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**Must-carry regulation: a must or a burden?**

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# Must-carry: Renaissance or Reformation?

The following article:

## *Must-carry Regulation: a Must or a Burden?*

by Nico van Eijk and Bart van der Sloot  
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## 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.

# 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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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,<sup>6</sup> 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

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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.<sup>7</sup>

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

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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.<sup>8</sup> 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,<sup>9</sup> 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,<sup>10</sup> and was later amended in the Audiovisual Media Services Directive.<sup>11</sup> 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*,<sup>12</sup> *Kabel Deutschland v. the Niedersächsische Landesmedienanstalt*<sup>13</sup> and *European Commission v. Belgium*.<sup>14</sup> 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

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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,<sup>15</sup> 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.<sup>16</sup> 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.

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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.”<sup>17</sup> 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.<sup>18</sup> 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.”<sup>19</sup> 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.

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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 *telemédia* (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 *telemédia* services.<sup>20</sup> 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.<sup>21</sup>

### 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.<sup>22</sup> 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.<sup>23</sup>

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20) “*Telemédia* 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.<sup>24</sup> 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.<sup>25</sup>

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:<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup>

### 3.2. France

In principle, the French must-carry legislation applies to all networks, without making a distinction between cable and terrestrial networks.<sup>29</sup> 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.<sup>30</sup>

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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 relative 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/analysismason\\_rapportfinal\\_tvlocale.pdf](http://www.csa.fr/content/download/16463/308831/file/analysismason_rapportfinal_tvlocale.pdf)

Besides the must-carry regulation, the French media legislation also provides for a form of must-offer.<sup>31</sup> 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*").<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup> If the must-carry obligation exceeds this capacity, priority must be given to the nationally financed television and radio channels and the regional channels.<sup>36</sup> 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 *telemédia* and *teleshopping* channels.<sup>37</sup>

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.<sup>38</sup> In principle, this is the provider's responsibility.

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31) Articles 34-4 and 34-1 Loi relative 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.<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup> Judging the case, which concerned remuneration,<sup>42</sup> 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.<sup>43</sup> 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.<sup>44</sup>

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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.<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup> As the frequency capacity is limited, the Swedish Broadcasting Authority determines separately which channels are allowed to be transmitted via terrestrial ether distribution.<sup>48</sup> 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.<sup>49</sup> 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.<sup>50</sup>

### 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.<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup>

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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.radioochtvtv.se/> & <http://www.radioochtvtv.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.radioochtvtv.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.<sup>54</sup> 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."<sup>55</sup>

In the United Kingdom, the implementation of a must-offer obligation for electronic communication networks and satellite<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup>

#### 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,<sup>59</sup> 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.

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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.<sup>60</sup> 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.<sup>61</sup> This is to prevent satellite operators from cherry picking and from transmitting subsidiaries only and thus causing harm to other providers.<sup>62</sup> 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.<sup>63</sup> 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.<sup>64</sup> 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.”<sup>65</sup> 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.

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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](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.<sup>66</sup> 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.<sup>67</sup> 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.

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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"<sup>68</sup>), 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.

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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.