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2012-5

Must-carry: Renaissance or Reformation?

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Must-carry Regulation: a Must or a Burden?

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  - Article 31 Universal Service Directive
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Must-carry: Renaissance or Reformation?

Foreword

On 11 July 2012, the *Tribunale Amministrativo Regionale per il Lazio*, an Italian administrative court in Rome decided on a case involving the Italian public service broadcaster RAI (TAR Lazio Decision n. 6320). It found RAI guilty of having violated its charter by encrypting its free-to-air TV channels, which made it impossible for Sky Italia to carry RAI channels on its platform.

In its decision, the details of which you may find in issue 2012-8 of our electronic newsletter IRIS (http://merlin.obs.coe.int/newsletter.php), the court stresses the importance of public service content which must be "universally accessible via all technology platforms". For this very reason public service content continues to be the prime object of the so called "must-carry" rule, roughly summarized as the obligation of certain transmitting services to make broadcast channels serving clearly defined general interest objectives available to the public. This rule dates back to the emergence of commercial television, when it was introduced as a means to secure the diversity of content offers. It is recognized by Art. 31 of the EU's Universal Service Directive and part of many national laws. The history and today's reality of the must-carry rule are explained in the Lead Article of this IRIS *plus*.

As the RAI case demonstrates, however, times have changed in that providers of content serving these general interest objectives are not always keen on making their content available. A certain number of these dislike the obligation to do so free-of-charge as has been the tradition under must-carry. As a consequence, the idea of a corresponding must-offer obligation for certain content providers emerged. This gained prominence as the number of competing transmission services increased, which meant that the demand for content – especially content serving public interests – went up as well. The Lead Article of this IRIS *plus* also touches briefly on the must offer issue and it includes reflections on the future of must-carry/must-offer regulation given the multiplication of media outlets and transmission services and their increasing convergence.

The Related Reporting-section offers examples taken from seven different countries concerning the introduction, modification, application and enforcement of must-carry and/or must-offer rules taken from the past 18 months of IRIS newsletter reporting.

Some of the goals and reasoning justifying must-carry obligations are also valid for the so called "due prominence" rules, which require EPG providers to give public service content an equal or even favoured visibility in their page ranking. As with must-carry, these rules find a legal basis in EU law, namely the Access Directive, and have been introduced into national laws. Based on this parallelism, the first part of the ZOOM-section describes the European framework for EPG regulation and explains the relevant national rules of the United Kingdom and Germany. The second part of the ZOOM contrasts the EU rules on must-carry with those of the United States. Contrary to the drive for diversity that motivated European legislators to intervene in favour of public content, the US concern was one of promoting local content. This part of the ZOOM guides the reader through the history of US must-carry rules and linked thereto are some major differences between the European and the US approaches to broadcasting regulation. In addition it also sheds light on market forces which keep the must-carry debate on the boil in the US and which – in one or the other variant – matter just as much on the European side of the Atlantic.

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The Retransmission of Broadcast Programming on Cable Television in the USA: When Interests Collide

Must-carry Regulation: a Must or a Burden?

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The first must-carry rules date back to 1990, the time when space on analogue broadcasting networks was limited and when supply grew quickly due to the introduction of private broadcasters. To ensure that channels of general interest would still be transmitted, countries introduced rules to regulate the scarcely available cable capacity. The major reason for introducing these must-carry rules was to guarantee access to public service broadcasting and ensure a diverse choice of programmes. The option in the European regulatory framework of reserving distribution capacity for selected channels, is characterised by its technology-neutral formulation. A distinctive feature of these European rules is that must-carry obligations can only be imposed if the respective networks are the principal means of receiving radio and television channels for a significant number of end-users of these networks. In a market where users increasingly opt for using one provider for all their communication services, the question is justified if – apart from technical restrictions – must-carry obligations should be linked to a quantitative criterion. In this article, insight is provided into the choices made by various European countries with respect to regulating must-carry obligations and how the general European framework is applicable to national regulations. A brief comparison is made with the situation in the United States, some conclusions are drawn and thoughts are provided on the future of must-carry obligations in Europe.

1. Introduction

Must-carry rules date back to the time when space on analogue broadcasting networks was limited and when supply grew due to the introduction of private broadcasters. The major reason for the adoption of these must-carry rules was to guarantee access to public service broadcasting and ensure a diverse choice of programmes.[3] Traditionally, governments play an important role in creating, guaranteeing and protecting pluralism in society in general and in the media in particular, thus ensuring that every group of any size has an opportunity to express its views on society, that communities within a country are represented in the assortment of programmes and that each community can obtain information about opinions and ideologies differing from its own. The logic behind governmental interference in the media landscape was initially also based on the scarcity of broadcasting capacity that was to be distributed equally. Later on, it was based on the fear that private broadcasters and distributors would only focus on commercially attractive groups rather than on minorities. Since the public service channels were initially the only channels available, the government could influence the entire media landscape. When the private broadcasters emerged, this influence was reduced; must-carry rules are a potential means to retain some of this influence.

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3) B. Braverman & D. Frappier, "Digital must-carry and forced access: Government-mandated access to cable distribution networks in the US and the EU.", *Communications and Strategies*, 2003, 49, 43-66. A. Scheuer and S. Schweda, "Progress in the Must-offer Debate? Exclusivity in Media and Communication", IRIS *plus*, 2008-10. EPRA, "Plenary session on must-carry rules. Valuable Tool or Sacred Cow?", Riga, Latvia 2008.

A number of countries have so-called must-offer rules in place that are supplementary to the must-carry rules.[4] Must-carry aims at guaranteeing access to certain (broadcasting) networks for specified channels. The must-offer phenomenon has arisen from the idea that channels also need to make their content available to the networks, not only to make the (basic) package more diverse but also to guarantee the economic viability of certain distribution networks (because certain channels are deemed necessary in order to make a competitive offer). The obligation of making a channel available is then shifted from the network to the channel provider. The network and the channel provider can negotiate on the distribution of costs for transmission and copyrights to any relevant extent.[5] Must-offer obligations will only be touched upon indirectly in this article.

In the past, must-carry rules took up a relatively large part of the transmission capacity of the distribution networks, so that providers were left with limited space to decide which other television channels they wanted to transmit. With the increasing capacity of digital networks, however, the relative capacity consumption decreased (the bandwidth of one analogue channel can be used to transmit up to eight digital channels). In addition to the compulsory broadcasting of must-carry channels, significant space is left for transmitting other channels and services. In the rapidly changing media landscape, more and more critical questions are asked about the current must-carry rules. For instance, in a market where users increasingly opt for using one provider for all their communication services, the question is justified if must-carry obligations should be linked to a quantitative criterion: that is, the criterion of a significant number of end-users using the network. Another argument put forward in this discussion relates to the question if the must-carry regulations, which usually give public service channels precedence over private channels, are not unreasonably discriminatory now that the distinguishing characteristic between these two types of channels in the current media landscape is – allegedly – becoming increasingly blurred. Finally, there is the question if there is any rationale for these rules in the current media landscape, given the fact that plurality in offer already exists through the huge number of available digital channels and the increasing shift towards media consumption via the Internet. Furthermore, it is suggested that large must-carry obligations may put an unreasonable financial burden on distribution networks, which will have consequences for consumers as well.

In this contribution, an overview is provided of the regulation and case law on must-carry rules at a European level. From this perspective, it is described if and how selected European countries have implemented must-carry rules. These countries are Belgium – more specifically Flanders – France, Germany, the Netherlands, Sweden and the United Kingdom. Finally, the European and national legal contexts are compared with the regulation that applies in the United States. In the conclusion, the lessons learnt from this comparison are provided, and some thought is given to the future of must-carry rules.

2. European context

In European Union regulation, the must-carry issue is dominated by two central elements. Firstly, by Article 31 of the Universal Service Directive,[6] which sets rules with respect to universal service and user rights regarding electronic communications networks and services. Secondly, European case law is a major parameter in this context. In various cases, the European Court of Justice has

4) Alexander Scheuer and Sebastian Schweda, "Progress in the Must-offer Debate? Exclusivity in Media and Communication", IRIS *plus*, European Audiovisual Observatory, 2008-10.
5) It is also possible that the channel is provided "duty-free" (all costs, like copyright related costs, are prepaid by the provider of the channel).
6) 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). Amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (Citizens' Rights Directive).

expressed its opinion on national must-carry obligations; in these cases, rules and criteria were formulated. Both elements of the European regulatory framework with respect to must-carry rules will be explained in greater detail.

2.1. Article 31 Universal Service Directive

Article 31 Universal Service Directive
"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.

Article 31 Universal Service Directive allows member states to impose must-carry obligations. Yet, it provides that such obligations must meet further preconditions. Pursuant to paragraph 1, the obligations can only be imposed on networks that are the principal means to receive radio and television broadcasts for a significant number of end-users of these networks. This is the so-called quantitative requirement referred to earlier. Additionally, the obligations can only be imposed if they are necessary for the achievement of objectives of general interest as clearly described by every member state. The obligations must be proportionate and transparent.

On the basis of Article 31, paragraph 2, appropriate remuneration can be provided for must-carry obligations. This concerns remuneration to network providers distributing channels rather than to providers of the respective channels. The remuneration given to companies that provide electronic communications networks must be non-discriminatory, transparent and proportionate. An example of remuneration is the compensation afforded for additional copyright fees for the distribution of channels falling under the must-carry obligation.

The preamble to this Directive provides further background information in considerations 43, 44 and 45. Firstly, it is stated that member states impose certain must-carry obligations on networks for the distribution of radio and television broadcasts to the public. In this context, it is indicated that member states should have the possibility to impose proportionate obligations – in the interest of legitimate policy considerations – on companies under their jurisdiction. These obligations can be imposed pursuant to Article 31 only where (a) they are necessary to meet general interest objectives, (b) such objectives are clearly defined by member states, (c) they are proportionate and (d) they are transparent. In short, the obligations must be reasonable, which means that the obligations are proportionate and transparent, in the context of clearly defined objectives of general interest, and where appropriate they can include a proportionate remuneration. It should be noted that the obligations may also comprise the transmission of services specifically designed to enable appropriate access by disabled users. This latter option was inserted by the Citizens' Rights Directive, amending among others the Universal Service Directive.[7]

The Directive is technology-neutral with respect to the networks focused on in Article 31. These networks may be traditional networks for the distribution of channels, such as cable television networks, satellite and terrestrial broadcast networks. Also other networks, for example distribution

7) Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009.

via the Internet Protocol (IPTV), can be included in the obligation to the extent that a significant number of end-users use these networks as their principal means to receive radio and television broadcasts. The description in recital 44 of the preamble could imply that traditional distribution networks for channels are considered by definition to meet the criterion of a significant number of end-users. It is debatable, however, whether this is the correct interpretation of this recital.

In the next consideration, recital 45, it is stated that services providing content such as the offer for sale of packages of radio or television broadcasting content (meaning the content itself) are not covered by the common regulatory framework for electronic communications networks and services. Therefore, the Universal Service Directive, specifically Article 31, does not apply to these services. In addition, it is stated in this consideration that this Directive is without prejudice to measures taken at a national level, in compliance with Community law, in respect of such services.[8] The application of the Directive is therefore restricted to the effects on the available distribution capacity but does not extend to the content as such. This also follows explicitly from the Framework Directive,[9] which provides the general framework for the European regulations with respect to the telecommunication sector, in which it is stated in Article 1, paragraph 3, that the relevant directives are "without prejudice to measures taken at Community or national level, in compliance with Community law, to pursue general interest objectives, in particular relating to content regulation and audio-visual policy."

2.2. Case law of the Court of Justice of the European Union

Besides the framework of national must-carry rules pursuant to Article 31 of the Universal Service Directive, the Court of Justice of the European Union (hereinafter referred to as European Court of Justice) has a long tradition of supervision with respect to the distribution of channels. This is the second important source for the legal context of must-carry regulation. In the past, the case law of the Court focused on typical transborder issues, such as prohibitions on the distribution of channels from abroad. The Television without Frontiers Directive caught up with this case law to a large extent,[10] and was later amended in the Audiovisual Media Services Directive.[11] It stipulates that programmes that meet the provisions of the Directive cannot be refused access to national markets. National must-carry rules, too, have been submitted to the European Court of Justice several times. In this context, three cases are of particular interest. They are in chronological order: *UPC et al. v. Belgium*,[12] *Kabel Deutschland v. the Niedersächsische Landesmedienanstalt*[13] and *European Commission v. Belgium*.[14] First, the two Belgian cases are discussed, as they are related to each other, after which the German case is dealt with.

2.2.1. UPC et al. v. Belgium

The first case concerns a provision that dates back to the time before the introduction of Article 31 Universal Service Directive, namely a Belgian regulation from 2001. The rules then in place imposed the obligation on cable operators in the bilingual Brussels area to transmit all television programmes that were broadcast by "public service broadcasters falling under the powers of the French Community and those falling under the powers of the Flemish Community" and by "any other broadcaster falling under the powers of the Flemish Community or the French Community and appointed by

8) Specific national rules (like an authorisation regime) might be applicable and other European rules (such as the Audiovisual Media Services Directive) can be at stake in this context.
9) 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).
10) Council Directive 89/552/EEC 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.
11) Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in member states concerning the pursuit of television broadcasting activities.
12) European Court of Justice, United Pan-Europe Communications Belgium SA and Others v. État belge, 13 December 2007, C-250/06.
13) European Court of Justice, Kabel Deutschland Vertrieb und Service GmbH & Co. KG v. Niedersächsische Landesmedienanstalt für privaten Rundfunk, 22 December 2008, C-336/07.
14) European Court of Justice, European Commission v. Kingdom of Belgium, 3 March 2011, C-134/10.

the competent minister." Both the public service broadcasters and the private broadcasters thus fell under the must-carry obligation in Flanders. The preliminary questions submitted by the Belgian court to the European Court of Justice with regard to this regulation, concern firstly the question if the aforementioned broadcasters of the programmes falling under the must-carry obligation are granted a special right in the sense of Article 86 EC Treaty,[15] which stipulates that the member states do not take or maintain any measure that violates the rules of this Treaty with respect to public companies and companies to which they grant special or exclusive rights.

The questions relating to this point were declared inadmissible by the European Court of Justice due to the lack of the necessary legal and factual information on the competition and market aspects of the case.

The second question is about how the freedom to provide services, as laid down in Article 49 EC Treaty, should be interpreted in the case at hand.[16] This article stipulates that restrictions on freedom to provide services within the Union are prohibited in respect of nationals of member states who are established in a state of the Union other than that of the person for whom the services are intended. In its decision, the European Court of Justice states that the article must be interpreted in such a way that in principle it does not preclude a regulation of a member state on the basis of which cable distributors active in the respective state must, pursuant to a must-carry obligation, broadcast the television programmes of the private broadcasters falling under the powers of such state and appointed by these authorities.

In such case, however, the regulation must meet two requirements. Firstly, an objective of public interest needs to be pursued with the regulation, such as the protection of the pluralistic nature of the television programmes offered in the area, pursuant to the cultural policy of the respective member state. The Court states that the regulation at issue pursues an objective of general interest, namely safeguarding the pluralistic nature of the television programmes offered in the bilingual area of Belgium, and therefore fits in with a cultural policy that aims at retaining the freedom of expression of the various movements in that area – especially the social, cultural, linguistic, religious and philosophical ones – in the audiovisual sector. With respect to the question if the regulation is suitable to achieve this aim, the Court believes that this requirement is met, as the regulation guarantees that the viewers in a bilingual area have access in their own language to the information and programmes in which their cultural heritage is expressed.

Next, the Court decides on the question if the regulation is also necessary. Firstly, the Court states that although member states have a wide margin of discretion when it comes to policies aimed at safeguarding freedom of expression, the requirements imposed in the implementation of such policies must not be disproportionate to that aim and the way in which they are applied must not lead to discrimination against nationals of other member states. Therefore, must-carry obligations should first of all be subject to a transparent procedure to prevent arbitrariness. According to the Court, every broadcaster should be able to determine in advance the nature and scope of the exact conditions that need to be complied with. It should also be clear which public service obligations broadcasters will be required to fulfil as a condition for the grant of must-carry status. General policy objectives are not sufficient. The regulation also needs to be based on objective criteria to promote pluralism in a country, for instance enabling access to national and local information by means of public service obligations. However, this status cannot be granted automatically to a broadcaster and all its programmes, but it has to be based on a specific assessment of the individual television channels.

The regulation must be non-discriminatory, which means that the grant of must-carry status may not, either *de facto* or *de jure*, be subject to establishment in the national territory of the member state. If certain requirements mean that it is easier to fulfil them for broadcasters established in the national territory, they need to be linked to the content of the programmes to be broadcast and they need to be necessary for the general interest pursued.

15) After amendment of the Lisbon Treaty Article 106.
16) After amendment of the Lisbon Treaty Article 56.

In the declaratory judgment, the Court provides a brief summary: The freedom to provide services does not preclude must-carry obligations, where the respective regulation "pursues an aim in the general interest, such as the retention, pursuant to the cultural policy of that Member State, of the pluralist character of the television programmes available in that territory, and is not disproportionate in relation to that objective, which means that the manner in which it is applied must be subject to a transparent procedure based on objective non-discriminatory criteria known in advance."[17] When defining the legal framework for must-carry obligations, it seems as if the Court allowed itself to be inspired by Article 31 Universal Service Directive, which had already been adopted by the time when the decision was passed and which the Advocate General explicitly refers to in his conclusion.

2.2.2. European Commission v. Belgium

In the context of Article 31 Universal Service Directive and in the light of the decision of the European Court of Justice, Belgium adjusted the statutory regulation. The fact that the European Commission had initiated infringement proceedings as the former provision had not been amended yet, also played a part. The new legislation from 2007 again made it possible for the government to impose compulsory transmission of both public service and private broadcasters – to the extent that they were subject to the jurisdiction of the various communities – on cable operators.[18] In the opinion of the European Commission, this adjusted text was insufficient as well, and consequently the infringement proceedings were carried through. As a result, the European Court of Justice could also give its opinion on Article 31 Universal Service Directive.

In line with its previous decision, the Court again emphasised that must-carry rules as such involve a restriction on the freedom to provide services but that restriction can be permitted where they are justified by overriding reasons in the public interest. In the Belgian regulations, it is stipulated that the must-carry rules are aimed at guaranteeing pluralism and cultural diversity. A cultural policy can be an overriding reason in the public interest. The Court is of the opinion that the wording chosen reflects that an objective of public interest in the cultural field is pursued and that the legislation is suitable for achieving such objective. Supplementary to previous case law, however, the Court also states that the measure must be proportionate. In other words, the grant of must-carry status needs to be limited to those channels whose overall programme content is capable of attaining the proposed general interest objective. Therefore, it must be clarified exactly in the legislation what factors providers can rely on for determining in advance the nature and effect of the exact conditions and obligations that need to be complied with to receive the status of beneficiary of the must-carry obligation.

The Belgian regulation lacks this clarity when it states that the must-carry obligation includes "television programmes broadcast by any other broadcasters falling under the powers of the French or Flemish Communities, as designated by the King."[19] The provision does not contain any objective criteria known in advance for the choice of programmes that are to benefit from must-carry status, so that the transparency principle as laid down in Article 31, paragraph 1, Universal Service Directive has not been complied with. In order to comply with the Directive, member states are to indicate specifically which channels fall under the must-carry obligation. Furthermore, must-carry status cannot be granted automatically to all the television channels of a given broadcaster, but must be limited to the channels whose overall programme content is capable of fulfilling the proposed general interest objective. The Belgian regulation, however, does not rule out that organisations, the channels of which do not comply with this condition, are designated as well. Additionally, according to the Court, clarity should be provided on what is meant by broadcasters that are subject to the Belgian authority.

17) Case C-250/06, paragraph 51.
18) Article 13 of the Law of 30 March 1995 concerning distribution networks for broadcasting and carrying on broadcasting activities in the bilingual region of Brussels-Capital, as amended by the Law of 16 March 2007 to amend the Law of 30 March 1995 concerning distribution networks for broadcasting and carrying on broadcasting activities in the bilingual region of Brussels-Capital as well as the Law of 17 January 2003 on the rules governing the regulator of the Belgian post and telecommunications sectors.
19) C-134/10, paragraph 4.

Finally, the Court looked into the question as to whether the must-carry obligation is limited to providers of electronic networks to which a significant number of end-users subscribe. The Belgian regulation provides for the possibility of granting exemption where the number is not significant. According to the Court, this reversal is not in compliance with the Directive. It should be noted that in this case and the two other cases discussed here, the criterion of a "significant number of end-users" is not part of the questions of law. The Court concludes that the Belgian must-carry rules are not in line with the Directive.

2.2.3. Kabel Deutschland v. Niedersächsische Landesmedienanstalt

In the last case discussed here, the Kabel Deutschland case from 2008, the European Court of Justice was asked for its opinion on provisions in the regulation of the German *Land* (state) of Niedersachsen on the utilisation of the analogue part of the cable network (hence the regulation is not about digital distribution). On the basis of this regulation, the supervisory authority, the *Niedersächsische Landesmedienanstalt für privaten Rundfunk* (NLM), imposed the obligation on Kabel Deutschland to allocate the 32 analogue channels of its network as follows: 18 channels were assigned to broadcasters whose channels were classified as "specified channels" since they were already also broadcast via the terrestrial network under the Digital Video Broadcasting Terrestrial standard (DVB-T). These are programmes of both a public and a private nature that have been allowed under the authority of the NLM. One channel was allocated in part to *Bürgerfernsehen* (Citizens' television) and in part to an organisation broadcasting a programme specifically laid down by law. For the other 13 channels there were several applicants, for which the NLM determined an order of priority with due observance of Article 37, paragraph 2 *Niedersächsisches Mediengesetz* (NMedienG). This article stipulates that in the event of scarcity the NLM is authorised to determine the order, taking the regional information needs into account.

The Court was asked if Article 37, paragraph 1 NMedienG is compatible with Article 31 Universal Service Directive. Another question was if Article 37, paragraph 2 NMedienG is compatible with Article 31, when in the event of scarcity of channels an order of priority is to be determined that leads to the full utilisation of the channels available. In addition, it was asked if media services such as *telemedia* (e.g. teleshopping) are within the scope of Article 31. The Court first focused on the fact that Article 31 only allows a must-carry obligation in the event of a significant number of end-users. This criterion was considered to be met, because in Germany analogue cable reaches approximately 57% of households.

In line with previous case law, the Court then examined if it had been indicated with sufficient detail which channels were to be granted a must-carry status. The Court believed this criterion had been met via the requirement to transmit programmes which were allowed to be broadcast through the terrestrial (ether) network and the requirement that the NLM establish an order of priority in the event of scarcity. The element of "specified" channels does not include a quantitative aspect that would oppose an allocation that covers the entire analogue part of the cable network.

The next question focused on was whether the obligation imposed was proportionate. Again, the Court held – this time also referring to the Framework Directive – that Article 31 Universal Service Directive does not apply to the content of broadcasting channels and that it does not alter the measures taken by the member states in this context to the extent that they pertain to realising an objective of public interest with due observance of Community law. From Article 31 no right arises for cable operators to determine which channels they transmit; on the contrary, it limits this right to the extent that it is granted on the basis of applicable national law. The Court states that the protection of pluralism and diversity is at the basis of the German regulation, which thus focuses on an objective of public interest. The must-carry rules can be proportionate for the attainment of this objective, but in order to prevent any unreasonableness or arbitrariness, an investigation into how the mechanism of Article 37 NMedienG works and which economic consequences it has for the cable operator is required. In this context, it is relevant that the channels have been selected on the basis of criteria of pluralism and diversity of opinions. With respect to this part of the obligation the question remains if the cable operator has to deal with unreasonable obligations, to the extent that it cannot meet them under economically acceptable circumstances. According to the Court, it is up to the referring court to decide if the obligation is unreasonable. Here, the Court points to

the fact that the obligation only applies to analogue channels, not to digital channels. The Court adds that it should be determined if a remuneration needs to be granted on the basis of Article 31, paragraph 2 Universal Service Directive.

Next, the Court proceeds to consider the second part of the regulation – the possibility of providing an order of priority for the remaining channels so as to ensure that the analogue cable network is fully utilised. On the basis of the national regulation, the NLM determines the order of priority, using the contribution of the programmes or services to the diversity of the cable service as a point of departure. Again, the Court states that this is an appropriate method for ensuring the attainment of the general interest objectives referred to by that provision. A provision of national law, such as Article 37(2) of the NMedienG, constitutes an appropriate means of achieving the cultural objective referred to, since, in such a situation, it enables television viewers to receive a pluralistic and diverse range of programmes on the analogue cable network. Also with regard to this situation, the Court holds that Article 31 Universal Service Directive does not establish a right for a cable operator to choose which channels to broadcast, but limits that right to the extent that it exists under applicable national law. The fact that all channels are utilised by the regulation that aims at the protection of pluralism and diversity, does not necessarily mean that it is disproportionate. The national court needs to investigate if there are unreasonable economic consequences for the cable operator.

With regard to the question of whether or not other services are subject to Article 31, the Court states that this is determined by the definition of television broadcasting services. In principle, the article also applies to *telemedia* services.[20] The other relevant elements of Article 31, however, such as the criterion of a sufficient number of end-users, still need to be met. Forming a final opinion on this issue is primarily a task of the national court.[21]

3. National regulations

Now that the regulations and case law on must-carry obligations at a European level and the criteria arising from them have been discussed, this article will continue by assessing if and how European countries have implemented must-carry rules. Special attention will be paid to the conditions and rules for the selection of broadcasters and channels that are part of the must-carry obligations. The countries analysed are Belgium – more specifically Flanders – France, Germany, the Netherlands, Sweden and the United Kingdom.

3.1. Belgium (Flanders)

In Flanders, the Northern and Dutch-speaking part of Belgium, the government has imposed must-carry obligations on the "service distributors" in Flanders – companies providing one or more distribution services to the public through electronic communication networks. The must-carry obligation only applies to distributors making use of electronic communication networks with a significant number of end-users using these networks as their principal means to receive broadcasting programmes.[22] Every three years, the Flemish Government determines which networks have a significant number of end-users and are therefore subject to the must-carry regulations. After one year, the situation may be reviewed.[23]

20) "*Telemedia* services, such as teleshopping, broadcast by the various electronic communications networks, irrespective of the manner in which they are transmitted by those networks, are 'intended for reception by the public'. It follows that those services are 'television broadcasting services' within the meaning of Directive 89/552."
21) Case C-336/07, paragraph 70.
22) Article 185, paragraph 1 Decree on radio broadcasting and television of 27 March 2009 (Media Decree). In practice, these are the CATV networks.
23) Article 185, paragraph 3 Media Decree.

On 10 December 2010, the Flemish Minister of Innovation, Government Investments, Media and Poverty Reduction determined that the following network owners "have a significant number of end-users": Tecteo, Coditel Brabant and Telenet.[24] Actually, the only underlying condition set is that the network has a significant number of end-users that use the network as their primary source for broadcasting programmes. In practice, the must-carry obligation therefore only concerns cable networks: the three parties mentioned all operate a cable network and cover together most of the territory of Flanders.

To promote pluralism and cultural diversity, the distribution of broadcasting services is to be provided unabridged and fully. The programmes of the following parties are covered:
- all broadcasting programmes of the public broadcaster of the Flemish community,
- the broadcasting programmes of the relevant regional broadcaster,
- two radio and two television broadcasting programmes of the public broadcaster of the French-speaking community,
- the radio broadcasting programme of the German-speaking community, and finally
- two radio broadcasting programmes and the television broadcasting programmes of the Dutch public broadcasting organisations.[25]

On the advice of the Flemish media regulator (*Vlaamse Regulator voor de Media*), the Flemish Government can also decide that other broadcasting programmes, such as those from private broadcasters, qualify for must-carry status. Here, the following conditions must be complied with:[26] the broadcaster must have its own editorial staff that mainly consists of professional journalists working on a fully fledged newscast, it must provide a varied, diverse and pluralistic choice of programmes including informative and cultural programmes which consists at least for a certain percentage of programmes in Dutch, and a certain percentage of the programmes should be subtitled for deaf people and people with hearing impairments. The Flemish Government determines the percentages for the diverse and pluralistic choice of programmes and the percentage of subtitled programmes. The expenses incurred by the service distributor for the fulfilment of the must-carry obligation are to be borne by the service distributor.[27] As discussed above, the Belgian rules are to be amended due to the decision of the European Court of Justice. A draft law to that end has not been submitted yet.[28]

3.2. France

In principle, the French must-carry legislation applies to all networks, without making a distinction between cable and terrestrial networks.[29] The obligation exclusively comprises channels of a public nature, particularly the public broadcasters, ARTE (shared channel), TV5, France Ô and the parliamentary channel. In the event of digital distribution on the respective network, the other channels distributed via the digital ether are to be transmitted as well, i.e. France 4, France 5 and the entire ARTE channel. If programmes can be broadcast in high definition, the relevant programmes need to be distributed in high definition as well. Finally, any local public channels need to be broadcasted.[30]

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24) Order of the Flemish Government establishing the networks that are the principal means to receive broadcasting programmes for a significant number of end-users of these networks (10 December 2010).
25) Article 186, paragraph 3 Media Decree. As a result of Flemish-Dutch cultural co-operation the Flemish networks are obliged to carry the Dutch channels. In return, the Flemish channels are part of the must-carry rules in the Netherlands.
26) Article 186, paragraph 2 Media Decree.
27) Article 186, paragraph 1 Media Decree.
28) Due to the governmental decision of 13 October 2011 to execute Article 81, paragraph 1 of the Decree of 27 June 2005 on the audiovisual media services and the film performances, however, the must-carry provision in the German-speaking community has been brought into further conformity with the requirements that apply at a European level. See *Computerrecht* 1/2012, p. 84, nr 19.
29) Article 34-2 Loi rélative à la liberté de la communication.
30) See also the study from 2010 into the conditions for the success of local television in France on the basis of an international comparison, in which the must-carry obligation is also focused on. Available at: http://www.csa.fr/content/download/16463/308831/file/analysysmason_rapportfinal_tvlocale.pdf

Besides the must-carry regulation, the French media legislation also provides for a form of must-offer.[31] The public broadcasters and other broadcasters distributed in analogue form or free via (digital) terrestrial ether networks, are subject to this obligation. In other words, they cannot oppose the distribution of their programmes via cable networks or other distribution networks.

3.3. Germany

The Interstate Treaty on Broadcasting (the *Rundfunkstaatsvertrag*) lays down the German must-carry regulations, which the various German *Länder* (states) can detail further. The broadcasting treaty sets the general rules for the allocation, designation and use of transmission capacity for broadcasting distribution. It is up to the states to further specify the must-carry obligation and to determine the order of programming within the conditions set in the *Rundfunkstaatsvertrag*.

With respect to the analogue channelisation ("*analoge Kanalbelegung*") it has been stipulated that regulations at a state level are permitted for clearly described objectives of public interest ("*zur Erreichung klar umrissener Ziele von allgemeinem Interesse erforderlich*").[32] These regulations can be adopted especially to ensure a pluralistic (both in terms of content and number of channels) package. In this context, rules can also be set with respect to the order of priority. In practice, the supervisory authorities (*Medienanstalten*) determine the analogue channelling to a higher or lesser extent in the event of scarcity – supplementary to the more specific must-carry obligations – at a state level.

For the remainder, the must-carry regulation in Germany is to a certain extent technology-neutral: it applies to package providers on all distribution networks, with the exception of providers of open networks (UMTS, the Internet and similar networks) in so far as these do not have a dominant position. The must-carry regulation applies with respect to networks with more than 10 000 homes with a fixed connection and wireless networks with 20 000 connections. The supervisory authorities of the states determine which package providers have to comply with the must-carry obligation.

The must-carry obligation concerns the nationally financed television and radio channels and the channel of the respective region, including the programme-related services.[33] The must-carry regulation may also apply to private broadcasters that are subject to the obligation in the broadcasting treaty to distribute a regional newscast programme.[34] Finally, there must be sufficient room for the regional and local television services and open channels that have obtained a licence in the respective state. The package providers are to make one third of their digital capacity available for the digital transmission of must-carry channels.[35] If the must-carry obligation exceeds this capacity, priority must be given to the nationally financed television and radio channels and the regional channels.[36] The space reserved for the must-carry channels that is not used, is to be used by other channels – taking the consumer's wishes into account and with the various groups in society sufficiently represented – including public channels, commercial services, theme channels, foreign language services and *telemedia* and teleshopping channels.[37]

Package providers can be exempted from must-carry obligations, if they can prove to the supervisory authority of the state that another provider in the same region on the same type of network, with the same type of reception equipment and without any extra costs for the receivers, already provides must-carry channels, or if the provider can prove that another provider has met the requirements of diversity set by the must-carry regulations.[38] In principle, this is the provider's responsibility.

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31) Articles 34-4 and 34-1 Loi rélative à la liberté de la communication.
32) Article 51b, under 3 Rundfunkstaatsvertrag (RStV).
33) Article 52b, paragraph 1, under 1 RStV.
34) Article 25, paragraph 4 RStV; Article 52b, paragraph 1, under b. In Article 25, paragraph 4 RStV, two public channels are mentioned that reach the largest public at a national level. In practice, these are RTL and Sat.1.
35) Article 52b RStV.
36) Article 52b RStV.
37) Article 52b, paragraph 1, under 3 RStV.
38) Article 52b, paragraph 3 RStV.

3.4. The Netherlands

The Dutch must-carry regulation is dominated by Article 82i and Article 82k of the Media Act.[39] In the former article, it is stipulated that the provider of a broadcasting network should broadcast at least 15 television programmes and at least 25 radio programmes unabridged, unchanged and simultaneously to all households connected to the distribution network. These programmes should at least include the public television and radio programmes at a national level, the public regional television and radio programmes and two radio programmes of the national Belgian broadcasting service in Dutch. According to Article 82k, the city council of each municipality with a broadcasting network is to set up a programme council that advises the broadcasting network provider which 15 public broadcasting television programmes and which 25 public broadcasting radio programmes it should at least broadcast to all households connected to the network pursuant to Article 82i.

In 2006, the European Commission initiated so-called infringement proceedings as the Dutch must-carry obligation, that is the regulation of the basic package of 15 television and 25 radio programmes, was said to be non-compliant with the Universal Service Directive's framework.[40] Initially, the European Commission believed that the discretionary authority granted to the Programme Councils was too wide and that the legal transparency and certainty within this model was insufficient. In discussions with the European Commission, the Netherlands indicated that the model only concerned the analogue package. Eventually, the proceedings ended in 2009. The European Commission did indicate, however, that an extension of the model to the digital package could lead to new infringement proceedings.

Additionally, the case law of the European Court of Justice, particularly the Kabel Deutschland case, has played a role in a dispute between Ziggo, the largest cable television provider in the Netherlands, and the regulatory authority in this field, the Dutch Media Authority (*Commissariaat voor de Media*), which was assessed by the Council of State, the highest national court in this field in the Netherlands.[41] Judging the case, which concerned remuneration,[42] the Council of State regarded the Dutch must-carry obligation laid down in Articles 82i and 82k of the Media Act as the implementation of Article 31 Universal Service Directive. The Council of State did not address the question of whether this implementation was correct, but only stated that both articles met the transparency requirement.[43] Ziggo held that imposing a must-carry obligation, including the obligation that the cable operator must bear the costs of must-carry, was unreasonable and disproportionate and therefore in contravention of Article 31 Universal Service Directive. The Council of State limited its focus to this cost aspect and referred to the Kabel Deutschland case, where must-carry obligations were said to have no unreasonable economic consequences for the cable operator. In the opinion of the Council of State, the rule that for important reasons the advice from the programme council can be deviated from, is not in contravention of the explanation given by the European Court of Justice of what a reasonable must-carry obligation is. In this case, according to the Council of State, the Dutch Media Authority had insufficiently taken Ziggo's interest into account by merely looking at the situation in rather than at the possible impact on the activities in the entire operating area of Ziggo.

The Dutch Government has announced that it will put forward proposals for a new mechanism to select must-carry channels. These proposals should also have a more technology-neutral approach.[44]

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39) The articles were renumbered after 2008: Article 82i is in Articles 6.12 to 6.14 inclusive and Article 82k has been laid down in Articles 6.15, paragraph 1, 6.20 and 6.21.
40) The development of the infringement proceedings described here, has been extracted from Kamerstukken II (Parliamentary documents), 2009-2010, 32123 VIII, nr. 14, p. 3.
41) Council of State, Ziggo v. Dutch Media Authority, 12 May 2010, LJN: BM4162.
42) The dispute was about advice from the Programme Council with respect to the cable television network in Amstelveen (a town near Amsterdam), which had been deviated from by Ziggo. The reason for the deviation was the remuneration asked for the transmission of a programme. In the opinion of the Dutch Media Authority, there was no reason to justify the deviation from the advice in this specific case.
43) It is unclear how this relates to the criticism of the European Commission of the Dutch must-carry rules.
44) Kamerstukken II (Parliamentary documents), 2011-2012, 32033, nr 10.

3.5. Sweden

In Sweden, the must-carry rules apply to operators/administrators of public communication networks used for distributing programmes via public analogue and digital cable to a significant number of connected households. They are obligated to transmit programmes of broadcasters that hold a government licence to the public free of charge. Conditions with respect to quality, objectivity and diversity are attached to this licence.[45] The must-carry obligation can cover a maximum of four public channels. The operators are to transmit these channels without charging for any costs and without any quality loss.[46] If a network provides the possibility of transmitting analogue programmes, it is obliged to transmit at least two channels.

Owners of networks to which over 100 households are primarily connected, can be forced by the broadcasting authority to transmit programmes specifically designated for the respective region free of charge. The networks transmitting both analogue and digital signals are under the obligation to distribute the local and regional channels in both signals.[47] As the frequency capacity is limited, the Swedish Broadcasting Authority determines separately which channels are allowed to be transmitted via terrestrial ether distribution.[48] If there are special reasons that speak in favour of terrestrial distribution, the Swedish Broadcasting Authority may exempt the selected channels from distribution under the must-carry obligations.

Until 2008, the private channel TV4 was also subject to the must-carry regulation, but as it has since been included in a provider's pay package, the must-carry obligation for this channel has been cancelled. The new must-carry legislation came into effect on 1 August 2010. On 29 March 2011, the Swedish Ministry of Culture announced that the Broadcasting Authority will review the must-carry rules for cable networks in the Media Act. It should be examined to what extent supplementary services, such as teletext and support for people with impairments, have to be part of the must-carry regulation.[49] In a report, the Broadcasting Authority seems to suggest that the applicable must-carry obligations must be maintained and that the teletext signal should also be subject to this obligation.[50]

3.6. United Kingdom

In the United Kingdom, must-carry rules apply to electronic communication networks with a significant number of end-users that use this network as their primary source for receiving television programmes.[51] This means that the obligation can apply with respect to cable, satellite and terrestrial networks, as well as other networks, such as IPTV. On the basis of legislation, the must-carry rule applies to the BBC, Channel 3 (ITV), Channel 4 and Channel 5 television programmes offered in digital form.[52] Channels 3, 4 and 5 are run on a private basis, but they are considered "public service broadcasting" as they are entrusted, to varying degrees, with a public task or special obligations.[53]

45) Chapter 9, paragraph 1 Swedish Radio and Television Act 2010. These broadcasters have obtained a government licence. This licence can be obtained on the condition that the programming is independent, objective and sufficiently diverse (including news broadcasts).
46) Chapter 9, section 2 Swedish Radio and Television Act 2010.
47) Chapter 9, section 5 Swedish Radio and Television Act 2010.
48) Swedish Broadcasting Authority, "Must-carry obligation on cable and IP networks", consulted in June 2011, available at: http://www.radioochtv.se/> & <http://www.radioochtv.se/Tillsyn/Annan-tillsyn/Vidaresandning/
49) Swedish Ministry of Culture, "Regeringskansliet", consulted in May 2011, available at: http://www.sweden.gov.se/sb/d/8371
50) http://www.radioochtv.se/Documents/Uppdrag/Vidaresandningsplikt%202011.pdf
51) Section 64, paragraphs 1 and 2 Communications Act 2003, Chapter 21.
52) Section 64, paragraph 3 Communications Act 2003.
53) For instance, the public service remit of Channels 3 and 5 "is the provision of a range of high quality and diverse programming", that of Channel 4 is more detailed and among other things focused on innovation and culture (Section 265 Communications Act 2003).

The Office of Communications (Ofcom), the regulatory authority in this field, determines if and under which conditions the must-carry obligations are to be implemented. In the United Kingdom, it is customary to adopt specific regulations (implementing general legislation) if there is a concrete reason to do so. As providers already transmit the aforementioned channels of their own accord, partly due to their customers' expectations, it has not been necessary to adopt any further measures.

The State Secretary for Culture, Media and Sports is to review the must-carry obligation regularly, which may lead to adjustments. Various criteria are to be taken into account, such as network capacity and coverage.[54] In a recent report, Ofcom states that new and emerging platforms "can also become subject to must-carry obligations if they become networks which are used by a significant number of people as their principle means of receiving television programmes. Currently, we do not see any new platforms which meet this criterion, but in time new IP based platforms may emerge which do."[55]

In the United Kingdom, the implementation of a must-offer obligation for electronic communication networks and satellite[56] in conformity with the media regulation is also possible, but like the must-carry rules it has never been applied in practice. This must-offer obligation concerns the channels which are covered by the must-carry obligation.[57] According to the must-offer rules, the channels (i.e. the broadcasters) must make their content suitable for broadcasting via as many networks as possible, reaching as large a part of the intended public as possible.[58]

4. United States

The US television market is dominated by five large, commercial, national broadcasting networks (NBC, CBS, ABC, Fox and The CW). In addition, there are hundreds of "local" broadcasters,[59] which co-operate with these national providers and take over their programming for a considerable part, supplementing it with their own newscasts and sometimes other programmes of their own or of third parties. There are also many cable channels with a national choice of programmes, often thematic or target-group channels, distributed via local cable networks, such as MTV, CNN, Fox News, Disney Channel, Nickelodeon, Cartoon Network, Discovery Channel and Animal Planet, and there are pay channels via cable with premium content, such as HBO and Starz. In comparison with its counterparts in European countries, the Public Broadcasting Service in the United States (PBS) is small with very limited, primarily educational and cultural programming. The national PBS and the public service broadcasters in some states receive minimum government subsidies and exist on voluntary donations from listeners and viewers.

In 1992, the United States introduced the current must-carry rules for cable. The reason for this was that cable operators did transmit the local channels of the large broadcasting networks but not the channels of the small and independent television providers. The must-carry regulations in the United States are mainly intended to guarantee the transmission of local channels with local news and as a means to exercise power for independent broadcasters in particular (i.e. broadcasters that are not allied to the big broadcasting networks or the cable operator) vis-à-vis the cable network owners.

54) Section 64, paragraph 5-13 Communications Act 2003.
55) OFCOM, "Emphasising localness in the PSB system. A report from Ofcom to DCMS", 10 December 2010, point 30.
56) Section 273 Communications Act 2003.
57) Section 272, paragraph 1 Communications Act 2003.
58) Section 272, paragraph 3 Communications Act 2003.
59) From a European perspective, the term "local channels" can be confusing. In the United States, these can be channels with a large distribution area and scope, especially in the case of local channels in the big cities.

Every three years, both public and private broadcasters can choose between a must-carry status and a retransmission consent, also called a "may-carry status". If a broadcaster opts for must-carry, it has to make its content available free of charge to the network operators, and the network operator is allowed to transmit the content without approval. If a broadcaster opts for a retransmission consent, the broadcaster and the distributor are to reach an explicit agreement on the transmission and the remuneration. Network operators are not allowed to transmit any content from these broadcasters within their own operating area without approval.[60] Due to this principle, smaller, independent parties can opt for a must-carry status, whereas parties with a strong negotiation position can opt for the retransmission consent, in other words a may-carry status. No must-carry obligation applies to foreign channels, but in the border areas these are often transmitted.

For satellite the "carry one, carry all" principle is in effect: if a satellite operator decides to provide one local channel, it should do this for all local channels within its operating area that put in a request for it.[61] This is to prevent satellite operators from cherry picking and from transmitting subsidiaries only and thus causing harm to other providers.[62] It should be noted, however, that if a television provider provides more than one local variant of a national station, the satellite operator only has to transmit one channel.

Finally, it should be mentioned that the must-carry rules of the Federal Communications Commission (FCC) for cable operators with respect to digital television were cancelled by law on 12 June 2012. In these rules, it was laid down that the cable operators were to transmit the digital television signals in analogue form to all customers of analogue cable television, or they were only allowed to transmit these signals in digital form, provided that all customers had the required equipment to receive this signal. Additionally, the FCC had included an exception for the small cable operators to transmit the signal for High-Definition broadcasts in HD quality as well. In a Notice of Proposed Rulemaking and Declaratory Order, the FCC proposes to renew these rules and the exception by a term of three years.[63] The reactions from the market parties to this proposal are mixed; some support the proposal while others have reservations (at least initially) about such renewal.[64] At the time of writing, it is unclear what the FCC will eventually decide.

The contribution by Jonathan Perl in the Zoom section of this IRIS *plus* describes in further detail which rationale lies behind the must-carry rules in the US. The prime goal of these rules is to support localism, that is, "to promote a marketplace in which broadcast stations respond to the unique concerns and interests of the audiences within the stations respective service areas," and learn "the needs and interests of their local communities so that they may better serve these needs and interests through programming."[65] However, it is questionable whether localism is actually promoted by the current must-carry rules.

5. Conclusions

In the European context, more in particular with regard to the member states of the European Union, there are specific restrictions with respect to must-carry obligations. The European regulations are primarily to be found in Article 31 Universal Service Directive, which makes it possible for member states to impose must-carry obligations. Imposing these obligations will only be allowed, if they are necessary to realise objectives of public interest on networks that are the principal means to receive radio and television broadcasts for a significant number of end-users of these networks. Additionally, general requirements of foreseeability, transparency, necessity and proportionality apply.

60) The signal of the so-called "superstations" – channels not transmitted via satellite – is allowed to be transmitted without any approval. Federal Communications Commission, Cable Television Information Bulletin, June 2000.
61) This operating area is called the customer's Designated Market Area. This means that all channels within the relevant local market are to be provided.
62) R. Frieden, "Analog and digital must-carry obligations of cable and satellite television operators in the United States", *Media Law and Policy*, 2006-15(2), pp. 230-246.
63) http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-12-18A1.pdf
64) See among other things http://apps.fcc.gov/ecfs/document/view?id=7021902829
65) Federal Communications Comm., In the matter of deregulation of radio (part 1 of 2), 84 FCC 2d 968 (1981).

In several cases, the European Court of Justice has further specified these general conditions, especially in the cases of *UPC et al. v. the Belgian State*, *Kabel Deutschland v. the Niedersächsische Landesmedienanstalt* and *European Commission v. the Kingdom of Belgium*. In the cases discussed, the implementation of the preliminary decisions takes place at the national level. With respect to Belgium it is not known yet what kind of changes will be introduced. In Germany, the case has not been carried through before the national court. The parties have accepted the decision of the European Court of Justice, and the existing practice has been continued. On 18 November 2010, the NLM again decided that on the basis of Article 37 NMedienG Kabel Deutschland had to distribute in 2011 the aforementioned 18 programmes that were also distributed via terrestrial channels and the Bürgerfernsehen channel.[66] In addition, the order of priority of the remaining analogue channels has been determined. These are nine more channels, as Kabel Deutschland has reduced the analogue capacity from 32 to 28 channels. An obligation with respect to digital distribution has not been imposed, because the must-carry channels are available in the digital part as such. This applies to the public programmes that are available without any further costs and for the private programmes for which a limited monthly fee has to be paid.

In summary, it can be concluded on the basis of case law that a correct implementation of Article 31 Universal Service Directive does not involve the fact that the objective of public interest is to be known, that cultural policy ("pluralism and cultural diversity") is permitted as an objective of general interest, that the obligations can only be imposed for specific channels and not for broadcasting organisations in general, and that obligations can only be imposed with respect to channels that contribute to the public interest objective. Besides, case law shows that the allocation of the must-carry status must be transparent and foreseeable and must indicate which criteria are to apply. Furthermore, the criterion of a significant number of users needs to be part of the regulation, and it should be sufficiently transparent; an opt-out regulation does not suffice. Finally, the Court does not specify a lower limit with respect to a significant number of end-users; although a reach of 57% is considered a significant number of end-users in the Kabel Deutschland case, the criteria may neither *de facto* nor *de jure* discriminate on the basis of the location of establishment. Additionally, the requirements must be proportionate and may not have any disproportionate economic consequences for market parties. In this context, a link is made with Article 31, paragraph 2 Universal Service Directive, which provides for the possibility of remuneration as a compensatory measure.

What is apparent from the overview of the national must-carry regulation is that in the United Kingdom, Germany and Flanders, the must-carry regulations apply to all networks to the extent that they are the primary source for television reception for a significant number of users. In France, Sweden and the Netherlands the must-carry obligations apply to specific networks: in France they apply to the traditional cable television networks and in Sweden and the Netherlands for the time being only to communication networks via cable. For all countries the obligations apply to the providers of these networks.

In the European countries under study, the must-carry obligation comprises a number of specifically described programmes of a public service broadcasting nature including the national public service broadcasters as such but also cultural channels (in France) or channels regarded as public service channels (in the United Kingdom). In Flanders, two Dutch public service channels are transmitted as well.[67] In Germany, the regulator has the authority to fine-tune the composition of the analogue package on the basis of pluralism considerations. This is in addition to the specific must-carry obligations that apply in Germany. In the other European countries under study, it is the network provider's responsibility to determine the selection for the remaining channels.

66) NLM, Presse-Information nr. 16/2010, 18 November 2010 ("NLM legt Rangfolge für Fernsehprogramm im analogen Kabel neu fest – lokales und regionales Fernsehen erhält Kabelplatz").
67) As a result of Flemish-Dutch cultural co-operation. In the Netherlands, Flemish channels are therefore part of the must-carry rules.

In the German must-carry regulation, a clear upper limit is set to the transmission capacity that can be taken up by the must-carry rules: a maximum of one third of the (digital) transmission capacity. In the United Kingdom, the must-carry obligation can be restricted or extended upon evaluation and with due observance of the prerequisites. In the other countries – Sweden, Belgium, France and the Netherlands – no explicit maximum has been specified for the transmission capacity utilised. The German must-carry regulations stand out from the regulations in other countries in that they clearly describe when the platform has a significant number of users. In the United Kingdom, Sweden, France and Flanders, this decision is left to the Minister or regulator.

Like in France, in the US the must-carry obligation applies to specific networks; it applies to the traditional cable television networks. In the United States, there is no public service broadcasting in the sense of the Western European model. Consequently, there is no legal must-carry obligation with respect to public service broadcasters in the United States. Must-carry rules for cable apply to channels that opt for it (including public service broadcasting), with the result that they have to make their content available free of charge. As the German rules, the US must-carry regulations set a clear upper limit to the transmission capacity that can be taken up by the must-carry rules: a maximum of one third of the (digital) transmission capacity.

What is apparent from the overview of the national must-carry regulations is that in a number of countries the must-carry regulations apply to all networks to the extent that they are the primary source for television reception for a significant number of users, while in others the must-carry obligation applies only to traditional cable networks. The trend is clearly towards a more technology-neutral approach. This means newer forms of distribution such as IPTV and digital terrestrial broadcasting are already or will be affected.

As far as the selection of channels is concerned, the jurisprudence of the European Court of Justice has an increasing impact. In the European countries under study the must-carry obligation for the channels of public service broadcasters remains unaffected. Going beyond these channels requires legally convincing arguments. In some countries, must-carry obligations therefore also apply to specific channels of private broadcasters. This is possible, for instance, when earlier considerations of diversity and pluralism have been taken into account (e.g. when scarce frequency capacity needs to be allocated). In such a case, the allocations granted become a basis for making the respective channels part of a must-carry obligation on other distribution networks. This restrictive interpretation, together with the digitalisation of distribution (and the reduction of analogue distribution), has a mitigating effect on the scope of the must-carry obligations.

The national obligations to reserve distribution capacity for the compulsory transmission of selected channels have to comply with the European framework. As mentioned, this includes the restriction that must-carry obligations can only be imposed if the respective networks are the principal means to receive radio and television channels for a significant number of end-users of these networks. In a market where users increasingly opt for using one provider for all their communication services ("triple play"[68]), the question is justified if – apart from technical restrictions – must-carry obligations should be linked to a quantitative criterion. For example, in the European regulatory framework, several obligations apply to telephony service providers in the interest of end-users, regardless of the size of the provider.

An additional aspect that might be taken into account when determining the scope and nature of must-carry obligations is the financing of must-carry. Firstly, it has to be considered whether the Directive requires that adequate remuneration be paid to the distributors or package providers on whom the obligation is imposed in order to compensate for must-carry obligations. Secondly, parties on which a must-carry obligation without remuneration has been imposed, may tend to transfer these costs to the end-users, which can result in less individual choice and a higher price.

68) One service provider is responsible for telephony, Internet access and the distribution of radio and television programmes.

Finally, the analysis shows that the present regulation in all countries solely focuses on traditional must-carry. Possible new must-carry issues might arise now that traditional channels are becoming more and more interactive and the number of new services such as catch-up television is growing. Also, related to the must-carry topic, is the broader context of the ability to find channels. A must-carry obligation has little meaning if the user is not aware a channel with must-carry status exists or if he cannot find it. In this context it should be noted that some countries have introduced regulation on Electronic Programme Guides (EPGs). Both in the UK and in Germany so-called "due prominence" or "appropriate prominence" regulation exists that should make certain must-carry programmes (primarily public broadcasting) more easily findable. This topic is further explored in the Zoom section.

IRIS plus
2012-5 p.25

Must-carry on the March

Imposing must carry-rules means intervening in the free market. Consequently the European Commission keeps a close eye on how its member states "practice" must-carry. This is underlined by the report on Bulgarian selection procedures for "must-carry" programmes. The Romanian regulatory authority provides an example for how must-carry rules are enforced within a country.

Iceland, Kazakhstan, Lithuania, Poland, Romania and Russia have introduced new must-carry and/or must-offer provisions in their regulations concerning broadcasting or reviewed the existing one. Some of the rules contain remarkable details such as the empowerment of the President of the Russian Federation to approve the list of must-carry channels or the Romanian procedural rules addressing the arrangements to be had between distributors and broadcasters for must-carry services.

I. Control

Bulgaria

European Commission Commences Infringement Procedure against Bulgaria

Rayna Nikolova
New Bulgarian University

The European Commission has launched an infringement procedure against Bulgaria over irregularities in the selection procedures for the companies to build the platforms for digital distribution of radio and television programmes (multiplexes, see IRIS 2011-4/12). Reportedly, in the Commission's view, the selection method includes some discriminatory conditions, such as the requirement that bidders shall not perform television activities abroad. Applying the latter condition, the Austrian company ORS was disqualified from the selection process. [...]

The third Commission's remark refers to the requirement that there are some mandatory "must-carry" programmes to be broadcast by the multiplexes. In 2009 the mandatory status was granted to bTV and Nova TV (see IRIS 2009-4/7) and in 2010-2011 such a status was given to bTV Action, TV7, MSAT, Darik and BBT. According to the European rules such an obligation can be applied only in exceptional cases.

Now, Bulgaria has two months to reply to the Commission's remarks. The tender for four out of the total six multiplexes, including the public multiplex, which would broadcast the programmes of the Bulgarian National Radio and the Bulgarian National Television, was won by the Latvian company Hannu Pro. Two of the frequencies have been granted to Towercom, which was subsequently acquired by NURTS Bulgaria - a joint-venture between the Bulgarian Telecommunications Company EAD and the offshore Cypriot company Mancelord Limited (see IRIS 2011-4/12) represented by the majority shareholder of the Corporate Commercial Bank.

IRIS 2011-7/11

Romania

Severe Sanctions for Breaching Audiovisual Regulations

Eugen Cojocariu
Radio Romania International

The *Consiliul Naţional al Audiovizualului* (National Council for Electronic Media - CNA) imposed in February 2012 numerous severe sanctions on several Romanian television stations for breaching audiovisual rules with regard to the right to private life; the right to one's own image; the protection of reputation and human dignity; the limit of advertising; the modification of rebroadcasting without permission; and the "must-carry" principle (see inter alia IRIS 2011-1/44, IRIS 2011-6/31, IRIS 2012-1/38, and IRIS 2012-2/32). [...]

Furthermore, one of the major cable television services, Internet and telephony providers, RCS&RDS, was sanctioned several times for breaching the Audiovisual Law. It was fined on 16 February 2012 for breaches of Arts. 74 (3) and 82 (2), providing that the programme offer can only be modified with the CNA's approval and that providers have to rebroadcast at least two local programmes in an area. RCS&RDS stopped the transmission of local station Info TV Arad and

introduced two more local channels (TV Arad, TVRM Educaţional) in its offer in Arad (western part of Romania) without approval. Previously, RCS&RDS had been sanctioned for breaching Arts. 74 (3) and 82 (1) ("must-carry") Audiovisual Law. On 31 January 2012 the provider was fined because it eliminated from its offer in Bucharest and other 25 cities the channel Naţional 24 PLUS, which is included in the "must-carry" index. One week before, RCS&RDS had received a public warning for similar breaches with regard to Antena 2 which was cut from the minimum subscription offer in 25 cities. On 23 February 2012, CNA issued the 2012 "must-carry" index, which includes both, Antena 2 and Naţional 24 PLUS. [...]

- *Topul staţiilor TV pentru 2012 în vederea aplicării principiului "must-carry"* (2012 TV index for "must carry" principle)
  http://merlin.obs.coe.int/redirect.php?id=12296

IRIS 2012-4/36

II. New Provisions

Iceland

New Media Law in Iceland

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Iceland and Reykjavik University in Media Law

On 15 April 2011 the Icelandic Parliament adopted a new media act, marking an end to a seven-year long struggle to have such an act enacted. In 2004 the President had vetoed a media law that foresaw ownership restrictions. Since then many different versions of media law bills have been presented in Parliament, but with no result until now.

The Act implements the Audiovisual Media Services Directive. It includes many other important changes to the existing legal framework for the media. The Act replaces the 2000 broadcasting act, as well as the 1956 press act. [...]

The new Act introduces for the first time in Icelandic law must-carry and must-offer provisions in television broadcasting, thus regulating the relationship between media service providers and network operators. There are exceptions: for example a network operator is not obliged to carry a TV broadcast if it takes up more than a third of the operator's capacity. Parties are obliged to make sure that future agreements with rightsholders reflect those provisions. If there is disagreement over payments between the parties the Post and Telecoms Authority will rule on the matter, subject to court review.

- *Lög um fjölmiðla - Lög nr. 38 20. apríl 2011* (Media Act n. 38 of 20 April 2011)
  http://merlin.obs.coe.int/redirect.php?id=13180

IRIS 2011-6/22

Kazakhstan

Broadcasting Law Enters into Force

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On 18 January 2012 Kazakhstan President Nursultan Nazarbaev signed into law the Statute "On television and radio broadcasting", adopted earlier by the national legislature. The Act consists of six chapters and 43 articles. It enters into force 2 March 2012. […]

The Statute regulates some aspects of the digital switchover. They involve, in particular, the establishment of a national operator for digital infrastructure, as determined by the Government (Art. 25). Must-carry channels shall be determined every three years by the Government taking into account the recommendations of the Commission on Development of Broadcasting to be established by the Government and acting in accordance with by-laws as approved by the Government (Arts. 11 and 12). […]

- *Закон Республики Казахстан от 18 января 2012 года № 545-IV «О телерадиовещании» (Statute of the Republic of Kazakhstan "On television and radio broadcasting" No. 545-IV, Kazakhstanskaya pravda, 31 January 2011, No. 33-34.)*
  http://merlin.obs.coe.int/redirect.php?id=15686

IRIS 2012-3/28

Lithuania

Rules on the Licensing of Broadcasting and Re-broadcasting Activities Adopted

Jurgita Iešmantaitė
Radio and Television Commission of Lithuania

On 13 April 2011 the revised Rules on the Licensing of Broadcasting and Re-broadcasting Activities came into force. […]

The revised Rules also specify the must-carry rules. According to the provisions of the Rules the RTCL on its initiative or on request of a broadcaster can grant a must-carry programme status for another television programme when envisaged by the Law, or exempt the obligatory television programme from re-broadcasting. When taking such decisions, the RTCL takes into consideration the artistic value of the television programme, its relevance for the viewers residing within the territory of the licensed activity of the re-broadcaster as well as other criteria provided for in the revised Rules.

The Rules oblige the RTCL to publish on its website the drafts of the RTCL's decisions concerning a must-carry television programme or an exemption of such for public consultation.

- *Transliavimo ir retransliavimo veiklos licencijavimo taisyklės, patvirtintos 2011-04-01 Kultūros ministro įsakymu Nr. ĮV-281-120* (Rules on Licensing of Broadcasting and Re-broadcasting Activities, adopted by decision No. ĮV-281 of the Minister of Culture)
  http://merlin.obs.coe.int/redirect.php?id=13212

IRIS 2011-6/23

Poland

New Regime of Must-carry / Must-offer

Małgorzata Pęk
National Broadcasting Council of Poland

On 30 June 2011 the Polish Parliament enacted the Act on the introduction of terrestrial digital television. Most of its provisions entered into force on 10 August 2011, the remainder of the provisions on 26 August 2011.

The Act establishes the mode of the introduction of DTT, the obligations of the operators of DTT multiplexes I and II (MUX 1 and 2) as well as the obligations of the broadcasters of programme services set on MUX 1 and 2 with regard to the public information campaign about DTT.

The Act also contains significant changes to the Broadcasting Act and Telecommunications Law. One of these changes is the introduction of a new legal must-carry regime within the Broadcasting Act.

Each operator retransmitting programme services (in the following referred to as "operator"), with the exception of an entity that retransmits programme services on the DTT platform ("DTT platform operator"), is obliged to retransmit the public service channels (Telewizja Polska I, Telewizja Polska II) and one regional television channel broadcast by the public service broadcaster - Telewizja Polska S.A.

Moreover, such an operator is obliged to retransmit those programme services that were broadcast on the basis of a broadcasting licence in analogue form terrestrially on the day of the entering into force of the Act on the introduction of terrestrial digital television, by the four commercial broadcasters: Telewizja Polsat S.A., TVN S.A., Polskie Media S.A., Telewizja Puls S.A. (namely the channels: Polsat, TVN, TV4 and TV Puls). These rules apply to all operators regardless of the technical mode of distribution, so they are basically technologically neutral (with the sole exception of retransmission by DTT platform operators, since these channels are broadcast on DTT platforms anyway).

These broadcasters cannot refuse to give their consent to the retransmission of the above-mentioned channels nor demand financial consideration for granting such consent. They are obliged to make these channels available free of charge on the motion of the operator within 14 days of receiving such a motion. The operator is obliged to retransmit these channels and to inform viewers that these channels are also available free-to-air and free of charge in digital form via terrestrial diffusion.

The Chairman of the Polish National Broadcasting Council ("NBC") conducts an analysis of the realisation of these requirements at least once every two years, in guidance with the public interests goals in respect to the provision of information, the making available of culture and arts to the general public, the facilitation of access to education, sports and science, as well as the popularisation of civic education. The Chairman of the NBC presents the results of the analysis to the Minister of Culture and National Heritage, who may take appropriate steps to propose amendments to the above-mentioned must-carry / must-offer regime, taking into account the need to keep these rules transparent, proportionate and objectively necessary.

- *Ustawa z dnia 30 czerwca 2011 r. o wdrożeniu naziemnej telewizji cyfrowej* (Act on the introduction of terrestrial digital television of 30 June 2011)
  http://merlin.obs.coe.int/redirect.php?id=15497

IRIS 2011-10/35

Romania

New Decision on the Granting and Modification of Rebroadcasting Notifications

Eugen Cojocariu
Radio Romania International

The *Consiliul Naţional al Audiovizualului* (National Council for Electronic Media – CNA) approved on 2 February 2012 Decision no. 72 on the conditions for granting and modifying a rebroadcasting notification. It was published in the Official Journal no. 118 of 16 February 2012 and replaced CNA Decision no. 12/2003 (see inter alia IRIS 2010-4/37, IRIS 2011-6/30 and IRIS 2012-2/32).

According to the Decision, any person who intends to distribute TV and/or radio programme services has to request, under Art. 74 of the Audiovisual Law no. 504/2002, a rebroadcasting notification. The applicant has to fill in the Decision's Appendix 1 with relevant personal data and data about the electronic communications network; a copy of the certificate issued by the *Autoritatea Naţională pentru Administrare şi Reglementare în Comunicaţii* (National Authority for Administration and Regulation in Communications – ANCOM), which confirms that it offers electronic communications networks/services; the structure of rebroadcast programme services (Appendix 2) in line with Art. 82 Audiovisual Law with regard to the "must-carry" principle; the rebroadcasting acceptance/rebroadcasting contract. The provider can air the rebroadcast programme services offer only after obtaining the rebroadcasting notification. Any modification of the provider's identification data has to be notified to the CNA within 30 days. If the provider intends to modify its rebroadcasting offer, the same steps as above have to be taken. The Council is bound to decide on the modification of the offer within 30 days. If, according to Art. 75 (3) Audiovisual Law (breaches of Art. 39 - programmes that seriously impair the physical, mental or moral development of minors; and Art. 40 - programmes comprising incitement to hatred due to race, religion, nationality, gender or sexual orientation), the Council temporarily limits the right of free-to-air rebroadcasting for a programme service, the providers will suspend the service as provisioned in the decision.

The rebroadcasting notification can be withdrawn under the following circumstances: upon the holder's request; if there is a cease of the right to provide electronic communications networks/ services, decided by ANCOM; and in the case of an application of Art. 74 (4) Audiovisual Law (service provider distributing a programme service without rights). If a rebroadcasting notification holder wants to sell it to a third party, it has to ask the Council for permission and the new holder has to take the same steps as the former holder.

The "must-carry" index has to be published by the CNA until 1 February. The index also includes the programme services declared by private broadcasters to be free-to-air in descending annual audience order measured and communicated until 15 January each year by the Asociaţia Română pentru Măsurarea Audienţelor (Romanian Association for Audience Measurement – ARMA).

The interested broadcasters will declare (Appendix 3) until 15 January at the latest for the respective year in which programmes will be free-to-air, without any technical or financial condition (which also means free and unconditioned access to the uncoded/unencrypted signal). The declaration is valid until 15 January of the next year. The "must-carry" list is applicable to all service distributors, except those using public networks with Direct-to-Home satellite access for rebroadcasting.

Distributors have to ask the broadcaster in written form within seven days for the annual rebroadcasting permission for every "must-carry" service. A lack of written response within 15 days after the release of the "must-carry" index is considered tacit approval. The distributors are obliged to insert into their offer the programmes included in the "must-carry" index within 30 days after its release. They are obliged to assure for every "must-carry" programme the same quality of rebroadcast signal in the electronic communication network as the signal quality offered by broadcasters.

If a broadcaster decides during a year, to give up or it is no longer compliant with the legal conditions for the "must-carry" regime for a certain programme service, the Council will announce this publicly on its website.

Infringements of the Decision could be sanctioned in accordance with to the Audiovisual Law.

- *Decizia nr. 72 din 2 februarie 2012 privind condiţiile de eliberare şi modificare a avizului de etransmisie* (CNA Decision no. 72 of 2 February 2012)
  http://merlin.obs.coe.int/redirect.php?id=15708

IRIS 2012-4/35

Russian Federation

Regulation of Broadcasting and Internet now Part of Media Statute

Andrei Richter
Moscow Media Law and Policy Centre

The Federal Assembly (parliament) of the Russian Federation has adopted the Statute "On amending some legal acts of the Russian Federation in order to improve legal regulation in the sphere of mass information" (*О внесении изменений в отдельные законодательные акты Российской Федерации в связи с совершенствованием правового регулирования в сфере средств массовой информации*). The Bill was introduced on 29 November 2010 by the chair of the parliamentary committee on the mass media, adopted in the first reading by the State Duma (lower chamber) on 22 February 2011, and in the 2nd and 3rd readings in one day - on 3 June 2011. The Council of the Federation (upper chamber) approved it on 8 June 2011, and the statute was signed by the President of the Russian Federation on 14 June 2011. Most of the provisions of the statute are to enter into force on 10 November 2011.

About 90% of the statute amends and expands the Statute of the Russian Federation "On the mass media" (No. 2124-I of 27 December 1991). In several ways the new act counteracts the recent Resolution of the Plenary of the Supreme Court of the Russian Federation "On Judicial Practice Related to the Statute of the Russian Federation 'On the Mass Media'" of 15 June 2010 (see IRIS 2010-6/40 and IRIS plus 2011-1). [...]

Article 32-1 gives powers to the President of the Russian Federation to approve the list of must-carry channels on all platforms (see IRIS 2009-10/25). The channels that enter the list obtain licences without tender (competition, auction). [...]

- *О внесении изменений в отдельные законодательные акты Российской Федерации в связи с совершенствованием правового регулирования в сфере средств массовой информации* (Statute "On amending some legal acts of the Russian Federation in order to improve legal regulation in the sphere of mass information", *Rossiyskaya gazeta*No. 129 of 17 June 2011)

IRIS 2011-7/42

Decree on Must-carry Channels Amended

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President Dmitry Medvedev of the Russian Federation signed on 12 May 2011 a decree amending his earlier decree of 24 June 2009 on must-carry TV and radio channels (see IRIS 2009-10/25).

This act amends the list of the eight mandatory TV channels on all platforms (including the first multiplex of digital terrestrial television) as several of them have changed their names (and programme policies) since 2009. Channel Sport has become Rossiya-2 with gradually decreasing number of sports broadcasts at the expense of entertainment fare, channel Kultura was rebranded as Rossiya-K, and Russian Information Channel as Rossiya-24. Another one - Petersburg-5th Channel has changed its remit as a regional channel and now presents itself as a federal broadcaster 5th Channel (see IRIS *plus* 2010-1). The act also specifies that a channel mentioned in the original decree as "channel for children and youth" is indeed a brand new channel Karusel by a state-run joint stock company of the same name.

Thus the list of TV channels includes now: Rossiya-1, Rossiya-2, Rossiya-24, Rossiya-K (all belong to the state broadcaster VGTRK), Channel 1 (run by the state and friendly businesses), NTV run by a Gazprom-owned company, Petersburg-5th Channel (owned by another private broadcaster), and Karusel. The list of radio channels (all belong to VGTRK) remains unchanged.

As expected the decree also expands powers of the state broadcasting communications network RTRS (see IRIS Special: The Regulatory Framework for Audiovisual Media Services in Russia, 2010) in regards to contracting private networks and facilities for the purpose of distribution of the must-carry channels. It also lets RTRS the use of the first multiplex of Digital Terrestrial Television to deliver an additional, a regional one, in each "broadcasting zone" of Russia, apparently a channel of its own choice. The decree imposes the right of the Government to set tariffs for services provided by private operators to RTRS on all platforms, as well as tariffs for RTRS services.

- *О внесении изменений в Указ Президента Российской Федерации от 24 июня 2009 г. N 715 "Об общероссийских обязательных общедоступных телеканалах и радиоканалах" и в перечень, утвержденный этим Указом* (Decree of the President of the Russian Federation of 12 May 2011 No. 637 "On amending the Decree of the President of the Russian Federation of 24 June 2009 No. 715 "On National Mandatory Free Television Channels and Radio Stations" and the list approved by this Decree", *Rossijskaja gazeta* No. 104 of 18 May 2011)

IRIS 2011-7/41

Due Prominence in Electronic Programme Guides

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The digitisation of television broadcasting has facilitated an exponential growth both in the number and the diversity of programmes and channels. Electronic Programme Guides (EPGs) help consumers to find their way in this abundance in offer. EPGs serve as a classical listing magazine or broadcasting guide with extensive information on television programmes, like VCRs they enable the recording of programmes, as search engines they allow users to look for content on the basis of a keyword and finally, EPGs list the most favoured programmes on the first page, either on the basis of popularity, the personal profile of the consumer or on the basis of agreements with particular broadcasting agencies. Some governments have adopted "due prominence" rules that require EPG providers to give public channels an equal or favoured treatment in their page ranking.

I. Introduction

In an environment where the number of television programmes and channels is constantly growing, the importance of adequate and effective search engines and navigation systems increases. The programmes that are listed on the first page of the EPG will attract more viewers than those on the second or third page. Some national regulators have implemented so-called "due prominence" rules, which require EPG providers to give public broadcasters or other selected channels appropriate prominence in their page-ranking system. Like must-carry rules, they serve as a way for governments to retain power over the changing audiovisual landscape and to preserve their influence through the public channels by giving these channels a preferred position. Since "[i]n the standard terrestrial television set, the public service channel is usually "number one on the dial" but in an EPG, it may be relegated to any other number, which could disadvantage it vis-à-vis competing channels",[2] the due prominence provision is a way to maintain the status quo.

When approaching this development, regulatory authorities will have to strike a balance between their neutrality on the one hand and their policy to stimulate diversity on the other. EPGs can be regulated under media law doctrines, which emphasise the need for governmental guarantees regarding the quality of and diversity in programming. EPGs can also be approached by relying on competition law principles, with their particular emphasis on fair competitive opportunities in the market. These may be used, for example, to lay restrictions on agreements between EPG providers and broadcasters with respect to the prominence given to particular programmes. Additionally, EPG regulation is affected by general consumer law, in which transparency, prohibitions on unfair commercial practices and restrictions and limitations on contract terms play a central role. This Zoom section shortly describes the European framework for EPG regulation contained in the Access Directive and then focuses on the national regulation of the United Kingdom and Germany.

1) Bart van der Sloot is a Researcher at the Institute for Information Law (IViR), University of Amsterdam.
2) O. Näränen, "European Digital Television: Future Regulatory Dilemas", *The Public*, 2004, 9-4, p. 26.

II. European Access Directive

Since the pursuit of pluralism and fair and equal competition can be countervailing interests,[3] EPG regulation often finds itself torn between these two core values. Although the main function of EPGs is to facilitate access to content by providing information on the content available,[4] and consequently some regulators have approached them from this perspective,[5] it seems apparent that EPGs do not qualify as television programmes or content services.[6] EPGs balance on a thin line between content providers and access services: two categories which in European legislation are regulated under two different regimes.[7] Currently, EPGs are regulated under the Access Directive,[8] the core principle of which is that bottleneck issues cannot be tackled only by anti-competitive rules but that public policy priorities, for instance the preservation of pluralism, must also be taken into account.[9]

The Access Directive contains the obligation to provide conditional access on fair, reasonable and non-discriminatory terms[10] and allows national regulatory authorities to impose these obligations on EPGs, to the extent that is necessary to ensure accessibility for end-users to specified digital broadcasting services.[11] In contrast to Application Program Interfaces (APIs), in relation to which the European Commission has reserved the right to implement standards,[12] the regulation of EPGs with regard to access issues is left entirely to the member states.[13] This is important since, traditionally, EU law is more concerned with competition regulation while national law is more concerned with the protection of pluralism.[14]

Besides the conditions regarding fair, reasonable and non-discriminatory terms of access, the article contained in the Access Directive regarding Conditional Access Systems (CASs) provides that member states may "impose obligations in relation to the presentational aspect of electronic programme guides and similar listing and navigation facilities."[15] However, it may not always be easy to distinguish between access and presentational aspects, because "the presentational aspects of an EPG design are crucial in determining if and how services are accessible to end users."[16]

It may be concluded that the regulation of EPGs is left to the member states; the European framework stipulates that they may impose obligations on providers both with regard to access issues and with regard to presentational aspects. There is no harmonisation of the national approaches towards EPG regulation in the EU. Among existing provisions regulating EPGs, the British and the German approach are the most developed and detailed; they will therefore be discussed below.

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3) N. Helberger & A. Springsteen, "Workshop Report: Vertical Limits – New Challenges for Media Regulation? (Summary of the Discussion)", p. 8. In: IRIS Special, *Regulating Access to Ditial Television. Technical Bottlenecks, Vertically-integrated Markets and New Forms of Media Concentration*, European Audiovisual Observatory, Strasbourg 2004.
4) N. Helberger, "Directive 2002/19/EC 'Access Directive': Access Regulation", p. 1136. In: O. Castendyk, E. Domming & A. Scheuer, *European Media Law*, Alphen aan de Rijn, Wolters Kluwer, 2008.
5) T. Gibbons, *Regulating audiovisual services*, Farnham, Ashgate, 2009, p. 61.
6) O. Castendyk & L. Woods, "Directive 89/552/EEC 'Television without Frontiers' Directive, article 1 (definitions)", p. 282. In: O. Castendyk, E. Domming & A. Scheuer, *European Media Law*, Alphen aan de Rijn, Wolters Kluwer, 2008. H. Galperin, "Can the US transition to digital TV be fixed? Some lessons from two European Union cases", *Telecommunications Policy*, 2002-26, p. 7.
7) T. Kleist, "Begrüßung und Einführung". In: EMR, "Die Zukunft der Fernsehrichtlinie: Dokumentation der Veranstaltung des Instituts für Europäisches Medienrecht (EMR) in Zusammenarbeit mit der Europäischen Rechtsakademie Trier (ERA)", Baden-Baden, Nomos, 2005, p. 11.
8) 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).
9) See also: N. Nikolinakos, "The new legal framework for digital gateways – the complementary nature of competition law and sector specific regulation", *European Competition Law Review*, 2000-21, p. 1.
10) Article 5 § 1 sub b Access Directive.
11) Recital 10 Access Directive.
12) Articles 17 and 18 Framework Directive. See also recital 6 of that directive. Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive).
13) W. Schulz, "Extending the Access Obligation to EPGs and Service Platforms?". In: IRIS Special, *Regulating Access to Digital Television. Technical Bottlenecks, Vertically-integrated Markets and New Forms of Media Concentration*, European Audiovisual Observatory, Strasbourg 2004, p. 49.
14) Schulz (2004), p. 53.
15) Article 6 § 4 Access Directive.
16) N. Helberger, *Controlling access to content: regulating conditional access in digital broadcasting*, The Hague: Kluwer Law International, 2005, p. 230.

III. United Kingdom

In the UK, the regulation of EPGs is based on the doctrine of "due prominence" for public channels. Following an obligation stipulated by the Communications Act of 2003,[17] the national regulatory authority, the Office of Communications (Ofcom), drew up the Code of practice on electronic programmes guides (hereinafter "the Code")[18] to be respected by EPG providers. In fulfilment of section 310 Communications Act the Code contains rules regarding the due prominence of public service channels.[19]

According to the Code, Ofcom considers that "appropriate prominence" permits a measure of discrimination in favour of public service broadcasting channels. EPG providers must be able to objectively justify their approach to the requirement for appropriate prominence. Ofcom does not give details on what appropriate prominence means, because in its opinion there are many possible ways in which EPGs could display information about public television programmes. In considering whether a particular approach to listing public service channels constitutes appropriate prominence, Ofcom will take into account both the interests of citizens and the expectations of consumers. Ofcom does state that the principles of the Code "would justify a decision by an EPG operator using a menu-based approach to position public service channels no more than 'one click' from the home page. They might also justify giving public service channels first refusal on vacant listings higher in the category that they were placed."[20]

When EPG providers enter into contract with broadcasters, they should ensure that the terms are fair, reasonable and non-discriminatory and comply with an objectively justifiable method of allocating listings, for example objectively justifiable "first come, first served" methods, alphabetical listings and listings based on audience shares. It is prohibited to give undue prominence to a channel to which the EPG providers are connected or to condition a contract for any EPG service or feature on exclusivity, except where required in the light of the appropriate prominence provisions.[21]

During the consultation period for the draft Code, the discussion regarding the appropriate or due prominence rule was primarily concerned with free and fair competition in the market and only to a limited extent with diversity and pluralism. Although at the time a number of respondents had hoped for more detailed criteria on appropriate prominence, Ofcom stated that there were a number of different approaches that could be justified and that it believed that broad and general guidance would maximize the scope for diversity, to the benefit of consumers.[22]

This view was repeated frequently by Ofcom, for example in 2008 when Ofcom held its Second Public Service Broadcasting Review. In that report, Ofcom also seemed to downplay the role of EPG prominence by stating that "[o]n one hand, an active trade in EPG positions in the multi-channel sector suggests that broadcasters believe their channels can increase viewing in higher EPG positions. However, there is equal evidence that viewers will seek out particular channels and content irrespective of EPG position […] – many channels attract significant share despite being absent from the first page of a particular genre category."[23] However, in an external study for Ofcom from 2010 on the audience impact of page-one EPG prominence, it was concluded that 28 of the 33 examined examples in which EPG listing was altered, supported the argument that EPG positioning affects audience performance, four examples were inconclusive and only one supported the argument that EPG positioning did not affect audience performance altogether.[24] It is not yet clear what Ofcom's response will be on this point.

17) http://www.legislation.gov.uk/ukpga/2003/21/introduction
18) http://stakeholders.ofcom.org.uk/binaries/broadcast/other-codes/epgcode.pdf
19) Section 310 Communications Act, http://www.legislation.gov.uk/ukpga/2003/21/section/310/prospective
20) Section 3 and 4 Code.
21) Paragraph 15 c. and g. Code.
22) Paragraph 14 Statement on Code on Electronic Programme Guides: Statement by Ofcom, available at: http://stakeholders.ofcom.org.uk/binaries/consultations/epg/statement/statement.pdf
23) Ofcom's Second Public Service Broadcasting Review, Phase Two: Preparing for the digital future, p. 98, available at: http://stakeholders.ofcom.org.uk/binaries/consultations/psb2_phase2/summary/psb2_phase2.pdf
24) F. El-Husseini, "An Analysis of the Audience Impact of Page One EPG Prominence", A Report for Ofcom, July 2010 Non-Confidential Version, p. 4, available at: http://stakeholders.ofcom.org.uk/binaries/consultations/review_c3_c5_licences/statement/attentionalreport.pdf

IV. Germany

In Germany, the media law regulates the so-called platform providers.[25] The protection of diversity of opinion is at the core of the law. Especially with regard to private broadcasters, the law imposes numerous provisions to ensure that its diversity policy is served.[26] EPGs are also regulated in that light and special rules exist for private platform providers. They must ensure that they also transmit public broadcasting programmes[27] and take into account the provisions regarding diversity of opinion and offer.[28] The regulatory authorities of the German *Länder* adopted (each for its jurisdiction) the *Satzung über die Zugangsfreiheit zu digitalen Diensten und zur Plattformregulierung* (Statute on freedom to access digital services and on the regulation of platforms, hereinafter "the Statute")[29] that names and describes in further detail the main principles aimed at pursuing the goal of diversity in offer and opinion. These principles are equal opportunity and non-discrimination.[30] Providers must ensure that access to distribution or marketing offers is not unduly (directly or indirectly) restricted and that there is no discrimination between similar providers without reasonable justification.

Equal opportunity is presumed if a provider gives everyone a realistic chance to access its access services. In contrast, conditions are presumed discriminatory if a provider offers the same service to one company under different conditions than to another company, unless the differences are objectively justifiable.[31] Concerning EPGs, meeting the following conditions should always lead to the conclusion that the principles of equal opportunity and non-discrimination are respected:

- several lists with different sorting criteria are offered next to each other,
- the user has the ability to change the sequence of channels in the list or to create his own favourites list and
- a proffered list of favourites is offered without prefixed settings.[32]

Finally, the Statute obliges EPGs to provide equal reference to public and private programmes.[33] This differs from the British model in which public channels should have due prominence, with which the particular importance of public service broadcasting is taken into account, but which could have the effect that the other broadcasters' chances of access and presentation be unduly diminished. "The solution which has been adopted in Germany could prove to be a less intrusive, but nevertheless equally effective alternative. By providing that navigators must facilitate that the start-up page makes reference to public service and private channels which is equal in weight, […] the Interstate Broadcasting Treaty gives the public service broadcasters on the one hand and the remaining broadcasters on the other the same chances to be perceived without favouring the public service channels to the detriment of the other content providers."[34] It is then up to the user to choose what he wants to view.

25) § 52 RStV. Staatsvertrag für Rundfunk und Telemedien (Rundfunkstaatsvertrag – RStV) vom 31. März 1991, in der Fassung des Dreizehnten Staatsvertrages zur Änderung rundfunkrechtlicher Staatsverträge vom 10. März 2010 (vgl. GBl. S. 307), in Kraft getreten am 1. April 2010.
26) § 25-34 RStV.
27) § 52b para 1, sub 1 RStV.
28) § 52b para 1, sub 2 RStV.
29) See: Satzung über die Zugangsfreiheit zu digitalen Diensten und zur Plattformregulierung gemäß § 53 Rundfunkstaatsvertrag2008, available at: http://www.die-medienanstalten.de/fileadmin/Download/ZAK_PDZ/Zugangs-und_Plattformsatzung_04.03.2009.pdf
30) § 4 Satzung.
31) § 4 paras 2 and 3 Satzung.
32) § 15 para 2 Satzung. See also: Birgit Stark, "Der EPG als Gatekeeper im Digitalen Fernsehen – Risikopotenzial durch neue Marktakteure?" TV 3.0 - Journalistische und politische Herausforderungen des Fernsehens im digitalen Zeitalter. 11. März 2008, Berlin FES Konferenzzentrum, available at: http://fes-stabsabteilung.de/docs/stark_tv_3_mr.pdf
33) § 15 para 5 Satzung.
34) A. Wichmann, "Electronic programme guides – a comparative study of the regulatory approach adopted in the United Kingdom and Germany: Part 2," *Computer and Telecommunications Law Review*, 2004-10, p.5.

V. Conclusion

Programmes that are listed on the first page of the EPG need not be the public channels, but could also consist of channels that the consumer favours or with which the EPG provider has contractual agreements. Some national regulators have implemented so-called "due prominence" rules, which ensure a high position for public broadcasters in the page ranking of EPGs. Similar to must-carry rules, this requirement allows governments to retain power over the changing audiovisual landscape and to preserve their influence through the public channels. Must-carry rules achieve this by requiring that public channels be part of the broadcaster's package; EPG regulation ensures this by requiring that public channels receive an equal or favoured treatment in the page ranking of programme guides.

The European framework contained in the Access Directive, leaves the regulation of EPGs to the national legislators. Whereas most European countries have no or very minor rules on EPGs, the UK and Germany have developed elaborate regulation in this respect, though their approach is different. While the German rules focus on the equality of public and private programmes, the British model requires that public channels have appropriate or due prominence, with which the particular importance of public service broadcasting is taken into account, but which could have the effect that the other broadcasters' chances of access and presentation are unduly diminished.

Like must-carry rules, EPG regulation balances on a thin line between content and access regulation, between media-specific rules and general competition law, and between stimulating quality and diversity and maintaining a neutral role for the government. Both will be increasingly challenged by new Internet-based services. For example, EPGs are no longer solely offered via a set-top box or digital television, but are also provided via tablets, smart phones, apps and social network sites. It remains to be seen whether governments will go so far as to include Internet services in their must-carry or EPG regulation.

The Retransmission of Broadcast Programming on Cable Television in the USA: When Interests Collide

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In the U.S, there are nearly 60 million subscribers of cable television. This tremendous growth has resulted in competition with the Broadcast networks that has adversely impacted the profitability of the Broadcast industry. Congress feared this would cause an erosion of free over the air broadcast television and the local news and public affairs programming it provides the public. Congress thus imposed "must-carry" obligations on cable operators, which requires cable operators carry the signals of local broadcast stations. This article provides an overview of the must-carry rule, why it was established, whether it has been effective, and how it is evolving in the digital age.

I. Introduction to the regulation of broadcast and cable television

In the U.S., television programming is accessible on a two-tiered basis: free over the air programming through the Broadcast networks ("Broadcast") and subscription based services like cable television ("Cable"). According to the Federal Communications Commission ("FCC" or "Commission"), which was created by the U.S. Congress ("Congress") to regulate telecommunications, more than 5300 cable systems are serving 60 million subscribers in more than 34,000 communities.[1] While Broadcast and Cable networks carry programming they develop and of affiliate stations, they differ in two important respects.[2] Cable operators generally carry the same programming nationwide while broadcasters carry national and local programming. Moreover, while there are a limited number of channels on the Broadcast network, cable subscribers can purchase a subscription to a large package of channels. For example, "most cable subscribers now receive service in excess of 100 channels and on average, cable systems offer about 80 expanded basic service channels as well as more than 50 digital channels."[3]

1) *Summary of Cable Television*, Fed. Communications Comm'n, http://www.fcc.gov/topic/cable-television (last visited June 13, 2012).
2) An affiliate is a television station that is not owned by a network but has a contract to air a network's programming.
3) *Summary of Broadcast Television*, Fed. Communications Comm'n, http://www.fcc.gov/topic/broadcast-television (last visited June 13, 2012).

Even though the U.S. generally has a decentralized, market-oriented television system, the Federal government regulates broadcast and cable television through *legislative acts* passed by Congress and *regulations* promulgated by the FCC. However, their authority to take action is constrained principally by the First Amendment of the U.S. Constitution ("First Amendment"), which provides that "Congress shall make no law… abridging the freedom of speech or of the press."[4] In order to determine whether a legislative act passed by Congress or whether a regulation promulgated by the FCC is in conformity with the First Amendment, the U.S. Supreme Court ("Supreme Court" or "Court") applies one of three tests: (1) the *rational basis test*, which requires an action "reasonably" relate to a "legitimate" government interest;[5] (2) the *intermediate level of scrutiny*, which requires that it be "substantially" related to an "important" government interest;[6] or (3) *strict scrutiny*, which requires it be "closely" related to a "compelling" government interest, narrowly tailored to achieve that interest, and the least restrictive means for achieving it.[7] The Court has held in a series of cases that the appropriate standard of review for television regulation depends on various factors, discussed below.

Congress established the first broadcast regulations and the FCC's authority to implement those rules, in the Communications Act of 1934 ("1934 Act").[8] Pursuant to the 1934 Act, the FCC must license a television station as either a commercial or noncommercial educational television ("NCE") station.[9] Congress subsequently explained that the primary objective of the "system of regulation" of the broadcast industry is to promote "local origination of programming"[10] while "rely[ing] on the marketplace to the maximum extent possible."[11] The Court subsequently held that all broadcast regulations are subject to the *rational basis test* and explained that the goal of the First Amendment as it relates to broadcast television is to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market" and that "the right of the viewers and listeners…is paramount."[12]

It was not clear, however, whether the FCC had authority to regulate cable television because it was developed after the 1934 Act was passed.[13] Nonetheless, the FCC first promulgated regulations for all cable systems in 1965.[14] The Court upheld the regulations and held the FCC has jurisdiction over cable television because "regulatory authority over [Cable] is imperative if [the FCC] is to perform with appropriate effectiveness certain of its responsibilities," namely assuring "the preservation of local broadcast service" and "an equitable distribution of broadcast services."[15] The Court, through a series of cases, established that the standard of review for cable regulations hinges on whether the regulation is content-neutral or content-based and applies the *intermediate level of scrutiny* for content-neutral cable regulation[16] and *strict scrutiny* for content-based cable regulation.[17]

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4) U.S. Const. amend. I (The FCC's regulatory authority is also constrained because it may only promulgate a regulation if Congress grants it authority over that area and its actions can be overturned by Congress or the courts if the regulation is arbitrary, capricious, or an abuse of discretion, or contrary to the Constitution or a statute. *What is the agency's authority to issue legislative rules*?, Fed. Communications Comm'n, http://www.fcc.gov/encyclopedia/rulemaking-process-fcc (last visited June 4, 2012); it must also follow various rule-making procedures delineated in the Administrative Procedure Act. Admin. Procedure Act, 5 U.S.C. § 706 (1946)).
5) Red Lion Broad. Co. v. Fed. Communications Comm'n, 395 U.S. 367 (1969) (hereinafter "Red Lion").
6) Turner Broad. System v. Fed. Communications Comm'n, 512 U.S. 622, 638-639 (1994) (hereinafter "Turner").
7) U.S. v. Playboy Entm't Group, 529 U.S. 803, 813 (2000) (hereinafter "Playboy Entertainment").
8) Communications Act of 1934, 47 U.S.C. § 151 (1934).
9) NCEs can't broadcast commercials or other promotional announcements for for-profit entities.
10) Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (hereinafter "Cable Act of 1992").
11) *Id.* at § 2(b).
12) Red Lion, *supra* note 5.
13) *Evolution of Cable Television*, Fed. Communications Comm'n, http://www.fcc.gov/encyclopedia/evolution-cable-television (last visited June 1, 2012).
14) *Id*.
15) U.S. v. Southwestern Cable Co., 392 U.S. 157 (1968).
16) Turner, *supra* note 6 (Cable warrants a different standard than broadcast because cable systems have the capability to block unwanted channels on a household-by-household basis).
17) Playboy Entertainment, *supra* note 7.

In 1992, Congress amended the 1934 Act with the Cable Television Protection and Competition Act ("1992 Act").[18] It established a new standard for carriage of television broadcast on cable systems, known as must-carry ("must-carry" or "must-carry rule").[19] The must-carry rule was passed to ensure that the local origination of programming that is produced by Broadcast television is available on Cable networks because local news and public affairs programming" produced by free-over the air broadcasting is "critical"[20] and a "substantial governmental interest"[21] and because the cable industry was adversely effecting the ability of broadcast networks to continue to produce that programming.[22] By protecting the interests of one industry - Broadcast – at the expense of the other, Congress first shaped the debate over how to balance the interests of the cable and broadcast industries in establishing public policies that will best protect the interests of the public.

II. Overview of the must-carry rule

Under must-carry, each local broadcast television station may be carried on each cable system serving the same market pursuant either to the provision in the must-carry rule that requires the cable system carry their signals ("must-carry") or pursuant to a retransmission consent agreement with the cable system ("may-carry").[23] If a station elects to be carried pursuant to the must-carry provision it is prohibited from demanding payment for its carriage.[24] A must-carry station has a "statutory right to a channel" number that is usually "its over-the-air [Broadcast] channel number or another channel number on which it has historically been carried" but can be carried on any channel that is mutually agreed upon.[25] However, only local commercial and NCE stations can elect must-carry status.[26] If a station does not elect to be carried pursuant to the must-carry provision, a cable operator can only carry that station's signal if "the cable operator and the television station reach an agreement" that it can "retransmit" the broadcaster's signal.[27] The negotiations are private and may include money, advertising time, or additional channel access."[28] While the may-carry provision applies only to commercial broadcast television stations, superstations may be carried outside their local market without their consent.[29]

Cable operators are also required to set aside a portion of their channels for local commercial and NCE stations. Specifically, a cable operator with 12 or fewer channels must set aside up to three channels for local commercial television stations and at least one channel for a local noncommercial educational television broadcast station; cable operators with more than 12 channels must set aside one third of their channel capacity for local commercial stations; cable systems with between 13 and 36 channels must carry at least one, but need not carry more than three, local noncommercial educational television stations; cable systems with more than 36 channels must carry all local noncommercial educational television stations requesting carriage with some exceptions for duplication of signals;[30] and an NCE station must be imported if there are none in the area.[31]

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18) Cable Act of 1992, *supra* note 10.
19) *Id.*
20) *Id.*
21) *Id.* at § 2(a)(10) (The Court found it is content-neutral even though its requirements distinguish between speakers in the television programming market because they do so based on the manner of transmission rather than on the content the messages conveyed).
22) Steven Waldman and the Working Group on Information Needs of Communities, *Information Needs of Communities – The Changing Media Landscape in a Broadband Age*, Fed. Communications Comm'n at 298 (rel. June 2011), *available at* http://transition.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf (hereinafter "Future of Media Report").
23) *Supra* note 13 (The choice must be made every three years and cable providers must inform subscribers about any changes that will affect them at least 30 days prior to any change).
24) *Id.*
25) *Id.*
26) *Id.*
27) *Id.*
28) *Id.*
29) *Id.* (Superstations are broadcast stations that are transmitted via satellite, usually nationwide).
30) *Id.*
31) *Id.*

A commercial station is local "if it is assigned to the same television market as the subscriber's cable system" while "a noncommercial station is local if it is licensed to cities within 50 miles of the subscriber's cable system or its signals meet certain technical engineering standards at the cable system's reception facility."[32] A station is thus local if it is geographically local to the subscriber rather than if it provides local content.

Regardless of whether a station is carried pursuant to must-carry or may-carry, cable systems must carry the entire program schedule of every local television station it carries – including the primary video, accompanying audio, and ancillary services such as closed captioning – without alteration or deletion.[33] However, carriage is subject to the "network non-duplication,[34] syndicated exclusivity[35] and sports broadcasting rules"[36] and partial carriage can be negotiated if the station is not eligible for must carry rights.[37]

The 1992 Act also required cable operators to transmit the digital television signals in analogue form to all customers of analogue cable television or in digital form if all customers have the required equipment to receive this signal and provided an exception for small cable operators from the obligation to transmit the signal for High-Definition broadcasts in HD quality.[38] This provision expired on 12 June 2012 because it was adopted to give cable operators time to accommodate their remaining analog-only subscribers.[39] The FCC recently proposed that the rule be renewed for three years but the process is still pending.[40]

Satellite television operators are also subject to their own version of a must-carry rule, commonly known as 'carry one, carry all'. It was established to prevent satellite operators from only transmitting the programming of subsidiaries and must be renewed every five years by Congress.[41] Pursuant to the rule, a satellite carrier must carry all local television broadcast station signals in its local market if it wants to carry any local broadcast television station signals, but it is not required to carry any local programming.[42] Moreover, they only have to transmit one channel if a television provider provides more than one local variant of a national station,[43] and may offer local signals to their subscribers on an à la carte basis at the same or a nearly identical price but may not offer some local stations in a package and others on an à la carte basis.[44]

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32) *Id.*
33) *Id*.
34) Commercial broadcast stations may protect the network programming they contracted for against more distant television broadcast stations carried on a local cable television system that serves more than 1,000 subscribers.
35) Cable systems that have over 1,000 subscribers may be required to provide syndicated protection to broadcasters who contract with program suppliers for exclusive exhibition rights to certain programs within specific geographic areas.
36) A cable system located within 35 miles of the city of license of a broadcast station where a sporting event is taking place may not carry it live if it is not available live on a local television broadcast station or if a request for a blackout is requested.
37) *Supra* note 13.
38) Deborah D. McAdams, *FCC Sunsets Analog Must-Carry*, TV Technology (June 6, 2012), *available at* http://www.tvtechnology.com/regulatory/0113/fcc-sunsets-analog-must-carry/213862.
39) *Id*.
40) *See In the Matter of Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules,* Fourth Further Notice of Proposed Rulemaking and Declaratory Order, CS Docket 98-120 (Rel. Feb. 10, 2012), *available at:* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-12-18A1.pdf.
41) Rob Frieden, *Analog and Digital Must-Carry Obligations of Cable and Satellite Television Operators in the United States*, 15 Media Law & Policy 2, at 230-246 (2006).
42) *Id*.
43) Kim Dixon, *U.S. Lawmaker Wants Satellite Companies to Carry Local TV*, Reuters (Feb. 10, 2009), *available at* http://www.reuters.com/article/2009/02/10/us-satellites-congress-idUSTRE5196V720090210.
44) Harry C. Martin, *FCC Clarifies Satellite Must-Carry Rules*, Broad. Engineering (Dec. 1, 2001), *available at* http://broadcastengineering.com/mag/broadcasting_fcc_clarifies_satellite/#ixzz1z6vTHc8G.

III. The primary objective of must-carry is to promote localism

FCC decisions pertaining to localism date back to 1941 when the FCC limited the influence of broadcasters over the programming of affiliates.[45] Since the 1980s, however, the FCC has promoted localism via deregulation pursuant to "the marketplace rationale" which seeks to enhance competition rather than implement behavioral regulation.[46] For example, the FCC substantially relaxed its media ownership rules in 2002, explaining that it would unleash the production of localism on the Internet and Cable television.[47] While there is no uniform definition of localism, the FCC defines localism in the broadcasting context as policies designed "to promote a marketplace in which broadcast stations respond to the unique concerns and interests of the audiences within the stations respective service areas," and learn "the needs and interests of their local communities so that they may better serve these needs and interests through programming."[48]

IV. Was government intervention necessary to achieve localism?

During the debate that preceded the passage of must-carry, broadcasters argued it was necessary to ensure the public has access to sufficient localism. They argued that the absence of government intervention enabled a market distortion that restricted their ability to "compete effectively against cable operators in their local markets"[49] and that this limited their financial capacity to produce "more coverage of local issues."[50] This development threatened the future of free over-the-air television broadcasting, they maintained, because "only their local news teams provid[ed] community reporting."[51] For example, James B. Hedlund, head of the Association of Independent Television Stations, testified before Congress that broadcasters' ability to promote "a diverse and free information flow to all Americans" was "at stake" and that failure to pass "must carry" would jeopardize "the number one source of news and information to the American public, namely local, over-the-air broadcasters."[52] Edward O. Fritts, president and CEO of the National Association of Broadcasters even predicted that "must-carry" would "guarantee local news, weather, public service and programming in the local market."[53]

45) *Report on Chain Broadcasting*, Fed. Communications Comm'n, http://media.about.com/od/mediatermsandglossary/g/Affiliate.htm (last visited June 29, 2012).
46) *Must Carry Rules*, Museum TV, http://www.museum.tv/eotvsection.php?entrycode=mustcarryru (last visited June 13, 2012).
47) *In the Matter of 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* Report and Order and Notice of Proposed Rule-making, MB Docket 02-277, FCC 03-127 (Rel. July 2, 2003) [hereinafter "2002 Biennial Review"].
48) *In the Matter of Deregulation of Radio*, 84 F.C.C. 2d 968 (1981).
49) Future of Media Report, *supra* note 22 at 299.
50) *Id*. at 298.
51) *Id*. at 299.
52) Statement and written testimony of James B. Hedlund, Ass'n of Independent Television Stations, Inc., Cable TV Protection Act of 1991: Hearing on S.12 Before the Subcommittee on Communications of the Committee on Commerce, Science and Transportation, 102nd Cong. 205 (1991).
53) Statement of Edward O. Fritts, President and CEO, National Ass'sn OF Broadcasters Cable Television Regulation: Hearings on H.R. 1303 and H.R. 2546 Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce of the House of Representatives, 102nd Cong. 753 (1991).

Opponents of must-carry countered that it was not necessary because "the economics of broadcasting…will insure that all citizens have access to information."[54] Specifically, they maintained that "indirect payment through advertising" will provide sufficient revenue and incentive to provide the local news that is appealing to its customers"[55] while, in contrast, must-carry imposes "an undue burden on their flexibility to select the [local] services that would be most appealing to their customers."[56] Similarly, they argued it would be inherently ineffective unless it was cost-inefficient because "[a]bsent free off-air television, government policy makers will be confronted with the costs of providing some form of lifeline service for those not connected to the wire, a cost which must be borne by the taxpayer or subscribers."[57]

V. Has the must-carry rule been effective at promoting localism?

In June 2011, the FCC released a 468 page report titled "The information needs of communities: The changing media landscape in a broadband age" ("Report") that surveyed the media landscape in the U.S.[58] The Report concluded that while there is no shortage of news per se, there is a shortage of "local accountability journalism."[59] It assessed the effectiveness of the must-carry rule and the state of localism more generally by two benchmarks: (1) if a particular platform produces sufficient localism and (2) if the public has access to sufficient localism, regardless of its origination.

The Report found that Broadcast remains a pivotal cog in the production and dissemination of localism because "Americans continue to rely on local television stations…for the majority of their local news."[60] However, while it found that "local broadcasters provide almost all of the local news on cable" television, it also found that many "do little or no local programming."[61] For example, as of May 2011, "there were approximately 39 local and regional cable news channels originating varying amounts of local news content…[r]oughly 20 to 30 percent of the population has access to these local cable news networks and "[o]f the 39 channels, 11 are owned by or affiliated with traditional news sources."[62] It also estimated that "[a]bout 30 percent air no local news, and of those that do, about one-third are contracting it from other stations in town" even though "all of those stations have government-enforced carriage on cable TV."[63] Similarly, it found that "most cable operators do not finance or carry local cable news operations." [64]

54) Future of Media Report, *supra* note 22 at 205-6.
55) *Id*.
56) *Id*.
57) *Id.*; *see also Lifeline Program*, Universal Service Admin. Co., http://www.usac.org/li/about/getting-started/default.aspx (last visited June 4, 2012) (explaining that Lifeline provides telephone companies support from the universal service funding as payment for eligible low-income individuals so they can have telephone service at just, reasonable, and affordable rates).
58) *See generally* Future of Media Report, *supra* note 22.
59) *Id*. at 233. (It found a decline of between 7,000 and 10,820 full-time professional journalists from local and government accountability beats).
60) *Id*. at 52.
61) *Id*. at 299.
62) *Id.* at 108 (Namely newspapers and broadcast TV stations).
63) *Id*.
64) *Id*.

It also found that broadcast stations are increasingly temporarily removing popular stations from distribution when a retransmission consent agreement can't be reached. [65] For example, in October 2012, three million subscribers missed programming when an impasse in negotiations led FOX to pull its station.[66] Even though this led to calls for the FCC to intervene,[67] it is "not authorized to participate in…retransmission consent agreements."[68] However, the FCC anticipates "to the greatest extent possible" that "cable systems will keep changes to a minimum while they comply with any changes in election by broadcasters" and maintains that "most broadcasters and cable operators agree that the least amount of change possible is…best."[69]

The Report therefore concluded that "the regulatory system for broadcasters is broken"[70] and that "the current must-carry system is *not* currently set up to favor stations that do local programming about their communities over those that do not."[71] It attributed this "muddy policy"[72] to an attempt to reconcile "tension between two very legitimate goals: the First Amendment, which rightly limits the Federal government's ability to take more aggressive action" and the requirement that broadcasters serve their communities."[73] It found two "keys" to solving this "policy riddle": (1) "improve transparency in ways that will better empower citizens and make markets work better" and (2) "remove unnecessary burdens on broadcasters who aim to serve their communities."[74] Moreover, while the Report did not propose any changes to must-carry, it called on the Federal government to "place no unnecessary burdens on broadcasters that are attempting to cover their communities using a variety of media platforms."[75]

VI. Potential changes to must-carry

On March 3, 2011, the FCC adopted a Notice of Proposed Rulemaking for changes to the retransmission consent rules that are designed to "minimize disruptions to consumers if an agreement between the parties was not reached."[76] Specifically, it asked for comments on proposals that would:

> "provide more guidance to the negotiating parties on good-faith negotiation requirements; improve notice to consumers in advance of possible service disruptions caused by impasses in retransmission consent negotiations; and eliminate the Commission's network non-duplication and syndicated exclusivity rules, which provide a means for parties to enforce certain exclusive contractual rights to network or syndicated programming through the Commission rather than through the courts."[77]

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65) *Id*.
66) Chris Morran*, NJ Senators Call for FCC to Intervene in Cablevision/Fox Squable*, The Consumerist (Oct. 18, 2012), *available at* http://consumerist.com/2010/10/nj-senators-call-for-fcc-to-intervene-in-cablevisionfox-squabble.html (Two U.S. Senators asked the FCC to intervene in the transmission consent negotiation).
67) *Id.*
68) *Should I expect more changes in the programming on my cable system in the future?,* Fed. Communications Comm'n, http://www.fcc.gov/guides/cable-carriage-broadcast-stations (last visited June 5, 2012).
69) *Id*.
70) Future of Media Report, *supra* note 22 at 347.
71) *Id*.
72) *Id*.
73) *Id*.
74) *Id*.
75) *Id*. at 346.
76) *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, Docket No. 10-71, FCC 11-31 (Rel. March 3, 2011).
77) *Retransmission Consent*, Fed. Communications Comm'n, http://www.fcc.gov/encyclopedia/retransmission-consent (last visited June 4, 2012).

The FCC is also reassessing "the appropriate definition of localism" for the digital age and how it should be measured.[78] The Report acknowledged that new-media is playing an increasingly significant role in producing the kind of original sourcing and investigative journalism that is at the heart of localism. For example, it estimated that "95 percent of stories – including those generated by new-media – were based on reporting done by traditional media."[79] At the very least, this acknowledges that five percent of stories are based on original sourcing by new-media. However, this also suggests that the number could be even bigger. The use of the phrase 'generate,' which is defined as "to originate,"[80] indicates that some percentage of the 95 percent is based on original sourcing done by new-media. It also found that "the potential for hyper-local Web sites and blogs to provide consumers with local news and information, such as neighborhood-specific news and events, may contribute to meeting the current or future needs and interests of local communities."[81] It therefore concluded that since every citizen is now able to "research and analyze in-depth and complex documents as well as any professional journalists,"[82] "[t]here are many facets of community life that probably can be adequately covered by an ad hoc combination of bloggers, volunteers, and occasional journalism."[83]

Must-carry may also be affected by the resolution of the FCC's reassessment of its Broadcast ownership rules. In 2002, the FCC substantially relaxed its media ownership rules, explaining it would not significantly harm localism because of the wide array of media outlets and technologies available in most markets.[84] The Court remanded many of those changes because it found inadequate evidence that Internet and cable television served as significant sources of local news and public affairs.[85] However it explained that if new evidence demonstrates that they do serve as significant sources of local news and public affairs, it may uphold future relaxations. Consequently, if the FCC's recent findings on localism and the impact of new-media meet the Court's threshold for justifying deregulation of media ownership, it could be sufficient justification for relaxing must-carry as well.

VII. Conclusion

Both broadcasters and cable operators can find support for their contentions in the recent findings on the current state of the media in the U.S. Broadcasters can argue that the finding that there is not enough localism demonstrates that must-carry continues to be necessary and may even need to be strengthened. Cable operators can counter that this finding leads naturally to the opposite conclusion – namely, that must-carry has had nearly 20 years to produce localism and its failure to do so demonstrates it is fundamentally incapable of doing so.[86] What is clear, however, is that the underpinnings of that debate are still relevant because the interests of the public and market players continues to evolve as the technology and market continues to evolve.

78) *In the Matter of 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Proposed Rule Making, MB Docket No. 09-182, FCC 11-186 (rel. Dec. 22, 2011).
79) Future of Media Report, *supra* note 22 at 16.
80) Mirriam-Webster Dictionary, *available at* http://www.merriam-webster.com/dictionary/generate (last visited July 10, 2012) (It defines originate as to bring into existence).
81) Future of Media Report, *supra* note 22 at 15.
82) *Id* at 16.
83) *Id*. at 263.
84) 2002 Biennial Review, *supra* note 47.
85) Prometheus Radio Project v. Fed. Communications Comm'n, 373 F.3d 372 (2004).
86) Future of Media Report, *supra* note 22 at 299 (They can also argue that recent contentions by broadcasters demonstrates they no longer believe it is necessary. For example, Dave Lougee, president of Gannett's broadcast division, maintained that "[broadcasters] want to invest in local news but are constrained financially by the must-carry rule," and would "be in a better financial position to invest in local" news without the must carry requirement" because they could "increase the retransmission consent revenue streams, news").

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