered as an abuse of its market power. However, it may be abusive if the aforementioned content is essential to success in the secondary market and the copyright owner's refusal unjustifiably prevents the launch of a television service for which there is a potential demand and, in so doing, excludes all competition from this market. The final condition needs to be very carefully scrutinised on a case-by-case basis. It would not be fulfilled, for example, if the content provider were a vertically integrated company, itself active in the market and which the third party considered to be a potential provider of a secondary product. This is quite different to the potential effects of a merger control decision.

The sensitivity with which ECJ case-law has tried to strike a balance between competition law and copyright law should also be employed in the creation of must-offer legislation, in order to avoid excessively restricting the rights of copyright holders to dispose of their intellectual property.

VI. Summary

As far as the future of the must-offer concept is concerned, the question therefore is whether a general must-offer obligation is necessary in Community or national law, either as a sector-specific competition rule or to supplement existing media regulations. In the case of Community law, it would also need to be clarified, in view of the distribution of powers between the EU and its Member States, whether the Community would have the jurisdiction to introduce such legislation. One possible advantage of a legislative measure could be the fact that all relevant aspects – including those that may, or should, be irrelevant to individual competition-related rulings – can be taken into account and balanced out appropriately.

Assessment of whether a must-carry rule is necessary should also include consideration of its future significance: in liberalised, digitised and converged markets, will scarcity of content be the only bottleneck in the longer term? This could make a must-carry obligation, as provided in Art. 31 of the Universal Service Directive, superfluous in the medium term.[57] Or might new distribution formats such as HDTV and broadband-intensive audiovisual media services again lead to a shortage of resources? If so, keeping such a rule might prove necessary in the future. And finally, does the argument that a must-carry obligation distorts the negotiation situation and enables broadcasters to put network operators under unreasonable pressure not also apply – with roles reversed - to a must-offer obligation? Seen as a whole, one possible consequence of the debate (and one which needs further discussion) could be that must-offer obligations are not considered to be a replacement for obsolete must-carry obligations in a changing market, but rather as a necessary addition for the creation of equal opportunities for all parties.[58]

Generally speaking, the time aspect appears to be significant: under Art. 31 (1) 3rd sentence of the Universal Service Directive, the need for must-carry rules is subject to periodic review. Thought should be given to whether must-offer obligations should also be limited in terms of time. As with the limits on the validity period of contracts on premium content – necessary under competition law – this

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could be a way of ensuring that intrusion on free enterprise lasts only as long as is necessary to keep access to upstream markets open to competition. For the main objective of a must-offer obligation is to break or tone down the position of a dominant provider for a transitional phase, in order to enable new providers to enter the market with equally attractive (sometimes identical or similar) content. This point of view has already been reflected in the decisions taken in accordance with merger control regulations.

Finally, a definitive overall concept should not be limited to the relations between network operators and broadcasters, but should cover all levels of the broadcasting process. As well as the two aforementioned groups, this includes platform operators, who play an important mediatory role in increasingly open networks.[59]

In addition, the suppliers of content must also be included in the debate. The implementation of must-offer obligations depends essentially on what content is made available by the rightsholders for transmission via the relevant infrastructure. It must therefore be determined whether the must-offer obligation of programme providers should also be extended to include copyright. If so, the follow-on question would need to be discussed, i. e., whether at this level also a corresponding "must-carry obligation" or "must-market", so to speak, would be necessary to ensure equal opportunities...

This article demonstrates that, in principle, exclusivity in media and communication, an essential cornerstone of the underlying business model, can remain in place – albeit with occasional restrictions.

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1) See *Bundesgerichtshof* (Federal Supreme Court - *BGH*), ruling printed in: GRUR 1968, pp. 209 *et.seq.*. (Lengede mining disaster). The *BGH* ruled that the exclusive agreement between a German magazine and miners who had survived a mining accident was immoral (and therefore invalid). The agreement was designed to ensure that only this magazine could report on the tragedy. The court ruled that it blocked the only source of information about an event concerning which the public had a considerable and legitimate right to be informed. It therefore violated the freedom of opinion and freedom of information enshrined in Art. 5(1) of the *Grundgesetz* (Basic Law- *GG*), which apply to private relationships between individuals under the so-called "*Drittwirkungslehre*" (theory of effect on third parties).
2) Martin Kuhr, Media Windows in Flux: Challenges for Audiovisual Media Chronology, European Audiovisual Observatory (ed.), IRIS *plus* 2008-4.
3) See Amélie Blocman, France: Report on the Cinema and the Law on Competition, IRIS 2008-5:10, http://merlin.obs.coe.int/iris/2008/5/article15.en.html
4) Exclusivity can also be geographical, covering one or more Member States: rights have been split territorially, based on the territoriality principle contained in copyright law for works and, similarly, based on (or for sports broadcasts, for example, justified by) the granting of certain exploitation rights. This has been the subject of criticism for a long time, mainly because of the resulting internal market limitations; see "*EU fordert Fernsehen ohne Grenzen*", *Handelsblatt*, 24 September 2008, http://www.handelsblatt.com/politik/international/eu-fordert-fernsehen-ohne-grenzen;2046813, and Lorna M. Woods, *Murphy v. Media Protection Services (Part II)*, in MMR 9/2008, p. XXVI.
5) See Sebastian Schweda, Video on Demand: The Legal Bonds between Business Partners, Competitors and Users, in European Audiovisual Observatory (ed.), Legal Aspects of Video on Demand, IRIS *Special* 2007-2, p. 13; more recently, see "Tele2 signs Warner Brothers and Disney VOD deals", Broadband TV News, 5 September 2008, http://www.broadbandtvnews.com/?p=7816
6) See the debate over the exclusive marketing of the *Apple iPhone* in Germany (by *T-Mobile*, http://www.heise.de/newsticker/Zeitung-iPhone-in-Deutschland-bei-T-Mobile—/meldung/92157) and France (by *France Télécom*, http://www.heise.de/newsticker/France-Telecom-verkauft-iPhone-in-Frankreich—/meldung/96390). The *LG Hamburg* (Hamburg district court) ruled that this sales strategy was admissible in Germany under competition law (see http://www.heise.de/newsticker/iPhone-in-Deutschland-weiter-exclusiv-bei-T-Mobile-Update—/meldung/100010).
7) Above the infrastructure level, exclusivity can also be achieved through the use of certain information and communication technologies, such as specifications for set-top boxes (STB); this and related decisions, particularly of the European competition authorities, are described in detail in: European Audiovisual Observatory (ed.), Regulating Access to Digital Television, IRIS *Special* 2004. The Commission's recent decisions concerning *Microsoft* (case no. COMP/C-3/37.792, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:l:2007:032:0023:0028:en:pdf) and *Newscorp/Premiere* (case no. COMP/M.5121, http://ec.europa.eu/comm/competition/mergers/cases/decisions/m5121_20080625_20212_en.pdf) are particularly relevant.
8) Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0022:EN:HTML
9) Markus Nauheim, *Die Rechtmäßigkeit des Must-Carry-Prinzips im Bereich des digitalisierten Kabelfernsehens in der Bundesrepublik Deutschland*, p. 106.
10) In some German *Bundesländer*, the *Land* media authorities had to introduce a selection process in 1995, when the number of TV channels applying for access to the cable network exceeded the number of available places, see Klaus Beucher/Oliver Rosenberg, *Kapazitätsknappheit und Programmvielfalt*, ZUM 1996, p. 643 f.
11) In Germany, for example, see Art. 52 *RStV* as amended by the *9. RÄStV* (9th amendment of the *RStV*). Since the *10. RÄStV* (10th amendment of the *RStV*) entered into force on 1 September 2008, the rule has been included in Art. 52b *RStV* and is no longer aimed exclusively at cable network operators, but more generally at all platform operators (except those listed in Art. 52 (1) *RStV*).
12) See, for example, Art. 36 (1) (1) *BayMG*; Art. 41 *MStV Bln.-Bbg.*; Art. 38 (2) *SächsPRG*.
13) The question of whether the Community legislator is sufficiently competent to adopt such regulations or whether they represent excessive interference in the regulatory powers of the Member States in the cultural sector, is not discussed here. For a cautious view on whether the Community has exceeded its jurisdiction, see Markus Nauheim, *op. cit.* (footnote 9), p. 134 ff.
14) ECJ, C-250/06, United Pan-Europe Communications Belgium SA vs Belgium, Rec. 2007, p. I-11135.
15) See, for example, the preliminary ruling of the *VG Hannover* (Hanover Administrative Court) of 14 June 2007, Kabel Deutschland vs NLM (case no. C-336/07), published in: ZUM-RD 2008, pp. 43 *et seq.*., and Carmen Palzer, *EuGH: Vorabentscheidungsverfahren zu Must-Carry-Regeln*, MMR 12/2006, p. XXI, concerning infringement procedures against Germany in relation to relevant provisions in some German *Land* legislation.

16) Internet Protocol (IP) is a network protocol commonly used in computer networks, http://de.wikipedia.org/wiki/Internet_Protocol
17) It is unnecessary to consider whether channels that are covered by a must-carry obligation due to the public interest would not be transmitted voluntarily by the network and platform operators anyway for economic reasons.
18) See Peggy Valcke, The Future of Must-Carry, in: European Audiovisual Observatory (ed.), To Have or not to Have – Must-carry Rules, IRIS *Special* 2005, p. 37.
19) Recommendation Rec(2007)2 of the Committee of Ministers to member states on media pluralism and diversity of media content, No. II.3.3.
20) See Art. 31 (2) and recital 43 of the Universal Service Directive.
21) However, press reports that Joost wanted to withdraw from the European market altogether, were denied by the company (see http://www.heise.de/newsticker/P2P-Videodienst-Joost-will-sich-angeblich-nur-noch-auf-die-USA-konzentrieren-Update—/meldung/106118).
22) See heise.de newsticker, *ZDF-Inhalte bald bei P2P-Streamingdiensten?*, report of 1 November 2007, http://www.heise.de/newsticker/ZDF-Inhalte-bald-bei-P2P-Streamingdiensten—/meldung/98339
23) *epd medien* 1/2008, p. 11.
24) See, for example, Peggy Valcke, *op. cit.* (footnote 18), p. 36, concerning debate on whether to extend retransmission obligations in Flanders, which would have given *Belgacom* access to the popular channel of Flemish broadcaster *VMMa*.
25) See the information compiled by Cullen International et al., *Study on the Regulation of Broadcasting Issues under the New Regulatory Framework*, Annex: Database of regulatory information for the broadcasting sector – Data collection by topic, Tab. 17.
26) *CSA* decision no. 2008-523 of 8 July 2008, *AB Sat vs Métropole Télévision*, http://www.csa.fr/upload/decision/reglement_differend_m6_absat.pdf
27) See Cullen International et al., *op. cit.* (footnote 25), Tab. 17, France. The must-offer obligation is derived from the must-carry obligation set out in Art. 34-2 for these broadcasters. It is argued that a logical consequence of the must-carry rule must be that the signal must then be provided by the public service television channels (see, for example, the *CSA* statement of 15 January 2008 to the *Conseil de la concurrence*, *AFORST vs France Télécom/France Télévisions*, p. 2, footnote 1, http://www.csa.fr/upload/dossier/avis_tvr_15_janvier_08_a.pdf). However, the obligation only applies to linear television channels which are subject to a must-carry obligation. Non-linear channels, on the other hand, were dealt with in a recently published decision of the *Conseil de la concurrence*, see IV. 2. a) bb) (3), below.
28) Act no. 231/2001 on radio and television broadcasting and amendments of other Acts, as amended by the Act of 25 April 2006.
29) Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings ("EC Merger Regulation"), available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R0139:EN:HTML
30) For the latest information about the review, see the results of the first reading of the European Parliament on 24 September 2008, available (provisional version) at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+20080924+SIT+DOC+WORD+V0//EN&language=EN
31) See the investigations of the *Bundeskartellamt* (Federal Cartel Authority) against *Kabel Deutschland GmbH* (*KDG*) due to exclusivity clauses in contracts with pay-TV providers, http://www.digitalfernsehen.de/news/news_282666.html. The procedure has now been stopped since, according to the *Bundeskartellamt, KDG* does not have a dominant market position for the purchase of special interest channels in the German pay-TV market, http://www.digitalfernsehen.de/news/news_332998.html
32) Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R0001:EN:HTML
33) European Commission, *Newscorp/Telepiù* (case no. COMP/M.2876, http://ec.europa.eu/comm/competition/mergers/cases/decisions/m2876_en.pdf), para. 180.
34) See Alison Harcourt, The Collapse of Digital Platforms in European Union Member States, in: European Audiovisual Observatory (ed.), Regulating Access to Digital Television, IRIS *Special* 2004, p. 91 *et seq.*.
35) *Op. cit.* (footnote 33), para. 246 and Annex Part II para. 10.
36) *Op. cit.* (footnote 33), Annex Part II para. 10.5.
37) *Op. cit.* (footnote 33), Annex Part II para. 10.10.
38) The Council of Ministers decision of 29 November 2002 is available (in Spanish) at: http://www.la-moncloa.es/ConsejodeMinistros/Referencias/_2002/c2911020.htm ; see also http://merlin.obs.coe.int/iris/2003/3/article17.en.html
39) See European Audiovisual Observatory (ed.), Tomorrow's Delivery of Audiovisual Services, IRIS *Special* 2005, pp. 8–10.
40) *Op. cit.* (footnote 38), General Conditions, nos 9 and 10.
41) *Op. cit.* (footnote 38), Second agreement of the Council concerning football, no. 5.
42) Amélie Blocman, France: Green Light for Merger of TPS and CanalSat Satellite Packages, IRIS 2006-8:14; http://merlin.obs.coe.int/iris/2006/8/article22.en.html
43) See Amélie Blocman, France: Television over ADSL – Conflict of Exclusivity among Operators, IRIS 2007-10:12, http://merlin.obs.coe.int/iris/2007/10/article20.en.html
44) *Conseil de la concurrence*, decision no. 08-D-10 of 7 May 2008, concerning *France Télécom/France Télévisions*, http://www.conseil-concurrence.fr/pdf/avis/08d10.pdf
45) See the *CSA* statement, *op. cit.* (footnote 27).
46) See Tony Prosser, United Kingdom: Competition Authorities Clear Multi-Media Mergers, IRIS 2006-2:13, http://merlin.obs.coe.int/iris/2006/2/article20.en.html
47) See Márk Lengyel, Hungary: "Must Offer" Obligation Imposed by the Competition Council, IRIS 2006-9:13, http://merlin.obs.coe.int/iris/2006/9/article19.en.html
48) This aspect cannot be discussed further here. However, it is discussed in more detail in European Audiovisual Observatory (ed.), *Remuneration for Creative Contributions to Audiovisual Works – the Role of Collecting Societies*, IRIS *Special* 2008-2 (in preparation), and Lucie Guibault/Roy Melzer, The Legal Protection of Broadcast Signals, European Audiovisual Observatory (ed.), IRIS plus 2004-10.
49) Concerning a similar situation linked to short reporting rights, see Art. 3k and rec. 40 of Directive 2007/65/EC on audiovisual media services; for more detailed information, see Alexander Scheuer/Max Schoenthal, Comments on Art. 3k AVMSD, in: Castendyk/Dommering/Scheuer, European Media Law, Alphen a/d Rhijn 2008, para. 5.
50) See also Natali Helberger, Controlling Access to Content, 2006, pp. 160 *et seq.*, and Estelle Derclaye, An economic approach to what the conditions of abuse of a dominant position of copyright should be, 2003, http://www.serci.org/2003/derclaye.pdf
51) ECJ, joined cases C-241/91 and C-242/91, RTE and ITP v Commission, Rec. 1995, p. I-743.
52) Court of First Instance, T-69/89, RTE v Commission, Rec. 1991, p. II-485; Court of First Instance, T-70/89, BBC v Commission, Rec. 1991, p. II-535; Court of First Instance, T-76/89, ITP v Commission, Rec. 1991, p. II-575.
53) *Op. cit.* (footnote 52).
54) See in particular Court of First Instance, T-504/93, Tiercé Ladbroke v Commission, Rec. 1997, p. II-923; and ECJ, C-7/97, Oscar Bronner, Rec. 1998, p. I-7791; see also Martin Kuhr, *op. cit.* (footnote 2), pp. 6 f.
55) ECJ, C-418/01, IMS Health, Rec. 2004, I-310.
56) *Op. cit.* (footnote 55), para. 45.
57) Anyone wanting a must-offer rule (only) because it can help to create a level playing field in the sense of compensating for must-carry obligations would have to distance themselves from the introduction of a must-offer obligation if must-carry obligations were withdrawn.
58) The Council of Europe Recommendation also reflects this view (see above, footnote 19).
59) The German *Länder*, for example, have recognised the importance of platform operators and granted them a crucial role in their revision of must-carry and access obligations in the *10. RÄStV*; see Sebastian Schweda, Germany: 10th Inter-State Broadcasting Agreement Enters into Force, IRIS 2008-9:7.

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