To Have or Not to Have Must-Carry Rules

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How would we wish television content to be: entertaining, informative and educational – diverse, pluralistic, European and/or national – trustworthy, interesting, and topical? Attributes to describe television content that viewers like to receive are as numerous as people are different. And still we seem to share the belief that some core substance exists: content with superior relevance to viewers, a nucleus that should be available to all of us, content that matters because it caters for public interests. But how can one guarantee that such universal content is offered to all viewers?

One way is to ensure that the complex system built around broadcasting is benevolent towards public interests. It is for this purpose, among others, that legislators look critically at media concentration fearing that the accumulation of content controlling power in the hand of a few might also endanger the possibility of receiving this very nucleus of television content. It is for the same reason that fair and non-discriminatory conditions to access media outlets are a major concern. And it is that struggle to guarantee the availability of core content that gives impulses to regulatory intervention aimed at promoting equal competition.

Must-carry rules are one string in the regulators' bow regarding their efforts to ensure that all viewers may enjoy a certain basic content package. The establishment of new distribution platforms for television content (mainly cable) seemed to call this aim into question. It was feared that without legislative intervention incoming platform operators might refuse to carry certain programmes or, alternatively, might use exclusivity contracts to take certain programmes away from traditional carriers. Under either scenario, the viewers' choice of platform would have become synonymous with their choice of content and the idea of universal content would have died.

In the Universal Service Directive, the EC legislator offers must-carry rules as a tool for safeguarding some universal content. It allows Member States to award those channels offering content in furtherance of public interest goals the right to be carried on all networks. Broadcasters fulfilling public service missions are the natural beneficiaries of this rule. The US legislator, in contrast, conferred must-carry status upon all local channels irrespective of what content they broadcast. The US solution builds on the idea that preserving a wide spectrum of television broadcasters enhances the country's democratic basis and thus fosters automatically the policy goals that Europe seeks to achieve by direct promotion of specific content.

The comparison and analysis of the two different approaches and their historical backgrounds is a first crucial step in approaching must-carry rules and possible justifications for having them. The next step consists in answering the question whether or not today's technological progress has rendered must-carry rules obsolete. This question poses a major challenge because we must

deal with a rapidly developing and extremely complicated and complex market in terms of technology – in addition to this there remain many unsolved questions of an almost philosophical nature such as how to define pluralism and public interest. However, asking whether or not we still need must-carry rules brings up also more practical issues such as the potential of must-carry obligations for distorting competition, compatibility and interoperability of networks and services, the role of access regulation and must-offer obligations, the availability of content, sector specific versus horizontal regulation, etc.. Finally, in a third step we need to reflect on how to design must-carry rules, if one were to conclude that we ought still to have them.

All three steps were taken at the occasion of a workshop jointly organised by the European Audiovisual Observatory and the Institute for Information Law (IViR) of the University of Amsterdam on 9 April 2005. This *IRIS Special* with the title *To Have or Not to Have – Must-Carry Rules* results from this workshop. It owes its existence to the excellent discussion among the participants chaired by Nico van Eijk and summarised by himself and Sabina Gorini. It reflects the commitment and expertise of Thomas Roukens, Rob Frieden and Peggy Valcke who, for this publication, put their oral workshop presentations onto paper. Sabina Gorini and Mara Rossini supplied the Glossary to facilitate the reading. Mara Rossini, on behalf of IViR, edited the original English versions of the texts while the overall editorial responsibility for all three language versions of this publication lies with the Observatory.

The question of whether "to have or not to have" this seventh joint workshop was not even an issue because in IViR the Observatory found once more a highly professional and enthusiastic partner in shaping and organising the event. As in the past our thanks go to Anja Dobbelsteen for providing the logistics and to our IViR colleagues for their manifold efforts to make this workshop a success. Our thanks are no lesser for the contributions from the proof readers, Danilo Leonardi, Britta Probol, Florence Lapérou, and translators as well as Francisco Cabrera and Michelle Ganter of our own Observatory team.

Strasbourg, October 2005

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Workshop on Must-Carry Obligations

Summary of the Discussion

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Introduction

On 9 April 2005, the Institute for Information Law of the University of Amsterdam (IViR) and the European Audiovisual Observatory held a joint workshop in Amsterdam on the topic of "must-carry" obligations (such as the obligation to carry particular programmes on cable television networks). The aim of the workshop was to critically analyse current legislation relating to must-carry in Europe and the United States and to stimulate a discussion on what the future of this concept might be in the context of changing market and technological conditions. Three presentations were given during the workshop, each of which was followed by extensive round table discussions. The first presentation by Thomas Roukens focused on the European situation, with a detailed analysis of Article 31 of the Universal Service Directive,[1] its impact and implications, and an overview of existing must-carry obligations in the various European Member States (particular attention was paid in the presentation to the concerns of cable operators). The second presentation (Rob Frieden) gave an account of current must-carry obligations in the United States as imposed on cable and satellite operators both in an analogue and digital context. Finally, the third speaker, Peggy Valcke, tackled the question of the future of must-carry, identifying a number of gaps in current must-carry regimes and putting forward a model for constructing must-carry obligations in the digital age. All three presentations are published in this report. This section of the report contains a summary of the main lines of thought that emerged from the round table discussions. A thematic (rather than chronological) approach has been followed.

A large part of the discussion was centered around the key question of what the actual objectives and justification for must-carry obligations are today and whether there is in fact a need for such rules in the current audiovisual landscape. There was a significant division in the positions expressed, with some participants being highly critical of the existence of must-carry and others claiming that this concept still had an important role to play.

I. No Justification for Must-Carry ?

Critics of must-carry looked at the issue from an economic standpoint arguing that must-carry rules are essentially measures which distort competition and are no longer justified in the digital environment. Indeed, according to these participants if today the market were left to develop by itself without intervention it would not be characterised by the elements of market failure which must-carry rules purport to address. On the one hand, the increase in capacity brought about by digital technology makes it possible to grant access to networks to everyone that seeks it. On the other hand, it can be argued that public service broadcasting channels and in general the channels currently benefiting from

1) 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 (Universal Service Directive) Official Journal L 108, 24/04/2002 P. 51-77.

must-carry would be carried anyway on both traditional and new platforms, given their popularity with the audience and the need for attractive content of all network operators. The argument was also made that with the proliferation of new channels, such as thematic history and educational channels, the market is actually now providing the public interest content (both in terms of type and in terms of diversity of content) which was previously ensured through public service broadcasters and that therefore granting must-carry to the latter is no longer a justifiable public policy objective. Taking this argument a step further, the view was expressed that must-carry rules are today in fact being used to protect established legacy broadcasters from the increasing competition brought about by new delivery systems and to extend their monopolistic position to new technology platforms. According to this view, must-carry rules are just a means of ensuring a privileged status to a strong lobby group (that of public service broadcasters), while putting new valuable competing channels, which could just as well provide the same content, in a disadvantageous position.

II. Non Sector Specific Regulation Should Be Sufficient

Along this line of thought, it was argued that there is actually no need for must-carry rules today because other regulatory tools are in place which could solve (to a large extent if not entirely) the issues in question. According to this view, both competition law and the general access regime provided for in the European regulatory framework for the electronic communications sector could go a long way in supporting pluralism and other general interest objectives. The idea is that the problem should be essentially dealt with through access regulation with then the possibility of having some form of content regulation on top of that to decide particularly difficult cases, rather than having content regulation through must-carry deciding what are to a large extent access issues. With regard to this point of view, it was however noted that the role of access regulation cannot really be equated to that of must-carry regulation because the former only applies when an assessment of significant market power is made, while the latter is applicable irrespective of this assessment.

III. Arguments for Must-Carry Regulation still Valid

In contrast to the above criticisms of must-carry, many participants defended the existence of must-carry rules and argued that these were still necessary in today's market. It was felt that all could not be solved through competition law and that currently market forces alone would not ensure access to networks for everyone but that there would still be elements of market failure. Indeed, while the major public service broadcasters (and in the US the network affiliates) would probably still be carried by network operators regardless of must-carry, this would not be the case for smaller channels with a lower audience (e.g. local channels or some of the new services of public service broadcasters such as for instance BBC3 and BBC4) which it could be argued play an important role in ensuring diversity of content and allowing a means of expression to various groups of society. Also, the concern was expressed that, while public service broadcasters might be carried today on various platforms through the operation of normal market forces, this might no longer be the case in future (*inter alia* in view of increasing platform fragmentation). In this perspective, certain participants felt that there was still a need for the policy maker to intervene in order to safeguard pluralism and freedom of expression and ensure the provision of valuable content, which would otherwise not be made available to the consumer, through the imposition of must-carry regulation (albeit in a modernized form).

IV. A Right to Access

It was also suggested that, rather than through traditional must-carry (i.e. the obligation on a network provider to broadcast a specific channel), these public interest objectives could be best safeguarded through another concept that is now in certain national legislation bordering the concept of must-carry, that is the concept of access right. This was understood as the obligation on network providers to reserve a certain percentage of their capacity for access by independent programmers. The example of Italy was made, where under the national law relating to broadcasting authorizations to use scarce frequencies, access to frequencies for terrestrial television is granted under the condition that if an operator owns two or more broadcasting licences it has to reserve 40% of its capacity to independent content providers (a good faith negotiation rule then applies). This ensures that minority groups are able to access the media, which is a fundamental aspect of a democratic society. In reaction to this view it was however noted that while under the European communications framework Member States are allowed to apply certain conditions to the use of scarce frequencies for terrestrial television, this does not apply to wireline networks (such as cable) which are in general the object of the must-carry discussion. Also, one participant fundamentally disagreed with the idea that there is a need for

regulatory intervention in the digital environment to ensure access to networks for minorities because the new technology already allows this and if a particular subset of people is unable to obtain access to one platform, they can simply use another platform (some participants felt that this argument would however not be valid for as long as there existed significant differences in the degree of penetration of different platforms).

V. Availability of Certain Content

Amid these arguments, some participants made the point that must-carry regulation and specifically in Europe Article 31 of the Universal Service Directive in fact has nothing to do with network access but that it is concerned with ensuring that certain content is made universally available to everyone. The heart of the question is therefore whether government should have a role in guaranteeing that certain content considered by society to be of public interest reaches all viewers and is therefore also deeply linked to the role of public service broadcasting. Looking at the problem from this angle, opinions continued to diverge. At one end, the view was expressed that government should have nothing to do with determining what content is provided to viewers and that we should be withdrawing public service broadcasters rather than expanding their services and reach as they no longer have a role to play in the digital age. According to this view public service broadcasters are just obsolete creatures fighting for institutional survival. At the other end, many participants recognized the continuing value of public service broadcasting and felt that this was still necessary today to fill existing gaps in the market. In their opinion, governments should indeed consider it their task to guarantee that certain content is provided through public service broadcasting and to then ensure that this is made universally available through must-carry regulation on the transmission level. There was however some agreement on the idea that it should not necessarily be public service broadcasters as institutions that should be brought into the digital age, but rather the concept of public service broadcasting as the idea of providing content which society agrees is of value and which the market would fail to provide (i.e. retain the services rather than the institutions). In this regard, it was suggested that States might in future consider entrusting programming obligations in a wider, technology-neutral manner rather than on terrestrial mostly state owned channels and that this would then help break the link that currently exists in many European countries between must-carry and established legacy broadcasters (it was noted that this was currently under debate in some countries).

Aside from the central question of whether must-carry should exist at all, a part of the discussion was devoted to analyzing what the best way of structuring must-carry obligations would be and specifically which channels should benefit from must-carry and on which operators it should be imposed.

VI. The US Model

On the question of who should benefit from must-carry, two distinctive models emerged from the presentations. On the one hand, there is the European approach, as expressed in Article 31 of the Universal Service Directive, whereby must-carry status is granted to specific channels on the grounds that the content of such channels is considered to further a number of public interest objectives (pluralism, cultural diversity, national language). On the other hand, there is the US model in which must-carry is granted to all local television broadcasters, irrespective of who they are and of the type of content they broadcast. Here must-carry is conceived as content-neutral regulation which is aimed at sustaining the economic viability of television broadcasters as a general category, as they are seen to play an important role in the promotion of the country's democratic debate (in the US must-carry is – among other things - structured around obligations to reserve a certain percentage of channel capacity for local television signals). Opinions were divided as to the merits of these alternative systems. Some participants thought that the American model seemed to be very irrational and that it would make more sense to grant must-carry status to those channels which are actually considered to provide content relevant to society, in line with the European model. This argument was supported by the fact that in the American system, the primary beneficiaries of must-carry are actually the channels that contribute least to pluralism and education, such as local home-shopping channels, which is a rather paradoxical outcome (these are indeed the channels that would not be carried through normal market forces). The result is that such channels end up crowding out more compelling content from the networks. In this perspective the argument was also put forward that must-carry rules in the United States actually appear to be shaped by political considerations: US local broadcasters can exercise a significant influence on the electorate and they leverage that power to obtain a preferred status.

On the other hand, the view was expressed that the US system of reserving a certain network capacity for all local broadcasting channels and the so-called "carry one carry all"[2] rule are not such irrational choices from the policymaker's point of view. Indeed, the problem with content-based must-carry rules is that one enters into a dimension in which the State has to determine what content is important to people and what isn't. However in a real democracy the State should not have the authority to make this decision. One can attempt to imagine criteria to rank channels on the basis of content (e.g. channels transmitting news might be more valuable than others), but this is a very delicate assessment which ultimately results in the State telling citizens what they should watch and listen to and the policymaker should avoid having to make this judgment. The American rule of reserving a certain capacity for local channels, as opposed to the classic European must-carry rule, is therefore more respectful of democracy. The ideal scenario would probably be to combine a good faith negotiation rule with a set of access rules (in terms of access pricing etc.), so as to ensure a reserved access to minority (in terms of audience) channels without imposing a particular model of what people should watch.

VII. Technology Neutral Approach

Looking at the scope of must-carry, participants also considered the question of what networks should be covered by this obligation. It was noted that the original intention in Europe at the time of the elaboration of the new communications framework was to restrict the application of must-carry and have it apply as a legacy concept only to cable, but that the concept of technology neutrality was subsequently brought into Article 31 USD, with the result that this provision now opens possibilities to actually extend the application of must-carry obligations to all networks (subject to the "significant number of end users" limitation). Some participants were of the opinion that it was dangerous to use the concept of technology-neutrality as had been done in this case to extend legacy regulation without review and were against applying must-carry to new platforms. On the other hand, certain participants thought that to the extent that the aim of must-carry rules is to ensure that certain content is made universally available, then all electronic communications networks should be subject to the same type of must-carry obligations. Indeed, it was argued that the viewer would typically subscribe only to one platform (cable, satellite, digital terrestrial etc.) and that therefore must-carry content should be available on all of these platforms. Along these lines it was suggested that it could be made a condition for all operators on the market for broadcasting transmission to carry a basic must-carry offering and it was thought that if this were a limited package operators of all transmission modes could build a viable business model incorporating this. Another participant believed that all distribution platforms which develop should to a certain extent include public service programmes through must-carry so that even certain target groups, such as young people, who would not be immediately interested in such content would still have the opportunity to come across it and be exposed to topics which are important for their development (the risk being that if must-carry was not imposed on them it is probable that new platforms targeting specific groups would not carry such content).

VIII. Applicability to Service Providers and Associated Facilities

Another point that was discussed relates to the exclusion of service providers from the scope of Article 31 USD and the fact that in a number of European countries must-carry obligations are applied to service provides as well as network providers. Some participants felt that this was a serious loophole in European must-carry law and that it could engender a number of distortions. The view was also expressed that imposing must-carry on service providers is in fact a nonsense. Indeed it leads to the perverse situation whereby service providers, which do not supply transmission have to pay the transmission costs of public service broadcasters. Connected to this point, participants also touched upon the question of whether must-carry should be applied to associated facilities (such as electronic programme guides). In this regard, it was argued that must-carry should only be applied to transmission facilities and not to associated facilities (to which the access regime applies), on the understanding that whereas transmission capacity can in certain circumstances be a finite resource, associated facilities are not finite and therefore in principle everyone can have access to them without prejudice to anyone else. In reaction to this point of view, it was stressed that while associated facilities might be beyond the scope of must-carry rules, they represent nevertheless a very important problem which should be tackled looking at the issue as a whole.

2) Editor's note: according to this rule, an operator who opts to carry any single station must carry upon request the signals of all television broadcast stations within a local market.

IX. Must-Offer Obligation

Finally, the discussion also focused on the concept of must-offer for content providers (i.e. the obligation for broadcasters to make their channels available to network operators that wish to carry them) as the other side of the coin to must-carry. There was substantial agreement among the participants on the desirability of introducing must-offer obligations, given that in the present audiovisual landscape the problem would appear to be more that traditional and new network operators are seeking to secure the possibility of transmitting attractive content rather than content providers seeking distribution channels. This is proven by the fact that in certain countries network operators are actually asking to be submitted to must-carry obligations as they see this as a means of ensuring that they can have access to must-carry channels, which they consider to be essential for the success of their offer (the example of Canal+ in France begging to be submitted to must-carry in order to have access to France 2 and France 3 was made). Also, the adoption of must-offer rules would be desirable in light of recent attempts by operators of developing platforms to conclude exclusive distribution deals with public service broadcasters and established commercial channels (this problem presented itself for instance in Italy in the case of mobile networks). In this perspective, certain participants supported the idea that must-offer obligations should be introduced in parallel to must-carry obligations so as to mirror them (i.e. broadcasters benefiting from must-carry status should also have a must-offer obligation). Other participants, on the other hand, suggested that must-offer obligations could actually *substitute* must-carry rules and that this would be a better way of ensuring the promotion of established (particularly public service) broadcasters in the digital age.

What Are We Carrying Across the EU these Days?

Comments on the Interpretation and Practical Implementation of Article 31 of the Universal Service Directive

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Introduction

The history of must-carry cannot be characterised as uneventful. Although must-carry in truth never triggered heated discussions at the highest political level across the EU - not even during the adoption of the Universal Service Directive[2] - it continues to be a contested subject amongst the various stakeholders, namely viewers, broadcasters, broadcast network operators, politicians and the European Commission.

The must-carry obligation only saw the light of day when cable networks[3] emerged. Cable networks were primarily rolled out for several reasons; for aesthetic reasons: banishing the parabolic antennas from rooftops; to provide citizens with a wider choice of broadcast programmes: foreign broadcasters were not available on terrestrial networks; and more recently, to provide competition to the incumbent telecoms network operators.

The origins of must-carry are difficult to retrace, but it is clear that it was introduced in a fragmented fashion across the EU because politicians feared that without such an obligation cable networks would not carry the programmes of the national public service broadcaster financed by the general public. Consequently, it was considered necessary to ensure that these programmes were available to all those who ultimately were paying for them.

In the first chapter of this paper a brief analysis of the various (legal) texts produced at European level will be conducted, followed in the second chapter by an overview of how these texts have subsequently been transposed, if at all, into national law. The issue of copyright and related rights, which is eminently related to must-carry, will be discussed in the third chapter. Some general remarks and views about possible developments of must-carry obligations in the next few years will conclude this paper.

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1) Thomas Roukens works at Telenet, a Belgian cable operator, as Regulatory Affairs Manager since 2004 and previously held the position of Regulatory Affairs Officer at ECCA, the European Cable Communications Association, from 2000 to 2004. The opinions expressed in this paper are those of the author and may not reflect the position of Telenet or ECCA. This paper is based on a presentation made by the author on 9 April 2005 in Amsterdam, during a workshop on must-carry obligations jointly organised by the Institute for information Law of the University of Amsterdam (IViR) and the European Audiovisual Observatory.

2) Directive 2002/22/EC of the European Parliament and of the Council on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) of 7 March 2002, OJ 2002 L 108/51. This Directive formed part of the so-called new regulatory Framework for electronic communications networks and services discussed amongst the European Commission, the European Parliament and the Council of Ministers between 2000 and 2002.

3) The reference to cable networks is used in a technology specific sense, as opposed to PSTN networks or terrestrial networks. Cable networks are traditionally made up of coaxial cables rolled out in various rings or loops. A cable network is typically composed of three rings: a primary ring where the head-end is located, a secondary ring to which the local hubs are attached and to which, in turn, the cable households are connected to, thus making up a tertiary ring. This network architecture was considered ideal for linear broadcasting purposes.

I. Must-Carry: Taken to the European Level

1. Preparatory Work

Until 1999, the concept of must-carry was not to be found in any document of the European institutions. That year, the European Commission launched a review of the European telecoms liberalisation legislation - which had opened up the national telecoms markets throughout the 90's - and the must-carry concept was one of the issues introduced in the Communications Review of 1999.[4]

Due to the convergence of technologies, the need for a more technology-neutral approach in the regulation of the telecommunications sector was deemed necessary. As an illustration of this we can see technology-neutral terms being used to designate which entities fall within the scope of the new regulatory Framework, notably *electronic* communications networks and services, instead of the previously used term *telecommunications* networks and services.

As a result of this new objective, cable operators saw the opportunity to request[5] the consideration of the must-carry subject in this second stage of liberalisation of the European telecoms sector. The aim was to create more transparency, to enhance harmonisation and to introduce the concept of proportionality in this matter. The latter was further developed by creating an obligation to provide for remuneration for undertakings subject to must-carry obligations within the initial Commission proposal for the Universal Service Directive.[6]

In the first paragraph of Article 26 (later Article 31) of the Commission proposal, must-carry was also explicitly limited in time. This was the expression of the conviction that must-carry legislation would over time become redundant. The assumption was that in a digital environment, electronic communications networks would start offering an ever larger selection of TV channels in the medium term, and this, combined with an expected increase in competition between network (platform) operators, was to markedly diminish the need for must-carry legislation.

As to the question concerning the broadcasters which may receive a "must-carry status",[7] the Working Document[8] - a preparatory document for the already mentioned Commission proposal for a Universal Service Directive - referred directly to the "pursuit of a public service broadcasting remit as conferred, defined and organised in relevant national law" as the precondition for obtaining a must-carry status. Section 26 of the Working Document even stresses that Member States' must-carry legislation "shall not mandate the transmission, by cable TV network operators, of broadcasting channels which are not subject to such a public service broadcasting remit." Although from a legal perspective it may be superfluous to also refer to those broadcasters that would not be candidates for must-carry status, the "political" position of the Commission on this topic was clear: national must-carry legislation should be restricted to "public service broadcasters". However, the political discussions regarding the adoption of the proposal were still to start.

The co-decision procedure, which effectively ended with an overall agreement between the Commission, the European Parliament and the Council, on 12 December 2001, concerning a whole new regulatory Framework, resulted in a must-carry provision which was substantially amended in comparison with the original proposal. The obligation to provide for remuneration towards undertakings subject to must-carry obligations was replaced by an option for Member States to provide for a remuneration mechanism.[9] Along the same lines, the need to limit must-carry legislation in time,

4) Communication from the European Commission, Towards a new Framework for Electronic Communications Infrastructure and associated services, COM (1999) 539.
5) Presumably a number of complaints regarding the incompatibility of national must-carry legislation with the free movement principles enshrined in the EC Treaty, also played a part in persuading the Commission to address the subject in the Communications Review of 1999. The complaints were submitted during the second half of the 90's by several cable operators, in relation to national must-carry legislation in Belgium (Flanders), Germany, The Netherlands and Sweden. Only the first complaint, as far as I know, resulted in concrete action by the Commission and ultimately in a modification of the applicable decree.
6) Article 26§2 of the Proposal for a Directive of the European Parliament and of the Council on universal service and users' rights relating to electronic communications networks and services, COM (2000) 392 final.
7) The term "must-carry status" refers to those broadcasters that (cable) operators have to distribute on the basis of the applicable must-carry legislation.
8) DG Information Society Working Document on Universal service and users' rights relating to electronic communications networks and services, 27 April 2000.
9) Today paragraph 2 of Article 31 Universal Service Directive allows for "the ability of Member States to determine appropriate remuneration".

was replaced by an obligation on Member States to periodically review their must-carry legislation. Furthermore, and most importantly, the objective to restrict the scope of broadcasters to those with a public service remit was not upheld. In the end, Article 31 of the Universal Service Directive mentions "clearly defined general interest objectives".

2. Article 31 of the Universal Service Directive

The must-carry provision underwent a considerable metamorphosis from the way it was set out in Section 26 of the Commission proposal to the shape it finally took in Article 31 of the Universal Service Directive. Even though conditions had changed during those two years, cable operators – being the first among those concerned with the matter – even today consider it worth the effort and valuable that the Commission had taken up the challenge to incorporate the must-carry concept in the Communications Review.[10]

Article 31 contains two paragraphs stipulating the conditions which national must-carry legislation must fulfil in order to be accepted under European law. Almost as important as the Article itself are the associated Recitals[11] in the Preamble to the Directive and the statement made during the Plenary session of the European Parliament by former Commissioner Liikanen for the Information Society at the adoption of the new regulatory Framework on 12 December 2001.[12]

The Recitals provide further guidance as to which networks might be covered by the Article and clarify that the regulation of "content packages" falls outside the scope of the new regulatory Framework. Liikanen's statement contained the political compromise not to address the topic of admission to conditional access systems (hereinafter "CAS") or other associated facilities within the boundaries of Article 31.

Before attempting to shed some light on how Article 31 is to be interpreted, it is necessary to consider the context in which the must-carry provision has been inserted into European legislation, namely in a liberalisation context that enables sector specific national regulatory authorities (hereinafter "NRAs") to impose a number of *ex-ante* obligations on undertakings that have significant market power on a particular electronic communications market.[13] The possible *ex-ante* obligations vary from applying transparency to providing access to networks on a cost-oriented basis.[14]

In this context, the must-carry provision, which in effect comes down to an access obligation, should be considered as one of the few exceptions to the structure of the new regulatory Framework. As outlined above, the structure of the new regulatory Framework provides for market analysis to be carried out first, before any obligation, in particular an access-like obligation, is imposed on a network operator. This line of thought is supported by comments made on a number of occasions by the Commission's "Article 7 Taskforce" regarding notifications received from NRAs[15] wanting to regulate the wholesale market for broadcasting transmission services, to deliver broadcast content to end-users.[16] The reasoning is basically as follows: since must-carry obligations are imposed on cable networks, the likelihood of competitive problems – i.e. access disputes – is minimal.

10) Obviously Member States were reluctant to address this topic at the European level, particularly as regards the electronic communications context. Firstly, some believe that must-carry falls under the subsidiarity principle. Secondly, there are Member States who are of the opinion that must-carry is a "content" issue, which is to be kept separate from regulating communications networks and services.
11) Recitals 43 to 45, discussed in more detail below.
12) Statement by Commissioner Liikanen, European Parliament, 12 December 2001, 2nd Reading vote on Universal Service Directive: Must-Carry Obligations.
13) The 18 markets which NRAs have to analyse are listed in the Commission Recommendation on relevant product and services markets within the electronic communications sector susceptible to ex- ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services of 11 February 2003, COM (2003) 497.
14) See Articles 9 to 13, Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), OJ 2002 L 108/51.
15) See Commission comments regarding Case IE/2004/0042, ComReg's (Irish NRA) notification concerning the market in Ireland for Broadcasting Transmission Services to deliver broadcast content to end-users of 2 March 2004. See also Commission comments regarding Case UK/2004/0111, Ofcom's (UK NRA) notification concerning the Broadcasting transmission services to deliver broadcast content to end- users in the United Kingdom of 28 January 2005. In the latter, the Commission was silent on Ofcom's observation that must-carry obligation ensured that the market for broadcasting transmission over cable networks tended towards competitiveness, http://forum.europa.eu.int/Public/irc/infso/ecctf/home
16) Referred to as "Market 18" in the Commission Recommendation, see footnote 13.

3. Attempts to Interpret Article 31

To this day, there is no case-law or any other piece of European regulatory practice with regards to Article 31. Fortunately, however, the Commission has made some effort to interpret Article 31 in two Working Documents,[17] the first concerning broadcasting aspects within the new regulatory Framework in general and the second specifically addressing the topic of must-carry. Both documents were produced for the Communications Committee, which is composed of national experts in the field of electronic communications and is chaired by the Commission.

3.1. Reasonableness

A must-carry obligation must be reasonable, meaning it should be proportionate and transparent in the light of clearly defined general interest objectives. From a material point of view, this concept does not in fact add anything substantial to the must-carry provision, next to the other conditions found in Article 31, apart from the fact that it could be seen as an additional warning to Member States to refrain from either enacting extensive or extending existing must-carry legislation. This is illustrated by Recital 43 which explains the reasonableness concept.[18] It basically binds together the various principles and conditions set out in the remainder of the Article.

It is argued that the reference to "reasonable" was inserted in Article 31 to compensate for the deletion of the obligatory character of proving for remuneration for those undertakings which are subject to national must-carry obligations. Which undertakings and what services are, however, susceptible to must-carry obligations?

3.2. Scope of Article 31

Starting with the first category – *which* undertakings – Article 31 clearly targets network operators only.[19] It is useful to further discuss this limitation, as we may ask whether or not this approach fits the realities of today's converging environment.

The reasons for limiting Article 31 to undertakings operating a network are manifold. Firstly, the original approach of the Commission was to prevent the proliferation of must-carry obligations in general, as referred to above. Secondly, for some, must-carry is a balancing act hanging on the thin line between electronic communications and media (content) regulation. In order to avoid conflicts between these two branches of regulation, the Commission safely chose to restrict the application of Article 31 to undertakings acting in their capacity of electronic communications network providers. Thirdly, building on the second reason, Recital 45 clarifies that providers of content packages are not covered by Article 31 nor by the new regulatory Framework as a whole. What does this third reason precisely mean?

Depending on the country and/or business model, undertakings can fulfil different functions within the electronic communications arena. Relevant for must-carry is the distinction between network operator and service provider. In countries such as Belgium, The Netherlands and the UK, a cable operator is the provider of a network, but simultaneously it is a provider of content packages to the cable subscriber. In other countries, however, these two functions may be managed by separate entities, a state of affairs which is subsequently reflected in the respective national law. For instance, in France the cable network was owned by France Télécom, while the basic content packages were offered by other entities. As a consequence, the French must-carry legislation is not applicable on network operators,[20] but on service distributors.[21]

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17) European Commission Working Document, The 2003 regulatory framework for electronic communications – Implications for broadcasting' (Document ONPCOM02-14) of 14 June 2002 and European Commission Working Document "Must-carry" obligations under the 2003 regulatory framework for electronic communications networks and services of 22 July 2002 (hereinafter "Commission Working Document").

18) "'Must-carry' obligations imposed by Member States should be reasonable, i.e. they should be proportionate and transparent in light of clearly defined general interest objectives, and could, where appropriate, entail a provision for proportionate remuneration."

19) "Undertakings providing electronic communications networks".

20) France Télécom only managed the network, not the end-user relationship, apart from France Télécom Câble which as a subsidiary of FT offered content packages over cable before it merged with NC Numéricâble in 2004.

21) In addition, in France the competition between platforms – cable and satellite – made this approach even more acceptable. In case of satellite, it is historically not the network operator (e.g. Astra) but rather a service provider (e.g. TPS) who offers services to end-customers.

After establishing that it is only network operators who are targeted by Article 31, a further question is what kind of networks fall within its reach. In conjunction with Recital 44, Article 31 quite directly states "Networks used for the distribution of radio or television broadcasts to the public include cable, satellite and terrestrial broadcasting networks. They might also include other networks to the extent that a significant number of end-users use such networks as their principal means to receive radio and television broadcasts". The reference to a significant number of end-users using a certain network, hints at the application of competition law within Article 31. It is obvious that must-carry concerns the broadcasting market, and in this market one can imagine that certain technologies are predominantly used for receiving broadcasting programmes - cable, satellite and terrestrial network. A significant number could then possibly exist once more than 40% of end-users of a particular technology would use it to receive broadcasting.[22]

On the one hand, this interpretation of the Article means that – as is further addressed below – it is fully justified to impose must-carry obligations on different networks within the same Member State[23] as long as those networks are individually used by a significant number of end-users. On the other hand, in a situation where different technological networks are widely used, one could also decide to withdraw national must-carry legislation altogether.

The second question that needs to be answered concerns the services that would encompass a must-carry obligation. It is very clear from Article 31 itself that radio and television broadcast channels are covered.[24] However, it also refers to "services". The Commission Working Document specifically addresses "broadcast services",[25] an expression which immediately excludes any on-demand service.[26]

Correctly so, the services that are referred to in this context are those that may not survive in a stand-alone fashion. Broadcast services only exist thanks to the linear broadcast. Recital 43 refers to services for disabled users, or enriched programming, which are all broadcast together with and not economically viable without the linear broadcast.

A word that is often overlooked and taken too lightly is that of "specified" in relation to radio and television broadcast channels and services that need to be specified in order to be granted a must-carry status. "Specified" is closely connected with the concept of transparency, addressed below. Especially in certain Member States where the national must-carry legislation refers to broadcasting *organizations* in general, it is expected that a more equitable system would be put in place whereby each must-carry channel is individually identified in the law.[27]

One of the central elements of Article 31 concerns the question as to when a must-carry obligation may be imposed or, in other words, when is it that a must-carry obligation is justified?

3.3. Clearly Defined General Interest Objectives

According to Article 31 a must-carry obligation is justified when one or more "clearly defined general interest objectives" are fulfilled. This gives rise to a number of things. First of all, it obliges Member States to motivate their decision to grant a must-carry status to a specified broadcast channel and/or service. As we will see below, this is still one of the difficulties still persisting in current national must-carry legislation. The objectives pursued by must-carry legislation are often not clear.

Secondly, there is the question of the general interest objectives which may be invoked to justify the imposition of a must-carry obligation. Recital 43 refers in this context to "in the legitimate interest of general public policy considerations". These considerations are not defined at a European level, but they include pluralism and cultural diversity. Recital 43 goes on to state that the objectives

22) The threshold of 40% stems from general competition law, where an undertaking with market share of 40% on a relevant market comes under scrutiny for possible dominance.
23) A particular Member State has only authority over those undertakings in its jurisdiction. Foreign network operators cannot, based on the free movement of services, be regulated by the receiving Member State.
24) "Broadcast" refers to the definition given by relevant European legislative acts and the interpretation of the Court of Justice, most recently in the Mediakabel case, Case C-89/04 of 2 June 2005, meaning a linear point to multipoint broadcast.
25) Page 6.
26) Along the same line of thought, CAS and EPG systems do not qualify as "broadcast services" within the meaning of Article 31. See also the statement by Commissioner Liikanen, see above footnote 12.
27) The law governing media related aspects for the Brussels Region in Belgium and the subsequent Ministerial Decree refer only to broadcasting organisations, which sometimes operate several channels, Ministerial Decree of 17 January 2001. The discussion whether only primary law or also secondary law could specify the broadcast channels and services is not addressed in this paper. It is however assumed that secondary legislation could also suit this purpose.

are to be defined in accordance with Community law. In addition, and in accordance with EU case law it should be noted that objectives of an economic nature cannot be considered as general interest objectives.

Whether or not the application of objectives such as pluralism and cultural diversity could be extended to broadcast channels from other Member States remains open. Especially in adjacent countries that share – in part – the same language, national must-carry legislation contains the option to grant foreign broadcast channels a must-carry status. Taking into account one of the original objectives of the Commission which was to lower the number of must-carry channels by addressing must-carry at European level, one should disapprove of the inclusion of foreign channels within national must-carry legislation. From a free circulation of services point of view, however, it might be difficult to a priori exclude foreign channels from must-carry. A detailed assessment will nevertheless be required in order to decide whether inclusion or exclusion may fall within the boundaries of proportionality. In an environment where only national public service channels are granted a must-carry status it seems perhaps disproportionate to grant commercial foreign broadcasters such a status. Moreover, the concept of "general interest objectives" is not defined at European level. It remains a national concept which makes it immediately more difficult to attach to or assign a foreign channel the idea of a national general interest objective. Moreover, most channels that are granted a must-carry status in practice do fulfil certain important conditions in terms of programming and production imposed by local media legislation. Since local media legislation is not applicable to foreign channels it is less likely that these channels would ever be able to "acquire" a must-carry status abroad, simply because they did not make similar commitments under the local media legislation.

An easier question to answer is whether general interest objectives are limited to channels of the public service broadcasters. The short answer to this is: no. The Commission Working Document,[28] but also the Commission comments on the first reading report of the European Parliament[29] clearly highlight that general interest objectives can also be invoked in connection with other broadcast channels. However, whether and when other broadcast channels would in actual fact fulfil these objectives remains to be seen.

It seems somewhat odd – unfortunately – that the Commission initially gave its opinion about which channels could receive a must-carry status, by including the reference "in pursuit of a public service remit".[30] Towards the end of the legislative process and afterwards,[31] however, the Commission openly refrained from taking position as to which channels could benefit from must-carry.

General interest objectives refer to the possible exceptions to the freedom to provide services in the EU. The reason for this is that in principle national must-carry legislation, directly or indirectly, favours certain national or regional programmes over foreign programmes. EU case law indicates that the freedom to provide services may be limited only on grounds of public policy, public security or public health (Article 55 and Article 46 EC), or by rules which are justified by overriding reasons relating to the general interest.

In this context, cultural policy may be deemed a general interest objective.[32] However, this does not

28) Page 7.

29) Amended proposal for a Directive of the European Parliament and of the Council on universal services and users' rights relating to electronic communications networks and services, COM/2001/503 final – COD 2000/183 OJ 2001 C332 E of 27 November 2001, p. 292-298.

30) DG Information Society Working Document of 27 April 2000 clarifies in relation to the proposed Section 26 "Thus, the section would not alter the current rules allowing Member States to impose 'must-carry' obligations on public communications network operators but would limit such obligations to channels that fulfill a public broadcasting sector function."

31) Commission Working Document "the designation of individual broadcasters benefiting from 'must-carry' obligations, […] are not addressed under Article 31."

32) The Court has held in Case C-288/89 Collectieve Antennevoorziening Gouda v. Commissariaat voor de Media [1991] ECR I-4007, paragraphs 22 and 23, Case C- 353/89 *Commission v Netherlands* [1991] ECR I-4069, paragraphs 3, 29 and 30, and Case C-148/91 Veronica Omroep Organisatie v. Commissariaat voor de Media [1993] ECR I-487, paragraph 9, that the Mediawet is intended to establish a pluralist and noncommercial radio and television broadcasting system and thus forms part of a cultural policy whose aim is to safeguard the freedom of expression in the audiovisual sector of the various components, in particular social, cultural, religious and philosophical ones, of the Netherlands. It also follows from those three judgments that *such cultural policy objectives are objectives of general interest which a Member State may lawfully pursue* by formulating the statutes of its own broadcasting bodies in an appropriate manner. Case C-23/93 TV10 [1994] ECR I-4795 §18 and §19.

mean that Member States are free to claim cultural objectives whenever they feel like it[33] and for whatever channel.[34]

3.4. Proportionality

A must-carry rule should be "proportionate". With reference to the previous paragraph, considering whether less intrusive measures can be applied to meet these objectives is one aspect of this principle. Such consideration could lead to the conclusion that must-carry rules are not necessary in a particular situation. The first paragraph of Article 31 re-enforces this approach by stipulating that these rules "shall only be imposed where they are necessary to meet [...] objectives".[35] The measure – i.e. the must-carry obligation – also needs to be indispensable to attain the objective that has been set out.[36]

This brings us to the conclusion that some form of assessment – by the lawmaker – prior to the designation of a must-carry channel is required. During this assessment less stringent alternatives need to be considered. A less stringent alternative could consist in requiring the network operator to apply non-discrimination when negotiating for access, instead of immediately imposing a default must-carry obligation which today means no remuneration or compensation from the channel.

It is worth mentioning that during the adoption process of the Universal Service Directive the suggestion was made to refer to the consultation procedure for market analysis – Article 7 of the Framework Directive – within Article 31. This would have created an additional guarantee for harmonised and proportionate must-carry legislation across the EU. Unfortunately this suggestion, although conceptually compatible with the presumption that Article 31 is ultimately an access obligation and as such an exception to the market analysis procedure, was not adopted.

Further, when half or more of the broadcast channels in the basic package must be carried, one could rightfully argue that the impact on the network operator is disproportionate. The Working Document[37] and a COCOM paper[38] from the Commission hint towards the possibility to lift the disproportionate character of such a measure by providing remuneration. Interestingly enough the COCOM paper even seems to suggest that remuneration could be required in certain cases to avoid a clash with the proportionality principle, even though remuneration as referred to in paragraph 2 of Article 31 is only an option for Member States.[39]

An additional question, currently more theoretical, concerns the simulcast[40] of a must-carry channel. When a network operator offers an analogue and a digital package, would it be proportionate for a must-carry channel to obtain mandatory distribution via both technologies, and possibly without remuneration? The Federal Communications Commission ("FCC") in the US already decided in 2001[41]

33) *Cultural policy* objectives adduced by the Belgian Government reveal that in reality *the purpose* of the measure complained of is to restrict genuine competition with the national broadcasting stations in order to maintain their advertising revenue. As regards the objective of preserving and developing the artistic heritage, suffice it to note, as the Commission does, that the measure complained of is in reality likely to reduce demand for television productions in Dutch. Case C-211/91 Commission v Belgium [1992] ECR I-6757 §9. Apart from the fact that *cultural policy is not one of the justifications set out in Article 56*, it is important to note that the Decree-Law promotes the distribution of national films whatever their content or quality.
In those circumstances, the link between the grant of licences for dubbing films from third countries and the distribution of national films pursues an *objective of a purely economic nature which does not constitute a ground of public policy within the meaning of Article 56 of the Treaty*. Case C-17/92 Distribuidores Cinematográficos [1993] ECR I-2239 §20 and §21.

34) It is not conceivable that with regard to a PayTV channel or a niche channel (one subject channel – e.g. home shopping) a general interest objective could be invoked to justify their inclusion in must-carry legislation.

35) As the Court has consistently held, the application of national provisions to providers of services established in other Member States must be such as to guarantee the achievement of the intended aim and *must not go beyond that which is necessary* in order to achieve that objective. In other words, it must not be possible to obtain the same result by resorting to less restrictive rules. Case C-288/89 Mediawet I [1991] ECR I-4007 §15.

36) If such a requirement is to be accepted, it must be shown that it constitutes a condition which is indispensable for attaining the objective pursued. Case C-222/95 Parodi [1997] ECR I-3899 §31.

37) Supra footnote 17.

38) European Commission Working Document, An approach to financing the transport of 'must-carry' channels, in relation to Article 31 [COCOM03-38] of the Universal Service Directive of 2 September 2003.

39) "Nevertheless, the general criteria indicated under article 31 of the Universal Service Directive may imply, under specific circumstances, that some form of remuneration should be provided in order for the must-carry obligation to be considered proportionate or reasonable." See further below under 3.7., chapter I.

40) "Simulcasting" means distributing a radio or television channel to subscribers in analogue and digital format. In order to watch the digital format a subscriber needs a decoder or settop box.

41) FCC, First report and order [CS Docket No. 98-120] of 18 January 2001. The discussion about simulcast must-carry or "dual carriage" in US terms has been re-opened with the advent of HDTV.

on the primary question of whether a TV channel could claim both analogue and digital distribution, that it infringes cable operators rights under the First Amendment to oblige them to carry both formats.

3.5. Transparency

The introduction of the transparency concept was most probably inspired by other existing European legislation.[42] The transparency principle – and similarly the proportionality principle – have become popular European jargon in those areas of law where Member States still retain discretionary powers on the regulation of certain undertakings and services. In the field of must-carry, transparency has the potential to increase legal certainty by obliging Member States to clearly identify in advance those channels and services that would benefit from must-carry. By doing so, a more predictable environment is created for those undertakings subject to the must-carry obligation. The use of the term "specified" in Article 31 is a further application of this principle.

In practical terms, national must-carry legislation which refers to broadcasting organisations only, without identifying the channels concerned, would not pass the transparency test. Likewise, it would not seem transparent to have relevant authorities decide which channels should have a must-carry status on an ad-hoc basis without consulting stakeholders and fixing any qualifying criteria. This would lead to arbitrary decisions and preclude the necessary stability for the targeted undertakings concerned.

Another consequence of correctly implementing the transparency principle concerns the necessity to attach a designated general interest objective to a channel that is granted a must-carry status. In other words, it has to be clear to the public which general interest objective a specific channel fulfils, or within which category of general interest objectives the must-carry channel in question falls.

The required stability is emphasised and enhanced by the reference made at the end of paragraph 1 of Article 31 to the obligation for Member States to periodically review their must-carry legislation.

3.6. Periodic Review

With reference to the above, the initial proposal did not state "subject to periodical review" but rather, "limited in time".[43] At (regular) intervals the appropriate authority needs to assess whether the necessary conditions for applying its must-carry legislation are still justified in the light of technological and market developments. In its Commission Working Document the Commission states: "The obligation to review the must-carry regime on a regular basis should encourage Member states to re-evaluate the need for and scope of must-carry rules and, in particular, regularly assess, taking into account technology and market developments and the views of interested parties, whether such rules still match the necessity and proportionality requirements." Although Article 31 does not provide any indication as to which direction a review could take place, the sentence above in the Commission Working Document clearly points to a reduction of the must-carry burden on the network operators concerned.

Revision at regular intervals could not entail reassessing the obligations more than once a year to prevent putting in jeopardy the necessary stability in the sector, namely network operators and broadcasters.

3.7. Member States Can Determine Appropriate Remuneration[44]

The cable industry held high hopes, at the launch of the Communications Review process in 1999, that they would be able to ensure once and for all compensation or remuneration in return for the

42) For instance: Article 13, Directive 98/10/EC of the European Parliament and the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment, OJ L 101/24, 1 April 1998 and Directive 98/34/EC as amended by Directive 98/48/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 204, 21 July 1998.

43) The suggestion to replace "limited in time" by "subject to periodic review" was made in the first reading of the Harbour report, Committee on Legal Affairs and the report on the Internal Market of the European Parliament of 31 May 2001, due to pressure from Member States and broadcasters who did not want to see must-carry legislation being phased out.

44) The words "remuneration" and "compensation" are used interchangeably.

obligation to carry specific broadcast channels. The initial Commission documents which addressed must-carry seemed to "go in the right direction".[45]

Two important elements in relation to must-carry obligations were recognised; one element was the obligatory nature of the compensation to be provided (reference to Member States "shall"), the other, was the fact that when the calculation of the adequate compensation was to going to be made the "network capacity required" was to be taken into account.

As already mentioned above, the "shall" became "the ability of Member States" and "if any" in the adopted text, and the reference to network capacity was replaced by non-discrimination between network operators, proportionality and transparency. Although not much was left from the original proposal, other suggestions made during the decision making process were fortunately not upheld.[46]

Probably as an effort to encourage Member States to provide compensation for the must-carry obligation, despite the adopted text, in 2002 the Commission engaged Eurostrategies to do a study on the cost of must-carry.[47] In general terms, Eurostrategies came to the conclusion that different models for payment between cable operators and broadcast channels existed for the (re)transmission of channels. In addition, they proposed a particular cost modelling method to assess the transportation costs for the cable operator which subsequently would lead to a guideline price fixed by a regulator with parameters allowing for deviation from the guideline price. The transportation costs they proposed were going to apply to all broadcast channels carried on a cable network, whether must-carry or not. Next to the technical transportation costs, however, Eurostrategies also seemed to suggest that the value of the must-carry channel would have to be taken into consideration when deciding on the final price.

Cable operators, broadcasters, the Commission and Member States, all of them for different reasons, were not enthusiastic about the outcome of the study. This resulted in a status quo situation, or to put it in other words, the issue of remuneration disappeared from the European agenda.[48] The emphasis from cable operators subsequently shifted more towards the copyright problem attached to the must-carry obligation.[49]

Furthermore, Paragraph 2 of Article 31 remains silent on which entity could be held responsible for the payment of remuneration in case it is prescribed by law. The obvious question here is whether it should be the Member State or the broadcaster concerned. One could possibly argue that in the case of must-carry status and remuneration for both public and commercial channels, it would be non-discriminatory to require the Member State to pay the latter for all channels, as it would in any case pay remuneration for the Public Service Broadcaster (hereinafter "PSB").[50]

An alternative line of thought suggests the creation of a must-carry compensation fund[51] financed by the platforms delivering broadcast channels in a particular Member State but which are not burdened by any must-carry obligation in that Member State. Such funding makes sense only if the networks concerned are assigned - next to the must-carry obligations - the task of achieving universal coverage and perhaps other associated general interest obligations, such as an affordable price for the distribution of a basic content package.

A complementary problem in relation to possible remuneration relates to signal delivery costs.[52] Signal delivery costs come into play, in particular, in connection with regional/local broadcasters who

45) The DG Information Society Working Document of 27 April 2000 already stated " Member States shall ensure that network operators receive adequate compensation for the transmission of 'must-carry' channels, taking into account the network capacity required." The Commission proposal modified the sentence slightly "Member States shall ensure that the undertakings subject to 'must-carry' obligations receive appropriate compensation on reasonable, transparent and non-discriminatory terms taking into account the network capacity required."

46) "[T]he value of those broadcast channels to operators" Harbour report, Committee on Legal Affairs and the Internal Market of the European Parliament report of 31 May 2001.

47) Eurostrategies, Assessment of the Member States measures aimed at fulfilling certain general interest objectives linked to broadcasting, imposed on providers of electronic communications networks and services in the context of the new regulatory framework, March 2003.

48) Even though the Commission tried to stretch the issue further by launching an inquiry amongst Member States to list what existed in practice and what their views where, without any publicly available result to date.

49) Which will be dealt with under Chapter 3.

50) Under the presumption that the PSB is financed through public means.

51) Similar to a universal service fund as known in the telecoms sector.

52) From a technical distribution viewpoint a distinction can be made between signal delivery costs and transportation costs. The former concern costs endured to bring the broadcast signal to the network operator concerned; the latter relates to costs of transporting the broadcast signal over the operator's network.

claim not to be in a position to pay for delivering their broadcast signal to the cable operator. It seems disproportionate to require cable operators to bear these additional costs.

II. Implementation - From a Patchwork to a Uni-Coloured Blanket?

Having discussed the various conditions that national must-carry legislation needs to comply with as of 24 July 2003, an EU implementation chart is provided indicating which national must-carry legislations fully or partly comply with the conditions set out in Article 31 of the Universal Service Directive.

	Specified Brodcast channels	Cable only	Clearly identified General Interest Objectives	Only public service channels	Copyright payement
Austria	YES	YES	NO	NO	YES/NO
Belgium	YES/NO*	NO/YES**	YES/NO	YES/NO	YES
Czech Rep	NO	NO	NO	NO	YES
Denmark	YES	NO	YES	NO	YES
Finland	NO	YES	NO	NO	NO
France	YES	NO	NO	NO	YES/NO
Germany	NO	YES	YES	NO	YES
Hungary	YES	YES	NO	NO	NO/YES
Ireland	YES	YES	NO/YES	NO	NO
Malta	NO	NO	NO	NO	NO
Netherlands	YES/NO	YES	YES	NO	YES/NO
Poland	YES	YES	NO/YES	YES	YES
Sweden	YES/NO	YES	YES/NO	NO	YES
UK	YES	NO	YES	YES	NO

* Most points of the provision have been implemented yet not all.
** Most points of the provision have not been implemented even though some have.

It is clear from this chart that Article 31 has not been fully implemented in all Member States. Some of them have not (as yet) amended their national legislation at all – e.g. Sweden, the Netherlands – on the argument that their media law cannot be affected by the new regulatory Framework, even though the Commission in its 9th Implementation Report pointed to the contrary.[53]

A first conclusion is therefore that Article 31 has failed to achieve the expected harmonisation of national must-carry legislations.

Another question is whether the provision was able to reduce the number of must-carry channels. Although not directly visible in this overview, Article 31 had the effect of decreasing the number of must-carry channels only in a limited number of Member States, e.g. in Belgium (Flanders and Walloon region). In other countries, cable operators are still facing an obligation to distribute a very high number of must-carry channels, up to 33 analogue channels in several German States and 15 must-carry channels in the Netherlands.

A second conclusion is that the objective of lowering the must-carry burden, in terms of number of channels has not been reached.

The next question is whether or not Article 31 led to the rationalisation of channels qualifying for a must-carry status. The rationalisation mechanism is part of the proportionality objective as pursued

53) "Most national measures transposing the new regulatory framework do not introduce must-carry rules; they are usually embedded in other pieces of national legislation, such as audiovisual laws. Nevertheless, such must-carry rules must comply with the principles set out in the Universal Service Directive, namely that they should only be imposed where they are necessary to meet clearly defined general interest objectives and shall be proportionate and transparent." 9th Implementation Report, 19 November 2003 COM(2003) 715 final

by Article 31. Depending on how broadly public service broadcasting is defined[54] only very few Member States that have limited the must-carry legislation to public service broadcast channels – the UK, Belgium (Flanders), Poland. On the other hand, there are still Member States where Home Shopping channels – e.g. Germany, Malta – and Pay-TV channels – Belgium (Brussels) –, have a must-carry status. In numerous Member States, a combination is applied – national PSB, regional broadcast channels, national private channels, foreign PSB, foreign private channels.

All this shows that, as regards the the rationalisation objective, Article 31 did not achieve a great deal.

Has Article 31 been able to make national must-carry legislation somewhat more transparent? To some extent it has had that effect. It has obliged Member States to more clearly define the general interest objectives at stake; and in some cases to provide a definition from scratch. Article 31 has been less successful at creating a link between the general interest objective and the extent to which a specified broadcast channel in fact pursues that objective. Most Member States fail to provide this link. One of the problems associated with the latter is that in several Member States only a few must-carry broadcasters are specified, and the remainder are decided on an ad-hoc basis by a regulatory authority – e.g. Germany, the Netherlands.

The fourth conclusion is that the transparency objective set out in Article 31 has in most cases not been fully complied with.

Possible remuneration for must-carry is not mentioned in the overview for the simple reason that no Member State has put in place an appropriate remuneration mechanism for must-carry.[55]

III. Is there Copyright Everywhere?

One of the concerns already touched upon – see also the implementation overview – is that of copyright.[56] Traditionally, in most countries affected by must-carry legislation, no provision was made contemplating payments for (re)transmission over cable networks regarding copyright in the strict sense and/or neighbouring rights. This approach was based on a variety of arguments.[57] This has changed, however, in recent years.

In a number of countries there is debate – in particular supported by PSB must-carry channels concerning their own neighbouring rights and by collecting societies – regarding the possible imposition on cable operators of the obligation to pay for copyright with regard to the must-carry channels.

In many of these countries payments by cable operators are already being made as regards third party copyrights, meaning all rights not owned/acquired by the must-carry broadcaster. In the so-called collective cable contracts between cable operators, mostly national and foreign PSB channels, and copyright collecting societies that existed for instance in Belgium, Germany, Ireland, the Netherlands, the national PSB must-carry channels formally did not receive any payment for retransmission over cable. In some of these countries and others there was an agreement with the government that no copyright payment was due for the must-carry channels (Sweden, Denmark, Finland). Separately, the Austrian copyright law (Article 17) explicitly states that, for the transmission of the national PSB must-carry channels over cable, the PSB channels are "communicating to the public" and not the cable operators.[58] In the Austrian example, the doctrine of "mere conduit"[59] is applied, whereby the cable operator's network is only used as a technical facility, which should not automatically lead to an act subject to copyright.

54) Does it include regional/local broadcast channels that might be financed privately?
55) Hungary is the exception where a fund has been created, similar to a universal service fund, whereby the private broadcasters pay the remuneration (copyright) for the PSB's must-carry status.
56) Reference here is made to copyright in a very broad sense – for simplification reasons – covering "copyright in the strict sense" and "neighbouring rights". Reference is made to "copyright in the strict sense" or "neighbouring rights" separately when required within the context.
57) Ranging from the "service area" principle, preventing "double payment" to the argument that "no retransmission over cable is taking place".
58) Article 11bis (1)(ii) Berne Convention. In copyright terms this means that there is no "retransmission" taking place.
59) Article 12, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (eCommerce Directive), OJ L 2000/17 and Statement attached to Article 8 WIPO Copyright Treaty 1996.

The importance of the copyright concern cannot be underestimated. Following from the premise that must-carry obligations are an exceptional form of access to electronic communications networks under the new regulatory Framework, it cannot be the case that, next to the obligation to provide access to its network, a cable operator is also obliged to pay for copyright for the content being transported over its network. This would be completely disproportionate in relation to the cable operators.

The Commission included a sentence in the invitation for comments regarding possible illegal state aid practices conducted by the public broadcasters & NOB – the Dutch PSB systems operator. In this invitation for comments the Commission seems to hint that cable operators are being favoured because they do not have to pay any copyright to the Dutch PSB until today.[60] It should be borne in mind that this opinion of the Commission is a preliminary view, on which a final decision is awaited. For the time being, this preliminary view does not seem to acknowledge the fact that the Dutch PSB channels have a must-carry status and more importantly, that they are being financed by the Dutch taxpayer, while foreign PSB or private broadcasters are not. A difference in treatment should subsequently be allowed, nevertheless bearing in mind that a payment in return for a copyright relevant authorisation for the transmission of a broadcast channel is not required per se.

IV. From Must-Carry to Must-Offer?

To sum up, the application of national must-carry legislation on a cable operator could lead to the following obligations:

- Obligation to carry a variety of broadcast channels and services (from PSBs to Home Shopping channels), while compensation for the must-carry obligation should not be expected,
- Obligation to pay for copyright regarding these must-carry channels.

With competition in the television market being strong and becoming even stronger, in those countries where cable had particular historical significance, it seems that the justification for must-carry is consequently becoming more and more difficult to support.

In an environment where all broadcasters could ask for compensation for copyright, combined with the platform operators' increasing desire to offer whatever content is necessary to stay ahead of the competition, must-carry's historical purpose of safeguarding the public service broadcasters' reach of the general public – at no additional cost – is no longer at risk. In several cases, PSBs are even financially better off than their private counterparts because while they do not pay for distribution, they do not ask for copyright payments from the distributor.

In a competitive market, must-carry legislation clearly means intervention in the negotiations that take place for distribution, in particular in a digital environment where one negotiates not only the price but also other associated services, such as EPG, on-demand and interactive services.

It is not clear whether or not it is valuable to introduce a "must-offer"[61] obligation for certain broadcasters instead of must-carry. Public Service Broadcasters in any case have a must-offer obligation, it is their raison d'être, based on their commitments towards the government and ultimately to the general public. It is one of the primary tasks of a PSB to offer its full programming to all platforms present in a particular Member State, especially when these platforms need to acquire exclusive rights from other content providers in order to differentiate their television offers.

In a recent Working Document[62] the Commission expressed its views on how Article 31 is to function within the new regulatory Framework in years to come:

60) See Aid C 2/04 (ex NN 170/03) — Ad-hoc measures to Dutch public broadcasters and NOB Invitation to submit comments pursuant to Article 88(2) of the EC Treaty, paragraph 111 OJ C 2004 63/1 of 10 March 2004. This arrangement is under pressure as the musical rights society (and Dutch PSBs) is suing cable operators in order to obtain copyright payment for the retransmission of the Dutch PSB. The final word has not been said, see Letter of 17 August 2005 from the Dutch Secretary of State for Media to the Dutch Parliament concerning the non-payment of copyrights for the retransmission of the Dutch PSBs.

61) "Must offer" already explicitly exists in the UK, Ireland and Belgium (Flanders) for the PSB.

62) Commission Working Document of 24 May 2005, Annex to the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on accelerating the transition from analogue to digital broadcasting, COM(2005) 204 final.

"Digitisation in networks will allow the current analogue programmes to be carried in a fraction of the spectrum currently required. Such digitisation requires considerable investment. Incentives to invest into digitisation of networks are high where network operators are given full commercial freedom as to how they use the additional spectrum available to them. Incentives would however be reduced or can even be destroyed for some business cases if 'must-carry' obligations would be extended to more services than currently carried. This concern applies to the incentives to invest into the distribution of TV services via all platforms (terrestrial, cable, satellite and in the future possibly DSL) if new 'must-carry' obligations were introduced or existing ones would be extended.

In particular, the Universal Service Directive, requires that 'must-carry' obligations are justified by clearly identified public interest objectives. These objectives do not change as a result of the change from analogue to digital transmission, and existing obligations to carry analogue services may be carried over to digital transmission. If the change in the transmission technique as such however is used as a justification to extend obligations relating to general interest and thereby to increase existing must-carry obligations, it has to be made transparent why this is reasonable and why such additional obligations are necessary to meet clearly defined public interest objectives and that such obligations are proportionate. Broadcasters can use provisions of the Access Directive when they wish to extend the services they provide over digitised networks."

Two remarks in relation to this extract: firstly, successfully switching analogue customers to digital is not as easy as it is sometimes assumed. This means that the capacity benefits that digital technology generates will only, to some extent, occur when analogue transmission has ceased. Of course, newcomers to the television market such as TV over DSL do not have to carry the analogue burden. Furthermore, due to the ever-increasing demand for new content and formats (HDTV requires considerable capacity) it is not at all clear whether the capacity constraint will ever be solved completely.

A second remark, which is important as regards the way in which Article 31 functions in the context of the new regulatory Framework, is the reference to the Access Directive. This reference is a recognition of the fact that *ex-ante* access obligations, based upon the market analysis procedure, is an alternative to must-carry.[63] One of the advantages for targeted network operators is that such an access obligation is not for free. Irrespective of the cost model used by the NRA, an operator would be allowed to recuperate its costs. However, it remains unclear whether a shift from national must-carry legislation to access obligations will take place in the medium term.[64] Access obligations based on the new regulatory Framework do not take into account general interest objectives and would apply to all broadcasters alike. Access obligations would nevertheless create much more transparency in a broadcasting market that is changing rapidly.

It is difficult to arrive at concrete conclusions with regards to the implementation of Article 31 of the Universal Service Directive since its wording is open to diverging interpretations. I firmly believe that must-carry will remain a heavily debated subject because of its chameleon-like nature: it changes in appearance to match the changing political background.

63) This line of reasoning is used in Italy.
64) In the Netherlands both systems already existed in parallel under the old telecoms framework. The new regulatory Framework has not led to a repeal of must-carry legislation.

Analog and Digital Must-Carry Obligations of Cable and Satellite Television Operators in the United States

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I. Must-Carry Background

In the United States cable television operators[2] bear a statutory obligation to reserve up to one-third of their channel capacity for the compulsory carriage of significantly viewed local, terrestrial broadcast television stations.[3] In 1992 Congress enacted a law codifying previous regulatory requirements established by the Federal Communications Commission ("FCC") that imposed a compulsory, "must-carry" responsibility on grounds that the national interest requires affirmative efforts to maintain the commercial viability of terrestrial television broadcasters.[4]

While many critics consider must-carry a "taking" of property and an intrusion into the speaker/programmer rights of cable television operators, reviewing courts consider the intrusion a lawful exercise of economic regulation. In 1997, the Supreme Court of the United States deemed must-carry obligations lawful, "content-neutral," regulation of cable television operators even though such regulation subordinates and conditions cable operators' constitutionally protected speaker and expres-

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2) Direct Broadcast Satellite operators do not have a must-carry obligation. However the decision to carry one local broadcast station in any market triggers an obligation to carry all other signals. Since 1 January 2002 a DBS operator must-carry upon request the signals of all television broadcast stations within a local market when the operator opts to carry any single station. Congress imposed this "carry one carry all" requirement to ensure that DBS operators do not "cherry pick" and carry only network affiliates, an outcome it deemed detrimental to the viability of all broadcast television station operators. *See* Implementation of the Satellite Home Viewer Improvement Act of 1999, 15 FCC Rcd. 5445 (2000); Implementation of the Satellite Home Viewer Improvement Act of 1999: Enforcement Procedures for Retransmission Consent Violations, 15 FCC Rcd. 2522 (2000). Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues, 16 FCC Rcd. 16,544 (2001); KVMD Acquisition Corp. v. DirecTV, Inc., 16 FCC Rcd. 22,040 (2001).

3) See, e.g., Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). Specifically, the 1992 rules obligated cable systems with more than 12 channels of video programming to set-aside up to one-third of their capacity for the retransmission of all commercial VHF and UHF stations broadcast in the local market; carry non-commercial stations (Public Broadcasting System affiliates); and carry up to two low-power TV stations broadcast locally where less than one-third of channel capacity was filled by commercial full-power stations. See Definition of Markets for Purposes of the Cable Television Mandatory Television Broadcast Signal Carriage Rules, Report and Order and Further Notice of Proposed Rulemaking in CS Docket No. 95-178, 11 FCC Rcd 6201 (1996).

4) In the United States terrestrial television broadcaster qualify for special regulatory safeguards in light of their free accessibility in contrast with cable and satellite television that require direct subscription payments. See, Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 194 (1997) (recognizing that terrestrial broadcast television "is an important source of information to many Americans … by tradition and use for decades now it has been an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression'); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 663 (1994) (acknowledging that terrestrial broadcast television "'is demonstrably a principal source of information and entertainment for a great part of the Nation's population"') (quoting United States v. Southwestern Cable Co., 392 U.S. 157, 177 (1968)); Review of Commission's Regulations Governing Television Broad., Report & Order, 14 F.C.C.R. 12,903, 12,912 P 18 (1999) (finding that television is "the primary source of news and entertainment programming for American" and "play[s] a leading role in shaping democratic debate and cultural attitudes").

sion rights.[5] Ironically, changed marketplace conditions and technological innovation substantially reduce the publics' interest in and direct reception of terrestrial broadcast television signals.[6]

The FCC subjects cable television to extensive "ancillary" regulation, despite the absence of public spectrum usage based on the perceived need to avert the potential for adverse harm to the economic viability of "free" broadcast television. Cable television has the capability of diverting audiences and revenues from broadcasters by offering consumers more video choices. Must-carry requirements ensure that cable television subscribers still have the option of viewing local terrestrial broadcast signals. This requirement preempts a marketplace determination whether consumers still want to view content available from local broadcasters. Legislative and regulatory preemption of marketplace decision making results in part from the appreciation that most consumers would favor some terrestrial broadcaster sources of news and coverage of major events, e.g., major network affiliated stations,[7] but largely disfavor unaffiliated, minor stations whose programming cannot match that available from subscription cable or satellite networks.

Critics of must-carry requirements state that the primary beneficiaries include marginal television broadcasters, such as home shopping channels and broadcasters operating in a foreign language, while cable operators incur an unnecessary handicap in having to abandon carriage of additional video content due to the compulsory carriage of signals few viewers would care to watch.[8] On the other hand, efforts by cable and satellite operators to expand channel capacity generally makes it possible to satisfy must-carry obligations while also offering a wide array of special interest content unavailable from terrestrial broadcasters that typically offer mass audience programming. Satisfying both regulatory and consumer requirements will become more difficult with the onset of both broadcast and non-broadcast high definition television that will require more bandwidth. Likewise, the onset of digital broadcast television will enable broadcasters to expand the number of channels they program thereby raising questions about the scope and nature of future must-carry obligations.

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5) Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997) (holding that because must-carry requirements did not directly affect content and First Amendment speakers' rights, the Court should use a less rigorous "intermediate scrutiny" to determine whether the requirements were narrowly tailored to advance Congress's interests in preserving the benefits of free, over-the-air local broadcast television, promoting the widespread dissemination of information from a multiplicity of sources, and promoting fair competition in market for television programming). In an earlier case, Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994), the Court made its intermediate scrutiny determination holding that must-carry provisions served important government interests by preserving free broadcast television, by promoting widespread dissemination of information, and by promoting fair competition. The First Amendment to the United States Constitution prohibits the legislature from making laws "respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

6) Approximately 90 percent of United States households view video content from non-broadcast television sources. As of June 2004, 92.3 million households subscribed to a Multichannel Video Programming Distributor with 71.6 percent subscribing to a franchised cable operator, 25.1 percent receiving their video programming from a Direct Broadcast Satellite operator, and 3.3 percent of subscribers accessing video content from other types of providers including broadband services, wireless cable and private cable ventures. See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 04-227, Eleventh Annual Report, FCC 5-013 (rel 4 February 2005); available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-13A1.doc . See also, National Cable and Telecommunications Association, *2004 Year-End Industry Overview* (2004); available at: http://www.ncta.com/pdf_files/NCTAYearEndOverview04.pdf ; Industry Statistics, available at: http://www.ncta.com/Docs/PageContent.cfm?pageID=86

7) Must-carry constitutes one of many legislative and regulatory initiatives designed to promote the availability of local broadcasting, despite the fact that broadcast stations typically retransmit national network content most of the time. Nevertheless the concept of "localism" has a firm foundation for justifying what one could consider "protectionist" safeguards. See, e.g., National Association of Broadcasters v. FCC, 740 F.2d 1190, 1198 (D.C. Cir. 1984) (recognizing that the FCC "historically has followed a policy of 'localism' as a sound means of promoting the statutory goal of efficient public service"); Competition, Rate Deregulation & Commission's Policies Relating to Provision of Cable Television Serv., Report, 5 F.C.C.R. 4962, 5039-40 P 149 (1990) (acknowledging that localism has been a driving force in FCC policy for the previous fifty years); Satellite Delivery of Network Signals to Unserved Households for Purposes of Satellite Home Viewer Act, Report & Order, 14 F.C.C.R. 2654, 2659 P 11 (1999) ("Localism has been a central principle of broadcast policy since the Radio Act of 1927."); Amendment of Subpart L, Part 91, to Adopt Rules & Regulations to Govern the Grant of Authorizations in Bus. Radio Serv. for Microwave Stations to Relay Television Signals to Cmty. Antenna Systems, First Report & Order, 38 F.C.C. 683, 699-700 PP 44-48 (1965) [hereinafter CATV First Report & Order]; see also Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1439-40 (D.C. Cir. 1985) (concluding that one of the cardinal objectives of the FCC was "the development of 'a system of [free] local broadcasting stations,' such that 'all communities of appreciable size [will] have at least one television station as an outlet for local self-expression'") (quoting United States v. Southwestern Cable Co., 392 U.S. 157, 174 (1968)).

8) See Christopher S. Yoo, Rethinking the Commitment to Free, Local Television, 52 Emory L.J. 1579 (Fall 2003); Thomas W. Hazlett, Digitizing "Must-Carry" Under Turner Broadcasting v. FCC (1997), 8 Sup. Ct. Econ. Rev. 141 (2000).

Supporters of must-carry emphasize that cable and satellite operators accrue legislative and regulatory benefits that balance out the financial burdens generated by compulsory signal carriage. For example, Congress conferred a financial benefit to cable and satellite operators by providing them with a compulsory license for the retransmission of copyrighted broadcast video content at attractive rates.[9] Additionally when cable and satellite operators comply with must-carry obligations, individual broadcasters cannot demand additional financial compensation.[10]

II. Balancing First Amendment and Public Policy Goals

The must-carry issue in the United States has forced Congress and the FCC to make difficult balancing decisions. The First Amendment to the United States Constitution appears to impose an absolute prohibition on governmental restrictions on speech, but in application many types of speech fall outside the prohibition, e.g., obscenity and speech that creates a clear and present danger for immediate, unlawful behavior. Courts have interpreted the First Amendment differently as a function of which medium the court examines. For example, the Supreme Court has endorsed limitations of speaker rights in terms of time, place and manner of speech where government has a compelling justification for partial suppression of speech and the imposed restrictions do not directly target a specific type of speech. Additionally the Court requires the legislature to specify any restriction as narrowly as possibly to avoid over breadth that would possibly limit or constrain permissible speech.

Cable television and DBS operators do qualify for First Amendment speaker freedoms in terms of how they program their channel capacity. Accordingly one could consider must-carry as a direct content-based restriction thereby obligating government to articulate a compelling justification. Courts have accepted as reasonable a government goal of promoting the economic viability of terrestrial broadcast television, both in terms of guaranteeing access by the public without having to pay for a subscription and in terms of broadcasters' contribution to the national interest in having an informed and involved electorate.

The nature and scope of judicial scrutiny applied to a media speech restriction depends on whether the restriction applies directly or indirectly on content. The Supreme Court considered must-carry "content neutral," because the restriction on cable speech applied to a type of signal that cable operators must-carry and not any type of specific content contained in that signal. In other words must-carry favors broadcast television and not specifically any type of content produced and disseminated by a particular television broadcaster. For restrictions on First Amendment freedom that do not directly impact or favor content, the Court uses an "intermediate scrutiny" standard to consider the reasonableness of the restriction and its specificity.

The Supreme Court first articulated the intermediate scrutiny standard when it determined that a Vietnam War protestor should face jail time for burning his draft card even though he sought to make a political statement of opposition to the war. Because government could articulate a reasonable justification for prohibiting draft card destruction, e.g., effective administration of the conscription process, the Supreme Court upheld a criminal conviction, despite the symbolic, political expression exhibited by destruction of the draft card.

9) See The Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2550, (codified at 17 U.S.C. § 111 (2000)). See also Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 67 Rad. Reg.2[d] (P&F) 1771 (1990). The Satellite Home Viewer Act of 1988 created a compulsory license for satellite broadcasting similar in structure to the cable compulsory license. Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, 102 Stat. 3949 (codified as amended in scattered sections of 17 U.S.C.).

10) Broadcasters not electing must-carry may seek additional direct compensation for their consent to retransmission by cable and satellite operators. The retransmission consent rules in § 325 of the 1992 Cable Act, 47 U.S.C. § 325 (2004) prohibit cable operators from transmitting signals of commercial television stations without their consent, except when the broadcaster has chosen must-carry.

III. Digital Must-Carry[11]

During the transition from analog to digital television, terrestrial broadcasters typically simulcast both formats.[12] In 2001, the FCC tentatively concluded that mandatory "dual carriage" of both signals would violate cable operators' First Amendment programming rights:

- a dual carriage requirement appears to burden cable operators' First Amendment
- interests substantially more than is necessary to further the government's substantial
- interests of preserving the benefits of free over-the-air local broadcast television;
- promoting the widespread dissemination of information from a multiplicity of sources;
- and promoting fair competition in the market for television programming.[13]

The FCC must decide what changes to make in light of the transition to digital television, particularly in light of the ability of television broadcasters to generate many different program feeds within a conventional six megaHertz channel and the fact that broadcasters will have two channels to use during the transition.[14] The Commission might refrain from imposing dual channel carriage responsibilities, or it might impose such a requirement on a transitional basis. Additionally the FCC will have to decide what portion of broadcasters' content qualifies for must-carry. The Commission has tentatively decided that digital-only television broadcasters have must-carry rights only as to their "primary video"[15] stream and other "program-related content."[16]

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11) For more extensive background on digital must-carry see Michael M. Epstein, "Primary Video" And Its Secondary Effects On Digital Broadcasting: Cable Carriage of Multiplexed Signals Under the 1992 Cable Act and the First Amendment, 87 Marq. L. Rev. 525 (2004); Joel Timmer, Broadcast, Cable and Digital Must Carry: The Other Digital Divide, 9 Comm. L. & Policy 101 (Winter, 2004); Andrew D. Cotlar, The Road Not Yet Traveled: Why The FCC Should Issue Digital Must-Carry Rules For Public Television "First," 57 Fed. Comm. L.J. 49 (Dec. 2004) Albert N. Lung, Must-Carry Rules In The Transition To Digital Television: A Delicate Constitutional Balance, 22 Cardozo L. Rev. 151 (Nov. 2000).

12) The FCC assigned television broadcasters an additional 6 MegaHertz channel to facilitate the transition to digital television. With two channels broadcasters can simulcast an analog and digital signal thereby offering consumers the chance to extend the usable life of their existing television sets, but as well the opportunity to use digital television sets to receive enhanced and high definition television broadcasts. See Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Fifth Report and Order, 12 F.C.C.R. 12,809, P 3 (1997) By law, broadcasters must relinquish one of the their 2 channels on 31 December 2006 or when 85% of households have a digital television set, which ever is later. "A television broadcast license that authorizes analog television service may not be renewed to authorize such service for a period that extends beyond 31 December 2006." 47 U.S.C. § 309(j)(14)(A) (2004). Extensions to the 31 December 2006 the deadline occur under any one of the three following circumstances: (A) one or more of the stations in that market licensed to or affiliated with one of the four largest national television networks is not broadcasting a digital signal; (B) digital-to-analog converter technology is not generally available in that market; or (C) 15 percent or more of the television households in the market do not subscribe to a multichannel video programming distributor that carries the DTV signal of each of the television stations broadcasting in DTV in the market, and do not have either (1) at least one DTV television receiver or (2) at least one analog television receiver equipped with digital-to-analog converter technology. 47 U.S.C. § 309(j)(14)(B).

13) Carriage of Digital Television Broadcast Signals, CS Docket No. 98-120, First Report and Order and Further Notice of Proposed Rule Rulemaking, 16 FCC Rcd. 2598 (2001).

14) "[W]e find it necessary to issue a Further Notice of Proposed Rulemaking addressing several critical questions at the center of the carriage debate including, inter alia: (1) whether a cable operator will have the channel capacity to carry the digital television signal of a station, in addition to the analog signal of that same station, and without displacing other programming or services; (2) whether market forces, through retransmission consent, will provide cable subscribers access to digital television signals and television stations' access to carriage on cable systems; and (3) how the resolution of the carriage issues would impact the digital transition process. The responses to these and other inquiries will help determine the answer to the dual carriage issue. In the Further Notice, we also raise questions concerning the applicability of the rules and policies we adopt herein to satellite carriers under the Satellite Home Viewer Improvement Act of 1999 ('SHVIA')." Id. 16 FCC Rcd. at 2600.

15) "[W]e conclude that 'primary video' means a single programming stream and other program-related content. With the advent of digital television, broadcast stations now have the opportunity to include in their video service a panoply of program-related content. Indeed, far more video content is possible broadcasting a digital signal than broadcasting in an analog format. For example, a digital television broadcast of a sporting event could include multiple camera angles from which the viewer may select. The statute contemplates and our rules require that cable operators provide mandatory carriage for this program-related content. In contrast, if a digital broadcaster elects to divide its digital spectrum into several separate, independent and unrelated programming streams, only one of these streams is considered primary and entitled to mandatory carriage. The broadcaster must elect which programming stream is its primary video and the cable operator is required to provide mandatory carriage to only such designated stream." Id. 16 FCC Rcd. at 2622.

16) A Further Notice of Proposed Rulemaking will create a definition of "program-related content." However in referring to the Commission's consideration of the issue in analog systems, the Commission tentatively concluded that material in broadcaster's vertical blanking intervals related to its primary video feed qualifies for carriage, but additional content, such as Internet-based material, would not. "First, Section 614(b)(3) of the Act entitled 'Content to be Carried,' states that a cable operator shall carry in its entirety the 'primary video' of the station. Second, it requires carriage of the 'accompanying audio' and 'line 21 closed caption transmission' of each station. Third, the operator must-carry 'to the extent technically feasible, program-related material carried in the vertical blanking interval or on subcarriers.' The statute is specific that 'Retransmission of other material in the vertical blanking interval or other nonprogram-related material (including teletext and other subscription and advertiser-supported information services) shall be at the discretion of the cable operator.'" Id. 16 FCC Rcd. at 2619 (citations omitted). "Based on the language in 614(b)(3), Congress was concerned that mandatory carriage be limited to the broadcaster's primary program stream but also include related content as described here. In the FNPRM we seek comment on the appropriate parameters for 'program-related' in the digital context." Id. 16 FCC Rcd. at 2622.

Digital Must-Carry Reconsideration

In a recent decision[17] the FCC resolved whether cable operators must-carry both the digital and analog signals of a station during the transition when terrestrial television stations continue to broadcast analog signals, commonly termed the dual carriage issue. The Commission also stated how it will construe the "primary video" carriage limitation contained in Section 614(b)(3)(A) of the Communications Act for commercial stations and Section 615(g)(1) for noncommercial stations.[18] The matter of mandatory multicast carriage arises when a broadcaster chooses to transmit multiple digital television streams.

The FCC affirmed its tentative conclusion not to require cable operators simultaneously to carry broadcasters' analog and digital signals. The Commission also reaffirmed its prior determination that cable operators should not have to carry more than the single, primary digital programming stream from any particular broadcaster. The decision states that mandatory dual carriage was not necessary either to advance the governmental interests as identified by Congress and the Supreme Court, or to facilitate the transition from analog to digital television:

> We therefore affirm our earlier conclusion that the Act is ambiguous on the issue of dual carriage. The statute neither mandates nor precludes the mandatory simultaneous carriage of both a television station's digital and analog signals. Further, we do not believe that mandating dual carriage is necessary either to advance the governmental interests identified by Congress in enacting Sections 614 and 615 and upheld [by the Supreme Court] or to effectuate the DTV transition. Since no evidence or arguments submitted on reconsideration gives us any reason to question our original judgment, we deny the petitions for reconsideration on this point.[19]

As to the digital multicasting issue, the Commission affirmed its earlier conclusion that cable operators need not carry any more than one programming stream of a digital broadcast television station. Although the FCC also found the applicable statutory language ambiguous on the subject of multicast must-carry, the Commission determined that based on the current record such a requirement was unnecessary to further the purposes of the must-carry statute, as defined by the Supreme Court:

> [B]ased on the current record, there is little to suggest that requiring cable operators to carry more than one programming stream of a digital television station would contribute to promoting "the widespread dissemination of information from a multiplicity of sources." Under a single-channel must-carry requirement, broadcasters will have a presence on cable systems. Adding additional channels of the same broadcaster would not enhance source diversity. Furthermore, programming shifted from a broadcaster's main channel to the same broadcaster's multicast channel would not promote diversity of information sources. Indeed, mandatory multicast carriage would arguably diminish the ability of other, independent voices to be carried on the cable system. [20]

IV. Must-Carry–Direct Broadcast Satellite Operators

The Satellite Home Viewer Improvement Act,[21] commonly referred to as SHVIA, initially provided individuals in rural areas lacking access to terrestrial broadcast television[22] with opportunities to view up to two of each network affiliate stations via Direct Broadcast Satellite ("DBS") service.[23] A 1999 amendment[24] provided DBS operators with a statutory copyright license, like that accruing to cable

17) Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules, Second Report and Order and First Order on Reconsideration, CS Docket No. 98-120, FCC 05-27 (rel. Feb. 23, 2005); available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-27A1.doc [hereinafter cited as Digital Must-carry Reconsideration Order].
18) See 47 U.S.C. §§ 534(b)(3)(A), 535(g)(1).
19) Digital Must-carry Reconsideration Order at ¶13.
20) Digital Must-carry Reconsideration Order at ¶39.
21) Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545, codified at 47 U.S.C. § 338. SHVIA amended the Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, 102 Stat. 3949 that gave DBS operators a limited copyright license to retransmit the signals of distant network broadcast television stations only to unserved households that could not receive an adequate over-the-air signal via a conventional rooftop antenna.
22) DBS access to local content is available only to subscribers located in areas lacking access to a "Grade B" broadcast television signal via a rooftop antenna and who have not received feeds of the nearest local network broadcast affiliates within the past ninety days via cable television.
23) SHVIA amended the Copyright Act, 17 U.S.C. § 119(d)(2), to create a limited statutory copyright license for satellite carriers to rebroadcast over-the-air television signals to unserved areas.
24) Pub. L. 106-113, 113 Stat. 1501, Appendix 1, codified at scattered sections in 17 and 47 U.S.C. (1999).

operators for retransmitting local programming. DBS operators previously had the right to retransmit local television signals without first obtaining the broadcaster's retransmission consent and without having to make available all stations entitled to must-carry.

Beginning 1 January 2002, SHVIA required DBS operators to secure retransmission consent from local broadcast stations for carriage into areas where viewers could receive such signals off air, commonly referred to as "local into local." Since 1 January 2002 [25] a DBS operator must-carry upon request[26] the signals of all television broadcast stations within a local market when the operator opts to carry any single station.[27] Congress imposed this "carry one carry all" requirement to ensure that DBS operators do not "cherry pick" and carry only network affiliates, an outcome Congress deemed detrimental to the viability of all broadcast television station operators. Broadcast television station management now must elect between retransmission consent and must-carry for a term of three years, with the first period actually running four years to 2006 so that the new cycle coincides with the time when cable television operators renegotiate with terrestrial television broadcasters for signal carriage rights.

The FCC also permits private negotiated copyright arrangements, outside the statutory process, to remain in force. However, broadcasters cannot secure an exclusive contract for carriage via one DBS operator, nor can either broadcasters or DBS operators fail to negotiate in good faith in must-carry/retransmission content discussions. The FCC established a two-part test for assessing whether good faith negotiations have occurred based on procedural standards, such as a willingness to meet and negotiate without a take it or leave it single offer, and the "totality" of the particular circumstances.[28]

With the ability to provide local into local, DBS operators enjoy competitive parity with cable television operators in terms of access to, and delivery of broadcast television content.[29] However, as cable operators had done previously, DBS operators objected to must-carry on Constitution grounds. The DBS operators also disputed the FCC imposed conditions on how they can offer and price local channels.

In Satellite Broadcasting and Communications Association v. FCC, 275 F.3d 337 (4th Cir. 2001), the Fourth Circuit Court of Appeals rejected DBS operators' Constitutional objections in much the same way as the Supreme Court rejected cable operators' objections to must-carry in Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 114 S.Ct. 2445 (1994) (Turner-I) and 520 U.S. 180, 117 S.Ct. 1174 (1997) (Turner-II). The Fourth Circuit acknowledged that both DBS and cable television operators engage in speech protected by the First Amendment when making channel and content selections. However, the court applied the precedent established by the Supreme Court in the *Turner* cases that preserving "free" broadcast television constituted a content-neutral measure that imposes only incidental burdens on speech sufficient to pass muster using intermediate First Amendment scrutiny. The court held that imposing mandatory carriage requirements on satellite television operators furthers an important, narrowly drawn governmental interest:

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25) 47 U.S.C. § 338(a)(3).

26) Broadcasters must bear the financial burden of delivering to DBS a signal of good quality whether via microwave, fiber optic or leased lines. See Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues, 16 FCC Rcd. 16,544 (2001); KVMD Acquisition Corp. v. DirecTV, Inc., 16 FCC Rcd. 22,040 (2001).

27) 325(b)(3)(C) of the Communications Act, 47 U.S.C. §325(b)(3)(C) requires satellite carriers to obtain retransmission consent for the local broadcast signals they carry, requires broadcasters, until 2006, to negotiate in good faith with satellite carriers and other MVPDs with respect to their retransmission of the broadcasters' signals, and prohibits broadcasters from entering into exclusive retransmission consent agreements.

28) See Implementation of the Satellite Home Viewer Improvement Act of 1999, 15 FCC Rcd. 5445 (2000); Implementation of the Satellite Home Viewer Improvement Act of 1999: Enforcement Procedures for Retransmission Consent Violations, 15 FCC Rcd. 2522 (2000); Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues, CS Docket No. 99-363, First Report and Order, 15 FCC Rcd 5445 (2000), recon. granted in part, 16 FCC Rcd 15599 (2001); Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Reciprocal Bargaining Obligations, MB Docket No. 05-89, Notice of Proposed Rulemaking, FCC 05-49, 2005 WL 524926 (rel. 7 March 2005)(proposing to extend good faith negotiation requirements on MVPDs).

29) DBS operators are subject to the same content access restrictions applicable to cable operators, including Network Nonduplication, Syndicated Exclusivity, and Sports Blackout Rules. Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Non-Duplication, Syndicated Exclusivity, and Sports Blackout Rules To Satellite Retransmissions of Broadcast Signals, Docket No. CS Docket No. 00-2, Report and Order, 15 FCC Rcd. 21,688 (2000), on reconsideration, 17 FCC Rcd. 27,875 (2002). These rules protect exclusive contractual rights that have been negotiated between program providers and broadcasters or other rights holders. These exclusive contractual rights are potentially threatened by cable and satellite systems that can import duplicative programming from distant sources beyond the control of the contracting parties.

1) preserving a multiplicity of local broadcast outlets; and
2) preventing the grant of a compulsory copyright license from undermining broadcast television competition, an outcome that could occur should DBS operators deprive their customers access to non-network broadcast stations.

The court also affirmed the FCC's rules for implementing SHVIA, in particular rules that limit DBS operators' commercial options for offering local stations as a package of all stations for one price, or the option of buying any individual station on an *à la carte* basis.

1. Satellite Home Viewer Extension and Reauthorization Act

Congress passed and the President signed into law the Satellite Home Viewer Extension and Reauthorization Act of 2004 [30] ("SHVERA") that extends until 2010 the compulsory copyright license for DBS operators to deliver local and distant broadcast network stations, including superstations, i.e., major terrestrial broadcast television stations whose content also is available for carriage via cable television systems. SHVERA provides DBS operators with near parity with cable television operators regarding opportunities for accessing and delivering broadcast television channels. The law authorizes satellite delivery of distant analog broadcast network signals into the top 100 local markets in May 2006, as well as significantly viewed distant network and superstation signals. With some minor exceptions, DBS operators may serve the remaining markets in 2007 if no local digital signal is available and the distant signal does not originate from a station operating in a different time zone. The law also requires DBS operators to deliver all local terrestrial broadcast signals to a single receiving dish antenna.

SHVERA also revises copyright royalty rates and establishes a new process for adjustments to cable and satellite compulsory copyright license royalty rates. The law revises retransmission consent requirements and elections, including a new requirement that all Multichannel Video Programming Distributors ("MVPDs") negotiate in good faith. The law orders the FCC to conduct studies and issue reports on signal measurement and carriage rules while the Copyright Office has to assess the impact of the compulsory copyright licensing process on program owners and to make recommendations on desirable changes.

2. Extended Signal Importation Opportunities

SHVERA provides DBS operators with better opportunities to import distant broadcast signals into markets lacking "local-into-local" delivery of nearby signals and localities unserved by terrestrial broadcast network signals. DBS operators now have a compulsory copyright license permitting the retransmission of distant network signals to unserved households and of superstations to any subscriber without retransmission consent from the broadcaster, but subject to copyright royalty payments. The law allows retransmission of local and "significantly viewed" distant signals, including distant digital network signals.

Specifically for areas where no off-air reception exists, DBS carriers may continue delivering distant network signals to subscribers who have legally received them as of 1 January 2005 even if a local package of nearby network signals was, is, or becomes available. DBS operators may begin delivering distant network signals after 1 January 2005 as long as no package of nearby local network signals via satellite becomes available. If the nearest local network affiliate waives its right to prohibit distant signal importation, a DBS operator may import a distant network signal. However DBS operators cannot deliver distant network signals to new subscribers if a nearby local signal becomes available via satellite.

30) SHVERA was introduced in the House of Representatives as H.R.4501, but was passed as Title IX of the 2005 omnibus spending package. See The Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, § 202, 118 Stat 2809, 3393 (2004) (to be codified at 47 U.S.C. § 340. The SHVERA was enacted on 8 December 2004 as title IX of the "Consolidated Appropriations Act", 2005. It extended the statutory license for secondary transmissions under 17 U.S.C § 119 (distant network broadcasts and superstations) and 17 U.S.C §122 (local broadcast signals) and amended the Communications Act of 1934 relating to must-carry, retransmission consent, signal carriage and broadcasting. See also House of Representatives, 108th Congress, 2d Session, House

3. Retransmission of Distant Digital Network Signals

SHVERA also offers DBS operators the opportunity to deliver distant digital network signals into "digital white areas" where the nearest network broadcaster does not currently offer digital content, or where adequate off-air reception does not occur. Additionally if a satellite subscriber previously received distant digital signals prior to enactment of SHVERA, such reception can continue even if a local digital package becomes available. For satellite subscribers otherwise eligible to receive distant digital signals, but located in an area where a DBS operators makes local analog signals available, the satellite operators may also deliver the same or a later time-zone distant digital network signals after 30 April 2006 for the top 100 markets and after 15 July 2007 for the remaining markets, if the subscriber also takes the local affiliate's analog or subsequently available digital feed from the DBS operator. Satellite subscribers must drop the distant signal feed when a nearby broadcaster offers a digital feed that the subscriber can receive adequately off-air.

V. Conclusion

Must-carry requirements will persist in the United States even in a digital, convergent environment and despite growing interest in deregulation and reliance on marketplace forces. Elected officials recognize the still extensive power of the terrestrial broadcast media to influence the electorate and elections. Must-carry ensures that broadcasting remains an important medium and sustains the symbiotic relationship between the media and politicians.

The Future of Must-Carry

From Must-Carry to a Concept of Universal Service in the Info-Communications Sector

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Introduction

Will the issue of must-carry become an anomaly in the era of digital broadcasting?[2] Some believe it will. After all, once scarcity is no longer an issue for cable operators and with competing networks in place, it seems highly unlikely that a network will refuse transmission or retransmission of broadcasting channels that can only increase the attractiveness of its package. Therefore, must-carry obligations ensuring access of certain (primarily public) broadcasting channels to transmission networks are no longer needed. Commercial negotiation, it is argued, can do the job…

This idea is not only defended by representatives of the electronic communications sector and by some scholars, but is also present in current discussion in European Commission circles. The wording of Article 31 of the Universal Service Directive[3] ("reasonable obligations", "necessary to meet clearly defined general interest objectives", "proportionate", "subject to periodical review"), suggests that the intention was to *limit* must-carry obligations, even to let them gradually "fade out", rather than to support their maintenance.

Consequently, it may have surprised the Commission to hear that some Member States – where must-carry obligations did not exist before – seized the opportunity of the implementation of the 2002 regulatory package to introduce must-carry rules.[4] Moreover, Article 31 does not seem very successful in achieving the harmonisation it pursues. A comparison of the must-carry regimes in the Member States[5] shows that important differences still exist when it comes to the number and nature of must-carry channels, the kinds of networks subject to must-carry obligations and the financial conditions for must-carry (in terms of transport fees as well as copyright arrangements).

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2) Many thanks to Monica Ariño Gutierrez (European University Institute; PCMLP Oxford) for the stimulating discussions and for co-authoring with me the OfcomWatch post on "The future (or non-future) of must carry" following the IViR/EAO workshop in Amsterdam on 9 April 2005. Parts of this post – available at http://www.ofcomwatch.co.uk/2005/04/future-or-non-future-of-must-carry – have been integrated in this paper (errors and omissions remaining my own).

3) 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 (Universal Service Directive), Official Journal L 108, 24 April 2002 pp. 51 – 77.

4) For the UK approach see the Ofcom proposals which set out must-carry obligations for terrestrial transmission; http://www.ofcom.org.uk/consult/condocs/bcast_trans_serv/must_carry/must-carry.pdf

5) See the paper by Thomas Roukens in this issue of *IRIS Special*.

Supporters of the must-carry rules emphasize that it is widely held in Europe that governments are to ensure the universal coverage of general interest contents. Incidentally, is it not the case that the ongoing debate on PSB[6] shows that Member States are very reluctant – if not utterly opposed – to abandoning the idea of publicly supported and universally available audiovisual contents?[7] For the Member States, must-carry obligations seem a logical and necessary measure in the *transmission* layer in order to achieve public policy goals set at the *content* level. It is also argued that must-carry obligations should be countered with "must-offer" obligations on the side of the content providers. Hence, in the digital age must-carry obligations could be seen as part of a larger concept of "universal service obligations with regard to content".

This idea is not without controversy. As already indicated, there are many opponents to the very notion of must-carry, which they perceive as an illegitimate and highly intrusive intervention on market freedom, all the more unnecessary in a multi-platform digital environment.

It seems, on the other hand, that must-carry will remain an important topic in years to come. In order to stimulate debate on the future role and form of must-carry obligations, this paper suggests an analytical framework – a layered model – as the basis for the construction of must-carry regimes in the future.[8]

This essay proceeds from the premise that governments still consider it as their task – even in an era of abundant information flow and lack of transmission scarcity – to ensure all citizens have access to a minimum and specific package of information services at an affordable price ("basic offer" or "basic package"). Within that context, this paper supports the view that must-carry rules are part of a broader concept in the media sector, a concept of "universal service with regard to content".

This paper will not discuss, however, the different arguments against or in favour of must-carry obligations. I am confident that the different stakeholders in this debate – advocates and opponents – will contribute actively to the discussion (as was already demonstrated during the round table in Amsterdam) and I will therefore leave it to them to put forward and comment on the various *pro* and *contra*, either economic or legal arguments.

Instead of examining the very existence of must-carry rules (and dealing with the question whether there is still a future for must-carry), the aim of this paper is to offer a "check-list" to policy makers who endorse the concept of compulsory retransmission. The goal is to help them build coherent and effective must-carry rules. In other words, provided that there is a future for must-carry, I propose to address how such a regime could and/or should look like in future.

The structure of the subsequent chapters is as follows. After a brief outline of some of the gaps in the current must-carry regimes, an analytical framework for rethinking must-carry in the digital age is outlined. The third chapter of this paper is dedicated to a practical example of how this model could be implemented in legislation (presenting the French Community of Belgium as a case study). In the concluding part I will summarise the most pressing policy questions in the context of future generation must-carry regimes with a view to launching the debate at European and national level.

I. The Gaps: What Is Wrong with Must-Carry Today?

- Is must-carry being granted to broadcasters who would gain access to transmission facilities in any case?

Currently, must-carry obligations in Europe are usually set out in favour of domestic public broadcasters and local channels. However, can we think of one single cable operator who would be inclined *not* to include programmes of those broadcasters in its offer? Given the high popularity of public broadcasting and local channels, I believe that the answer is "no".

6) Public service broadcasting.
7) No Member State puts into question the fundamentals of PSB – on contrary, the vast majority of European countries adhere to a strong public broadcaster that ensures the availability of a wide range of contents on different (if not all) distribution platforms.
8) Although this framework might seem theoretical at first sight, the fact that it has already served effectively as a starting point for the new broadcasting legislation in the French-speaking part of Belgium proves its viability.

On the other hand, the European Commission disapproved strongly of the Flemish Community's[9] proposed introduction of must-carry rules to the benefit of new commercial channels in Flanders, in its recent Broadcasting Decree of 7 May 2004.[10] The intention of the Flemish government was to grant new broadcasters a *temporary* must-carry status (namely, during the first two years after their take-up) in order to give them enough "try out" time to prove their value, gain sufficient market share and be in a position to negotiate access with cable operators on purely commercial terms after the expiry of their special status. According to the Flemish government, this measure was supposed to stimulate the development of innovative programmes in Flanders, and provide in turn a fair balance between the interests of content providers and cable operators.

In the eyes of the Commission, however, the rationale for this measure was economic and not cultural. The Flemish government had to abandon the idea. The result is that in Flanders, the already popular public and local channels enjoy must-carry status (although their place on the cable is guaranteed even without must-carry), while newcomers (which could equally contribute to the promotion and development of local culture and language, but often encounter problems in gaining access to the cable) are denied the benefit of must-carry status.

A first - provocative - question is whether must-carry is benefiting the wrong broadcasters.

- Is must-carry imposed on network operators that would grant access anyway?

A second reflection is based on the fact that must-carry rules historically apply to cable television (CATV) operators and that, since the Universal Service Directive, they can only be imposed on network providers whose network is "used by a significant number of end-users as their principal means to receive radio and television broadcasts".

I believe that networks with enough capacity (especially after the digital switchover takes place) to transmit many more channels in addition to those with must-carry status should not become the main concern of legislators eager to ensure universal coverage of specific contents.

Is it not correct to assume that the threat, if any, is from newcomers to the digital broadcasting arena, such as telco's offering TV subscriptions via ADSL or providers exploiting only one multiplex on a digital terrestrial network? Are these not the businesses probably most tempted to cherry-pick and offer only a limited package of premium content, hence endangering the universal coverage of broadcasters with a public service remit?

- Is there a future for must-carry without must-offer?

A third gap in the current must-carry regimes may well be seen in the recent attempts by some telecommunications operators to convince their governments of the need to broaden the scope of must-carry obligations, in order to cover not only the CATV operators, but all fixed electronic communications networks (or at least also the PSTN network). This might seem curious. What could possibly be the telco's motivation to be subject to must-carry obligations? The answer is simple: to secure their access to popular television channels in their region that might otherwise engage in exclusive partnerships with competing platform operators.

Let me further clarify this point by referring to the circumstances in Flanders last year, when the Decree of 7 May 2004 was being prepared for introduction in Parliament. At a certain moment, the question arose as to whether must-carry obligations had to be applied in a "technologically neutral" manner, in the sense that not only CATV operators, but also the operators of other electronic communication networks would be subject – immediately after the entry into force of the new decree and regardless of their subscriber base at that moment – to compulsory distribution of specific radio and TV channels. Such an idea might have been to the advantage of Belgacom,[11] in search of "a ticket" to the contents of those Flemish broadcasting organisations that attract large audiences, in particular

9) *I.e.* the northern, Dutch-speaking part of Belgium.
10) Decreet 7 mei *2004 houdende wijziging van sommige bepalingen van de decreten betreffende de radio-omroep en de televisie, gecoördineerd op 25 januari 1995, en van sommige andere bepalingen betreffende de radio-omroep en de televisie, Belgisch Staatsblad / Moniteur Belge,* 8 August 2004. This Decree implements the European directives on electronic communications networks and services in Flanders as far as broadcasting transmission is concerned.
11) *I.e.* the incumbent Belgian telecommunications operator; website: http://www.belgacom.be

those of the commercial broadcaster VMMa.[12] Why would Belgacom need such a "ticket"? Because there were (and still are) rumours about an exclusive partnership between VMMa and cable operator Telenet in the context of digital television.[13] Were this scenario to become a reality obviously Belgacom would find itself in a major competitive disadvantage when launching its own digital TV platform.[14] And how would it get such a "ticket"? Via the must-carry rules: under the former must-carry regime[15], commercial broadcasters in Flanders offering so-called general interest channels[16] – such as the SBS channel VT4 and the popular VMMa channels VTM, Kanaal2 and JimTV – had must-carry status. For Belgacom, being subject to the obligation to (re)transmit these must-carry channels would implicitly give it the right to include the most popular Flemish channels[17] in its programme package. Hence, it could use the must-carry obligations to enforce access to *contents* (contrary to what these rules were intended for, *i.e.* guaranteeing access to *networks*). Although Belgacom was never able to put this strategy to the test,[18] questions about its legitimacy and appropriateness remain.

Indeed, similar situations could arise with regard to the programmes of *public* broadcasters. What if some of the digital channels or services of *public* broadcasters were to be distributed exclusively on one of a number of competing platforms?[19] Think about the early days of the VRT's (Flemish public broadcaster) news site,[20] when only Belgacom Skynet customers could access the video streams on the website.[21]

What if mobile operators put pressure on public broadcasters to offer news services exclusively to their customers and not via the networks of their competitors? And what if some mobile operators are not interested in investing in technical equipment and network and/or storage capacity required to offer such services to their end-users (for instance, because their commercial strategy is focused on offering cheap telephone rates and not content services). Should public broadcasters in that case bear themselves the financial burden of being present on *all* platforms (in order to fulfil their duty of universal coverage), or can we consider the decision about the presence or absence of public broadcasters on various platforms as a purely commercial issue (which in turn depends on the financial situation and business models of network operators)?

All in all, I believe that network operators (who are in search of channels and services to attract end-users to their networks) are the ones currently soliciting content providers, rather than the reverse (as it used to be in the analogue world when transmission capacity was scarce). It makes us wonder whether must-carry obligations for network operators should be completed with or mirrored by must-offer obligations for specific content providers.

- The growing complexity of the audiovisual landscape

The audiovisual landscape in which the initial must-carry regimes emerged is no longer the prevailing scene today. Must-carry cannot be regarded anymore as a simple question of extending the universal coverage obligation of public broadcasters to cable operators. Digitisation, liberalisation and

12) Vlaamse Media Maatschappij; website: http://www.vmma.be .
13) It should be noted that the likelihood and scope of such exclusive cooperation remains unclear, as one of the conditions imposed by the Belgian Competition Council in the Telenet/Canal+ merger case states explicitly that "Telenet cannot conclude exclusive distribution contracts with the aforementioned open channels that are currently transmitted over its cable networks…" (translated from the Dutch); Competition Council, decision n° 2003 – C/C – 89 of 12 November 2003.
14) Which it will try to compensate via its recent acquisition of the exclusive broadcasting rights for the Belgian football league.
15) *I.e.* before the Decree of 7 May 2004 entered into effect.
16) These are channels that offer a wide variety of contents in different domains (information, entertainment, culture, sports, education) to various segments of the public and bring at least two daily news reports prepared by independent journalists (articles 65-70 Gecoördineerde Decreten betreffende de radio-omroep en de televisie, *Belgisch Staatsblad / Moniteur* 8 April 2005).
17) *I.e.* the programmes of the public broadcaster VRT, the local channels and the VMMa channels.
18) Since, on the one hand, must-carry rules no longer include the commercial general interest channels and, on the other hand, the idea of expanding the scope of must-carry obligations to Belgacom was never taken up by the Flemish legislator (as this would be contrary to Article 31 Universal Service Directive, at least as long as Belgacom's network is not used for reception of broadcasting contents by a significant number of end-users).
19) For instance, because they were co-produced with the operator of the television platform, who therefore insists on exclusivitiy.
20) www.vrtnieuws.net
21) And not the customers of other ISP's, such as Telenet or Tiscali (due to discussions about the costs for server capacity). A few weeks after the launch of the news site, Telenet accepted to bear the costs of hosting the website, but customers of alternative ISP's still could not receive the video streams. Only when VRT decided to pay the costs for hosting the servers did all (Belgian) internet users gain equal access to the contents on its news site.

convergence of telecommunications and broadcasting have led (and are still leading), on the one hand, to a multiplication of content providers and on the other to an increase in the number of network operators.

The different relationships between these players are becoming complex and multidirectional: content providers are looking for new distribution means while network operators (not only CATV operators, but also telco's and mobile operators) are often on the look-out for interesting and preferably exclusive contents. Consequently, challenges to universal coverage of general interest contents may arise in the context of access to networks and technical facilities, and also with regard to access to contents. The scope of the current must-carry obligations is, however, limited to the former.

Moreover, we are witnessing the emergence of new intermediary players ("aggregators" who do not operate the network themselves) for example, content platform operators, who bundle a variety of channels and services into packages and offer them to end-users.

These changes urge us to re-think existing must-carry regimes.

With the aim of furthering this discussion, I will now "set the scene", and give details of an analytical framework on the basis of a horizontal or layered approach to communications regulation.

II. Rethinking Must-Carry in the Digital Age: a Layered Approach

- The layers: transmission versus content regulation

Before turning to the main issue of this chapter, I would like to clarify what is understood here by "horizontal or layered approach" of communications regulation. Recent technological and economic developments in the information and communications sectors (digitisation, liberalisation, convergence) are leading to a shift *from* a vertical subdivision of legal frameworks (*i.e.* along the lines of the different sectors: broadcasting regulation *versus* telecommunications regulation) *to* a horizontal approach (*i.e.* distinguishing between content and transmission regulation).

This trend is perfectly illustrated by the 2002 directives on electronic communications networks and services.[22] These directives apply to all kinds of networks – fixed and mobile telecommunications networks, terrestrial or cable or satellite broadcasting networks, IP networks, even electricity networks – that are used for the transmission of electronic communications signals, irrespective of their technical structure or predominant use. Hence, the scope for the application of these directives can be described as the "transmission layer".

Similarly, Commissioner Viviane Reding has already announced at various occasions[23] that she wants to transform the "Television without Frontiers" Directive[24] into a directive dealing with all audiovisual contents, in other words regulating the whole "content layer" (as a counterpart of the transmission regulation in the electronic communications directives).[25]

22) *I.e.* the Framework Directive (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, *OJ L* 108, 24 April 2002, p. 33), and the four specific directives (Access Directive 2002/19/EC, Authorisation Directive 2002/20/EC, Universal Service Directive 2002/22/EC and Privacy in Electronic Communications Directive 2002/58/EG).

23) For instance, at the Conference of the European Cable Communication Association in Brussels on 18 January 2005, "Challenges ahead for the European Commissioner for Convergence" (speech/05/18), or in her opening speech for the seminar on the revision of the Television without Frontiers Directive in Luxembourg on 30 May 2005, "La modernisation de la directive Télévision sans Frontières" (speech/05/315); available at: http://europa.eu.int/information_society/newsroom/cf/comnews.cfm?type=sp

24) Directive 89/552/EEC of the Council of 3 October 1989 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* 298, 17 October 1989, p. 23, as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997, *OJ L* 202, 30 July 1997, p. 60.

25) It is important to be aware, however, that the distinction between transmission and content regulation can never be absolute, given the intrinsic links that exist between them.

- The players in the value chain

The French Community of Belgium (whose must-carry-regime will serve as an example in a following chapter of this paper) has taken these two layers – transmission and content – as a starting point for its new Broadcasting Decree of February 2003.[26] It distinguishes between three different categories of players in the value chain – two in the content layer and one in the transmission layer – and structures its broadcasting rules around these categories:

- the **"editors of broadcasting services"** (or "content providers"), are those who produce (have the editorial responsibility over) broadcasting channels or other information services[27]
- the **"distributors of broadcasting services"** (or "service providers"), are those who aggregate or package channels and services (either their own productions or acquired from third parties) into various bundles and offer these to end-users[28]
- the "**network operators"** (or "network providers"), are those who control the technical exploitation of broadcasting networks and provide transmission capacity for the delivery of radio and TV broadcasts and other information services, including those who provide value added network services such as encryption, decoder systems, etc. [29]

It should be noted that in practice, market players will often perform several functions simultaneously, hence, they would fall under more than one of the above categories. A radio station transmitting over the air, for instance, acts at the same time as content provider (editing its own radio programme), service provider (offering its programme to the listener) and network provider (operating its own broadcasting equipment). The Flemish commercial TV broadcaster, VMMa, is both editor and provider of broadcasting services, but not a network operator (since it has no transmission facilities of its own, but distributes its channels over the networks of the cable operators).

In the case of UK cable operator NTL, the broadcasting service provider and the network provider are one and the same entity: NTL operates the network and it bundles channels of third parties (editors of broadcasting services) into different packages to sell them to its cable subscribers (for instance, the "Base Pack", "Family Pack", on demand channels, extra services, etc.).[30]

Maintaining the network and offering programme packages to end-users are different operations, however, which can be performed by separate entities. Taking again the example of cable distribution, this can be illustrated by BeTV (formerly Canal+) in the French-speaking part of Belgium,[31] which sells its premium packages to the cable subscribers of the Walloon CATV operators (without operating these cable networks itself).[32]

- A layered model for must-carry

Let us now concentrate on the main point of this paper: how to construct must-carry obligations in the digital age.

As already explained, this paper is based on the premise that even in an era of abundant information flows and lack of transmission scarcity governments still view it as their task to ensure that all their citizens have access to a minimum and specific package of information services at an affordable price:

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26) *Belgisch Staatsblad / Moniteur Belge,* 17 April 2004.
27) *"[E]diteur de services: la personne morale qui assume la responsabilité éditoriale d'un ou de plusieurs services de radiodiffusion en vue de les diffuser ou de les faire diffuser"; art. 1, 13°.*
28) *"[D]istributeur de services: toute personne morale qui met à disposition du public un ou des services de radiodiffusion de quelle que manière que ce soit et notamment par voie hertzienne terrestre, par satellite ou par le biais d'un réseau de télédistribution. L'offre de services peut comprendre des services édités par la personne elle-même et des services édités par des tiers avec lesquels elle établit des relations contractuelles. Est également considérée comme distributeur de services, toute personne morale qui constitue une offre de services en établissant des relations contractuelles avec d'autres distributeurs[30]"; art. 1, 12*
29) *"[O]pérateur de réseau: toute personne morale qui assure les opérations techniques d'un réseau de radiodiffusion nécessaires à la transmission et la diffusion auprès du public de services de radiodiffusion"; art. 1, 22°.*
30) See: www.ntl.com
31) In Flanders, Canal+ has been taken over by Telenet and has been renamed "Prime".
32) This distinction was blurred in Flanders after the take-over of (the Flemish branch of) Canal+ by Telenet. It should also be noted that Canal+ performs to a certain extent the role of network provider, since it maintains its own conditional access system (offering its own decoders to the cable subscribers).

a "basic offer" or "basic package". Against this background, I take the position that must-carry rules should be understood as part of a larger concept of "universal service obligations with regard to content" (hence, we could also speak of a "universal service package" instead of a "basic package", which is probably – in order to avoid misunderstandings with the basic packages that, for instance, cable operators offer to their subscribers – a better expression to mean an offer that is legally defined as containing all general interest contents to which every citizen should have access at reasonable conditions).

The key questions in the universal service obligations-debate (USO-debate) are, similar to questions asked as regards USO in telecommunications, as follows:
- what should be the content of the universal service package (USP)?
- who will deliver this basic package?
- what are the terms (financial & commercial)?

In light of technical and economic developments in the audiovisual landscape, I believe that governments – if they want to guarantee universal access to a package of basic contents – need to act on three levels, which in turn correspond with the field of action of the different players whom I have mentioned in the discussion regarding the layered model for communications regulation.

1. On the Level of the Editors of Broadcasting Services: "Must-offer"

Firstly, governments have to decide which content providers ought to be granted the right of "compulsory distribution", *i.e.* the right to be included – for all of their content or for specific contents – in the universal service package (which will be offered by at least one broadcasting service provider; *cf. infra*). Moreover, there should be safeguards in place to ensure that these content providers not only have the right, but also the *obligation* to be included in the universal service package (at least for those programmes that are considered to be in the general interest and for which they benefit from a right of compulsory distribution). Simply said, a right to compulsory distribution and a "must-offer" obligation are two sides of the same coin.

2. On the Level of the Distributors of Broadcasting Services: "Must-distribute"

Secondly, at least one distributor or service provider ought to have the obligation to distribute the universal service package.

As the service provider is not necessarily the same person as the network operator, it is necessary to ensure that the former has access to at least one network with universal coverage (in order that they can effectively offer the USP to all citizens). In other words, on the level of the distributors of broadcasting services, their obligation to distribute the USP is mirrored by the right to acquire network access and sufficient transport capacity to deliver the USP.

3. On the Level of the Network Operators: "Must-carry"

And finally, it follows from the preceding points that there should be at least one network operator, whose network is capable of reaching all citizens (or alternatively, several operators whose combined networks have universal coverage), and who provides sufficient transmission capacity for the delivery of the USP. As a result, there will be an implicit obligation for this (these) network provider(s) to grant access to its (their) network(s) and ensure the transmission of the USP from the broadcasting service provider to the public.

III. Case Study: the French Community in Belgium

After the theory, the practice: how can we translate these different steps and concepts into legislation? This chapter is a case study. I address the system of must-carry that was introduced in the French Community of Belgium by the Broadcasting Decree of 27 February 2003.[33]

33) *Cf. supra,* note 26.

1. Editors of Broadcasting Services: Right to Compulsory Distribution and Must-offer

At the level of the editors of broadcasting services,[34] the Broadcasting Decree introduces the "right to compulsory distribution".[35] This right guarantees certain content providers the inclusion in the basic offer of the distributor. Its main features are listed in articles 48-51 of the Broadcasting Decree, as follows:

- the right to compulsory distribution is attributed by the French Community government
- this right is attributed to editors of broadcasting services for one or more specific channels or services
- it can be enforced in relation to the distributors of services mentioned in article 82, § 2 *(cf. infra)*
- in order to be entitled to the right of compulsory distribution the editor has to enter into an agreement with the French Community government and both the editor and its broadcasting service should fulfil certain conditions (that are listed in article 50):
  - *the broadcasting service shall (§1):*
    - contribute to the (cultural) patrimony of the French Community
    - consist of a "full" programme (*i.e.* one that brings a substantial amount of daily hours of original content)
    - include at least one (general) newscast every day
  - *the content provider is required to (§2):*
    - make investments in the audiovisual production of the French Community (calculated in terms of annual turnover and employment figures).[36]

The other side of the coin is the "must-offer" obligation for editors of broadcasting services who have the right to compulsory distribution. Article 51 explicitly obliges them to provide the broadcasting programme or content service concerned no later than 6 months upon receipt of the right to compulsory distribution.

It should be noted that the French Community Broadcasting Decree also contains a list of "traditional" must-carry obligations – more specifically in its provisions dealing with distributors of broadcasting services (title VI, chapter 1 of the Broadcasting Decree) – which bring a degree of inconsistency to the system of compulsory distribution[37] According to article 82, § 1, the following programmes (services) must be included in the basic offer of the cable distributor *(cf. infra)*:

- the services of the RTBF (the public broadcaster of the French Community)
- the services of the local TV broadcasters (in their territory)
- the services, appointed by the government, of international broadcasters in which the RTBF participates
- a limited number of services of the VRT and BRF (public broadcasters of the Flemish and German-speaking Community), on condition of reciprocity.

2. Distributors of Broadcasting Services

Title V (article 75 and subsequent articles) of the Broadcasting Decree deals with the second level of players, the distributors of broadcasting services.

The provisions relevant in the context of must-carry can be found in articles 81 and 82.

Article 81 prescribes that there should be at least one distributor of broadcasting services offering the "basic package", more specifically via cable (as I will explain immediately).

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34) *"[L]es éditeurs de services", "de uitgevers van diensten", cf. supra*
35) *"[L]e droit de distribution obligatoire", "het recht op verplichte verdeling"*.
36) It is difficult not to be under the impression that this requirement comes down to "buying" a right of compulsory distribution. For a similar reason, the former must-carry regime in the French Community was criticised in legal scholarship from an internal market perspective: Jeroen Capiau, "Een Europese vinger in de Belgische *must-carry* pap", *Auteurs & Media* 2002/5, 387-401 (390, note 17).
37) I believe it would have made more sense to list all broadcasting service editors with must-carry status (or more correctly stated: enjoying a right of compulsory distribution – be it on the basis of the Decree itself, or because they have been appointed by the French Community government – in article 48 (and therefore also including the public and local broadcasters mentioned in article 82, § 1).

Article 81, §1 stipulates: "the network operators mentioned in article 97 guarantee the distribution on their networks of a basic offer containing at least the broadcasting services mentioned in article 82. The basic offer is supplied by a distributor of broadcasting services. If there is no (separate) distributor, the network operator is obliged to perform the distribution activity and to offer the basic package".

The three main elements of this provision are:

> the distribution of a basic package must be guaranteed…
i.e. a package including at least the services of the content editors mentioned in article 82, namely - on the one hand - the public and local broadcasters mentioned in § 1, and - on the other hand - the editors referred to in § 2, which have been granted the right of compulsory distribution on the basis of article 48;

> …via cable…
as article 81 refers to "the network operators mentioned in article 97" and article 97 applies to "operators of teledistribution networks" – the latter defined as "broadcasting networks via coax cables"[38] – the scope of this obligation is limited to cable operators in the traditional sense (*i.e.* operators of coax cable networks)

> …by at least one distributor of broadcasting services
i.e. either a distributor independent of the cable operator, or – in the absence of such separate distributor – the cable operator itself.

Moreover, article 81 §2 prescribes that distributors of broadcasting services can only offer additional content or service packages to end-users that have subscribed to the basic package.

3. Network Operators

Article 81 (referring to article 97) imposes the obligation to transport the basic offer (*i.e.* to provide sufficient network capacity for the delivery of this basic package) on cable operators in the traditional sense (*i.e.* only operators of coax cable networks; *cf. supra*).[39]

IV. Closing Remarks

I emphasised at the outset that the "existential" question as to whether there is a future for must-carry rules in an environment of converging digital media was not to be addressed as such. Instead, I hypothesised that under certain conditions there is a future for must-carry, and I moved on to explore the shape and components of what I deem a coherent and effective must-carry regime, able to ensure to all citizens access to a minimum and specific package of information services at an affordable price. This exercise was based on what is termed a horizontal or layered approach to communications regulation, and I addressed the broadcasting legislation for the French Community of Belgium as a case-study.

I suggest that we stop considering must-carry as a separate issue only involving cable operators or broadcasters with a public service remit. Instead, must-carry rules should be made part of a global concept of "universal service obligations with regard to content".

In order to guarantee effectively the provision and distribution of a "universal service package" of contents, it is necessary to build safeguards in the different levels where the players operate in the value chain.

38) See the definition of "teledistribution network" in article 1, 36°: "*Réseau de télédistribution: réseau de radiodiffusion mis en œuvre par un même opérateur de réseau dans le but de transmettre au public par câble coaxial des signaux porteurs de services de radiodiffusion*" (emphasis added by the author).

39) Here as well (*cf. supra,* note 37), the Decree is not entirely consistent in my view. I would have expected the obligation to provide sufficient network capacity for the distribution of the USP to be set out in the provisions dealing with transmission networks, *i.e.* title VI (= articles 90 and those following it).

In the near future I see a need for societies to tackle the following challenges:

> **What** should be the content of the universal service offer: which content providers are to be included, and more precisely, which particular content services are to be included among those on offer?
– *i.e.* will the content of public or also commercial broadcasters be included? As far as the public broadcasters are concerned: are their general interest channels the only ones to be included or will their thematic channels (culture or sports channels) be also part of the universal service package? Which criteria are to be applied for the selection of commercial broadcasters: their contribution to culture and language, their coverage of events of major importance for society[40]…?

> **Who** will deliver the universal service package? Should the package be available on at least one technical platform (and should this be a platform with "universal" coverage, or with "substantial" coverage?) or on all available platforms?
– *i.e.* would it be sufficient in Flanders if Telenet guaranteed the distribution of the basic offer, or would it be necessary to make it also available on Belgacom's digital platform?

> **Affordable** access to the universal service package, or free access? Under which financial/commercial conditions should delivery and transport of the basic package take place? Who will bear the various costs: society, market players, consumers?
– *i.e.* should delivery of the universal service package be supported by public funding? Are network operators under an obligation to provide the necessary capacity for this basic offer at cost-oriented prices?

May all of you consider this paper as an open invitation to take part in this fascinating debate!

40) In the sense of Article 3a of the "Television without Frontiers" Directive.

Glossary

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 (Framework Directive)

Chapter I

Art.2
Definitions

For the purposes of this Directive:

a) "electronic communications network" means transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed;

[…]

c) "electronic communications service" means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks;

d) "public communications network" means an electronic communications network used wholly or mainly for the provision of publicly available electronic communications services;

e) "associated facilities" means those facilities associated with an electronic communications network and/or an electronic communications service which enable and/or support the provision of services via that network and/or service. It includes conditional access systems and electronic programme guides;

f) "conditional access system" means any technical measure and/or arrangement whereby access to a protected radio or television broadcasting service in intelligible form is made conditional upon subscription or other form of prior individual authorisation;

[…]

j) "universal service" means the minimum set of services, defined in Directive 2002/22/EC (Universal Service Directive), of specified quality which is available to all users regardless of their geographical location and, in the light of specific national conditions, at an affordable price;

[…]

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 (Universal Service Directive)

Article 31

"Must-carry" obligations

1. Member States may impose reasonable "must-carry" obligations, for the transmission of specified radio and television broadcast channels and services, on undertakings under their jurisdiction providing electronic communications networks used for the distribution of radio or television broadcasts to the public where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcasts. Such obligations shall only be imposed where they are necessary to meet clearly defined general interest objectives and shall be proportionate and transparent. The obligations shall be subject to periodical review.

2. Neither paragraph 1 of this Article nor Article 3(2) of Directive 2002/19/EC (Access Directive) shall prejudice the ability of Member States to determine appropriate remuneration, if any, in respect of measures taken in accordance with this Article while ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks. Where remuneration is provided for, Member States shall ensure that it is applied in a proportionate and transparent manner.

Quotations of the relevant reasons for consideration:

(43) Currently, Member States impose certain "must-carry" obligations on networks for the distribution of radio or television broadcasts to the public. 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 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.

(44) Networks used for the distribution of radio or television broadcasts to the public include cable, satellite and terrestrial broadcasting networks. They might also include other networks to the extent that a significant number of end-users use such networks as their principal means to receive radio and television broadcasts.

(45) Services providing content such as the offer for sale of a package of sound or television broadcasting content are not covered by the common regulatory framework for electronic communications networks and services. Providers of such services should not be subject to universal service obligations in respect of these activities. This Directive is without prejudice to measures taken at national level, in compliance with Community law, in respect of such services.

Proposal for a Directive of the European Parliament and of the Council on universal service and users' rights relating to electronic communications networks and services, Brussels 12.7.2000, COM (2000)392final

Article 26

"Must-carry" obligations

1. Member States may impose 'must-carry' obligations, for the transmission of specified radio and television broadcasts, on undertakings under their jurisdiction providing electronic communications networks established for the distribution of radio or television broadcasts to the public. Such obligations shall only be imposed where they are necessary to meet clearly defined general interest objectives and shall be proportionate, transparent and limited in time.

2. Member States shall ensure that the undertakings subject to 'must-carry' obligations receive appropriate compensation on reasonable, transparent and non-discriminatory terms taking into account the network capacity required.

Belgium
Ministère de la Communauté française - Décret sur la radiodiffusion du 27 février 2003

TITRE III. - L'édition de services de radiodiffusion.
[…]
CHAPITRE III. - Règles particulières aux services de radiodiffusion télévisuelle.
[…]

Section III. - Dispositions relatives au droit de distribution obligatoire

Art. 48. Le Gouvernement peut attacher à un ou des services spécifiés d'un éditeur de services de radiodiffusion télévisuelle autorisé, un droit de distribution obligatoire. L'octroi de ce droit est conditionné à la conclusion d'une convention entre l'éditeur de services et le Gouvernement. Ce droit s'exerce à l'égard des distributeurs de services conformément à l'article 82, § 2.

Art. 49. § 1er. L'octroi du droit de distribution obligatoire fait l'objet d'une demande préalable introduite par lettre recommandée avec accusé de réception auprès du ministre ayant l'audiovisuel dans ses attributions et auprès du secrétariat général du ministère de la Communauté française.
§ 2. Dans le mois de la réception de la demande, le secrétariat général du ministère de la Communauté française notifie au demandeur la prise en compte de sa demande.
§ 3. Après que le Collège d'autorisation et de contrôle ait octroyé au demandeur une autorisation visée à l'article 33, le Gouvernement transmet la demande et le projet de convention y afférent au Collège d'autorisation et de contrôle qui rend son avis conformément aux modalités prévues à l'article 133, § 4.

Art. 50. § 1er. Un droit de distribution obligatoire ne peut être attaché à un service que si celui-ci répond aux obligations minimales suivantes :
1° Mettre en valeur le patrimoine - et particulièrement le patrimoine culturel - de la Communauté française au sens large et dans ses différents aspects régionaux;
2° Proposer un nombre quotidien minimal d'heure de programmes, dont une partie à déterminer en première diffusion;
3° Proposer quotidiennement au moins un journal d'information générale.
§ 2. En outre, pour bénéficier d'un droit de distribution obligatoire attaché à un service, l'éditeur de services doit répondre aux obligations minimales suivantes :
1° Contribuer à la production audiovisuelle de la Communauté française. A cette fin, il consacre, outre la proportion visée à l'article 41, § 2, au moins 24 % de son chiffre d'affaires, tel que visé à l'article 41, § 3, à la production propre, la commande partielle ou totale, l'acquisition de programmes, les prestations extérieurs, le pré-achat et la coproduction. Le chiffre d'affaires est le chiffre engendré par les services bénéficiant du droit de distribution obligatoire.
Dans le calcul de la proportion minimale de 24 % visée à l'alinéa 1er, le pourcentage du chiffre d'affaires consacré à la coproduction ou au pré-achat équivaut à 8 fois sa valeur nominale.
2° Créer en Communauté française un nombre minimum de 60 emplois équivalent temps plein sous contrat de travail, indépendamment du nombre de services édités.
§ 3. La convention visée à l'article 48 règle les modalités d'exécution des obligations reprises aux §§ 1er et 2.
§ 4. La convention peut prévoir des obligations complémentaires à celles visées aux §§ 1er et 2 en fonction du format et de la nature du service pour lequel l'éditeur demande un droit de distribution obligatoire.
§ 5. L'éditeur de services qui dispose d'un droit de distribution obligatoire mentionne dans le rapport annuel visé à l'article 46, les éléments d'information relatifs au respect des obligations contenues dans la convention visée à l'article 48.

Art. 51. Les éditeurs de services qui disposent d'un droit de distribution obligatoire sont tenus de distribuer le service autorisé dans les 6 mois à compter de l'octroi dudit droit visé dans l'acte d'autorisation.

[…]

TITRE V. - L'offre de services.
CHAPITRE I. - Règles relatives aux distributeurs de services.
[…]

Section II. - La distribution de services par câble.

Art. 81. § 1er. Les opérateurs de réseau visés à l'article 97 garantissent la distribution sur leurs réseaux d'une offre de base comprenant au moins les services visés à l'article 82.
L'offre de base est fournie par un distributeur de services. A défaut, les opérateurs de réseau sont tenus d'exercer l'activité de distributeur en fournissant l'offre de base.
§ 2. Tout distributeur ne peut proposer d'offre complémentaire de services qu'aux seuls abonnés à l'offre de base.

Art. 82. § 1er. Les distributeurs de services visés à l'article 81, § 1er, 2e alinéa, doivent distribuer au moment de leur diffusion et dans leur intégralité les services de radiodiffusion télévisuelle suivants :
1° les services de la RTBF destinés prioritairement au public de la Communauté française;
2° les services des télévisions locales dans leur zone de couverture;
3° les services, désignés par le Gouvernement, des éditeurs de services internationaux au capital desquels participe la RTBF;
4° deux services du service public de radiodiffusion de la Communauté flamande pour autant que les distributeurs que cette Communauté autorise soient tenus de transmettre deux services de télévision du service public de radiodiffusion de la Communauté française;
5° un ou des services du service public de radiodiffusion de la Communauté germanophone pour autant que les distributeurs que cette Communauté autorise soient tenus de transmettre un ou des services de télévision du service public de radiodiffusion de la Communauté française.
§ 2. Les distributeurs de services visés à l'article 81, § 1er, 2e alinéa, doivent distribuer au moment de leur diffusion et dans leur intégralité les services de radiodiffusion télévisuelle des éditeurs de services autorisés en vertu du présent décret et bénéficiant d'un droit de distribution obligatoire.
§ 3. Les distributeurs de services visés à l'article 81, § 1er, 2e alinéa, doivent distribuer au moment de leur diffusion et dans leur intégralité les services de radiodiffusion télévisuelle désignés par le Gouvernement de tout éditeur de services de l'Union européenne et qui ont conclu avec celui-ci une convention relative à la promotion de la production culturelle en Communauté française et dans l'Union européenne prévoyant notamment une contribution financière à cette promotion.
§ 4. Les distributeurs de services visés à l'article 81, § 1er, 2e alinéa, doivent distribuer au moment de leur diffusion et dans leur intégralité les services de radiodiffusion sonore suivants :
1° les services de la RTBF émis en modulation de fréquence;
2° deux services du service public de radiodiffusion de la Communauté flamande pour autant que les distributeurs que cette Communauté autorise soient tenus de transmettre deux services sonores du service public de radiodiffusion de la Communauté française;
3° un service du service public de radiodiffusion de la Communauté germanophone pour autant que les distributeurs que cette Communauté autorise soient tenus de transmettre un service sonore du service public de radiodiffusion de la Communauté française.

Must-offer: the obligation on broadcasters to make their channels available to network providers.

EPG

[Definition taken from the Digital Television Glossary, Supplement to the IRIS Special: Regulating Access to Digital Television, published by the European Audiovisual Observatory, Strasbourg 2004]

The Electronic programming guide is an application programme that is based on the API in the set-top box. For the EPG to work, it has to be interoperable with the API and so it has to "speak its language".

The EPG is an especially important player on the digital television scene. It contains real-time information, which is more comprehensive than that of the basic navigator, on the current and future programmes of the broadcasters it covers. Using the EPG, viewers can request background and additional information about programmes. It may also contain video sequences and pictures. The contents conveyed by the EPG are broadcast along with the programmes. What channels it covers depends on the supplier of the EPG.

The distinction between the basic navigator and the EPG is frequently overlooked. In addition, the EPG may sometimes take over the function of the basic navigator when the programmes can be controlled only by an EPG, for instance one distributed by a network operator.

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