

Spring 2006

What Are We Carrying Across The EU These Days? Comments On The Interpretation Of Article 31 Of The Universal Service Directive

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WHAT ARE WE CARRYING ACROSS THE EU THESE DAYS?

**COMMENTS ON THE INTERPRETATION AND PRACTICAL
IMPLEMENTATION OF ARTICLE 31 OF THE UNIVERSAL
SERVICE DIRECTIVE**

By
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INTRODUCTION

The history of must-carry cannot be characterized as uneventful. Although must-carry in truth never triggered heated discussions at the highest political level across the EU -- not even during the adoption of the Universal Service Directive⁴ -- it continues to be a contested subject amongst the various stakeholders, namely viewers, broadcasters, broadcast network operators, politicians and the European Commission.

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The opinions expressed in this paper are those of the author and may not reflect the position of Telenet or ECCA. This paper is based on a presentation made by the author on 9 April 2005 in Amsterdam, during a workshop on must-carry obligations jointly organized by the Institute for information Law of the University of Amsterdam (IViR) and the European Audiovisual Observatory.

⁴ Directive 2002/22 EC of the European Parliament and of the Council on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) of 7 March 2002, OJ 2002 L 108/51, also *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_108/l_10820020424en00510077.pdf. (This Directive formed part of the so-called new regulatory Framework for electronic communications networks and services discussed amongst the European Commission, the European Parliament and the Council of Ministers between 2000 and 2002).

The must-carry obligation only saw the light of day when cable networks⁵ emerged. Cable networks were primarily rolled out for several reasons; for aesthetic reasons: banishing the parabolic antennas from rooftops; to provide citizens with a wider choice of broadcast programs: foreign broadcasters were not available on terrestrial networks; and more recently, to provide competition to the incumbent telecoms network operators.

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

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

I

MUST-CARRY: TAKEN TO THE EUROPEAN LEVEL

A. Preparatory Work

Until 1999, the concept of must-carry was not to be found in any document of the European institutions. That year, the European Commission launched a review of the European telecoms liberalization legislation - which had opened up the national telecoms markets throughout the 1990s - and the must-carry concept was one of the issues introduced in the Communications

⁵ The reference to cable networks is used in a technology specific sense, as opposed to PSTN networks or terrestrial networks. Cable networks are traditionally made up of coaxial cables rolled out in various rings or loops. A cable network is typically composed of three rings: a primary ring where the head-end is located, a secondary ring to which the local hubs are attached and to which, in turn, the cable households are connected to, thus making up a tertiary ring. This network architecture was considered ideal for linear broadcasting purposes.

Review of 1999.⁶

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

As a result of this new objective, cable operators saw the opportunity to request⁷ the consideration of the must-carry subject in this second stage of liberalization of the European telecoms sector. The aim was to create more transparency, to enhance harmonization and to introduce the concept of proportionality in this matter. The latter was further developed by creating an obligation to provide for remuneration for undertakings subject to must-carry obligations within the initial Commission proposal for the Universal Service Directive.⁸

In the first paragraph of Article 26 (later Article 31) of the Commission proposal, must-carry was also explicitly limited in time. This was the expression of the conviction that must-carry legislation would over time become redundant. The assumption was that in a digital environment,

⁶ Communication from the European Commission, *Towards a New Framework for Electronic Communications Infrastructure and Associated Services*, COM (1999) 539, also available at http://europa.eu.int/comm/information_society/policy/telecom/review99/pdf/review_en.pdf.

⁷ Presumably, a number of complaints regarding the incompatibility of national must-carry legislation with the free movement principles enshrined in the EC Treaty, also played a part in persuading the Commission to address the subject in the Communications Review of 1999. The complaints were submitted during the second half of the 90s by several cable operators, in relation to national must-carry legislation in Belgium (Flanders), Germany, The Netherlands and Sweden. Only the first complaint, as far as I know, resulted in concrete action by the Commission and ultimately in a modification of the applicable decree.

⁸ *Proposal for a Directive of the European Parliament and of the Council on universal service and users' rights relating to electronic communications networks and services*, COM, Art. 26 §2 (2000) 392 final, also available at http://europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/documents/com2000-392en.pdf.

electronic communications networks would start offering an ever-larger selection of TV channels in the medium term, and this, combined with an expected increase in competition between network (platform) operators, was to markedly diminish the need for must-carry legislation.

As to the question concerning the broadcasters which may receive a "must-carry status,"⁹ the Working Document¹⁰ -- a preparatory document for the already mentioned Commission proposal for a Universal Service Directive -- referred directly to the "*pursuit of a public service broadcasting remit as conferred, defined and organized in relevant national law*" as the precondition for obtaining a must-carry status. Section 26 of the Working Document even stresses that Member States' must-carry legislation "*shall not mandate the transmission, by cable TV network operators, of broadcasting channels which are not subject to such a public service broadcasting remit.*" Although from a legal perspective it may be superfluous to also refer to those broadcasters that would not be candidates for must-carry status, the "political" position of the Commission on this topic was clear: national must-carry legislation should be restricted to "public service broadcasters." However, the political discussions regarding the adoption of the proposal were still to start.

The co-decision procedure, which effectively ended with an overall agreement between the Commission, the European Parliament, and the Council on December 12, 2001 concerning a whole new regulatory Framework, resulted in a must-carry provision that was substantially amended in comparison with the original proposal. The obligation to provide for remuneration toward undertakings subject to must-carry obligations was replaced by an option for Member States to provide for a remuneration mechanism.¹¹ Along the same lines, the need to limit must-carry legislation in time was replaced by an obligation on Member States to periodically review their must-carry legislation. Furthermore, and most importantly, the objective to restrict the scope of broadcasters to those with a public service remit was not upheld. In the end, Article 31 of the Universal Service Directive mentions "*clearly defined general interest objectives.*"

⁹ The term "must-carry status" refers to those broadcasters that (cable) operators have to distribute on the basis of the applicable must-carry legislation.

¹⁰ DG Information Society Working Document on Universal Service and Users' Rights Relating to Electronic Communications Networks and Services, 27 April 2000.

¹¹ Today para. 2 of Article 31 of the Universal Service Directive allow "*Member States to determine appropriate remuneration.*"

B. Article 31 of the Universal Service Directive

The must-carry provision underwent a considerable metamorphosis from the way it was set out in Section 26 of the Commission proposal to the shape it finally took in Article 31 of the Universal Service Directive. Even though conditions had changed during those two years, cable operators – being the first among those concerned with the matter – even today consider it worth the effort and valuable that the Commission had taken up the challenge to incorporate the must-carry concept in the Communications Review.¹²

Article 31 contains two paragraphs stipulating the conditions which national must-carry legislation must fulfill in order to be accepted under European law. Almost as important as the Article itself are the associated Recitals¹³ in the Preamble to the Directive and the statement made during the Plenary session of the European Parliament by former Commissioner Liikanen for the Information Society at the adoption of the new regulatory Framework on 12 December 2001.¹⁴

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

Before attempting to shed some light on how Article 31 is to be interpreted, it is necessary to consider the context in which the must-carry provision has been inserted into European legislation, namely in a liberalization context that enables sector specific national regulatory authorities (hereinafter “NRAs”) to impose a number of ex-ante obligations on undertakings that have significant market power on a particular electronic

¹² Obviously, Member States were reluctant to address this topic at the European level, particularly as regards the electronic communications context. First, some believe that must-carry falls under the subsidiary principle. Second, there are Member States who are of the opinion that must-carry is a “content” issue, which is to be kept separate from regulating communications networks and services.

¹³ Universal Service Directive, PE-CONS 3673/01,22, Recitals 43 to 45.

¹⁴ Statement by Commissioner Liikanen, European Parliament, 12 December 2001, 2nd Reading vote on Universal Service Directive: Must-Carry Obligations.

communications market.¹⁵ The possible ex-ante obligations vary from applying transparency to providing access on a cost-oriented basis.¹⁶

In this context, the must-carry provision, which in effect comes down to an access obligation, should be considered as one of the few exceptions to the structure of the new regulatory Framework. As outlined above, the structure of the new regulatory Framework provides for market analysis to be carried out before any obligation, in particular an access-like obligation, is imposed on a network operator. This line of thought is supported by comments made on a number of occasions by the Commission's "Article 7 Taskforce" regarding notifications received from NRAs¹⁷ wanting to regulate the wholesale market for broadcasting transmission services, to deliver broadcast content to end-users.¹⁸ The reasoning is basically as follows: since must-carry obligations are imposed on cable networks, the likelihood of competitive problems – i.e. access disputes – is minimal.

¹⁵ The eighteen markets which NRAs have to analyze are listed in the Commission Recommendation on relevant product and services markets within the electronic communications sector susceptible to ex- ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services of 11 February 2003, COM (2003) 497.

¹⁶ See Directive 2002/19/EC of the European Parliament and of the Council, Articles 9 – 13 of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), OJ 2002 L 108/51.

¹⁷ See Commission comments regarding Case IE/2004/0042, ComReg's (Irish NRA) notification concerning the market in Ireland for Broadcasting Transmission Services to deliver broadcast content to end-users of 2 March 2004. See also Commission comments regarding Case UK/2004/0111, Ofcom's (UK NRA) notification concerning the Broadcasting transmission services to deliver broadcast content to end- users in the United Kingdom of 28 January 2005. In the latter, the Commission was silent on Ofcom's observation that must-carry obligation ensured that the market for broadcasting transmission over cable networks tended toward competitiveness, available at <http://forum.europa.eu.int/Public/irc/infso/ecctf/home>.

¹⁸ See *supra* n. 13 (Referred to as "Market 18" in the Commission Recommendation).

C. Attempts to interpret Article 31

To this day, there is no case law or any other piece of European regulatory practice with regards to Article 31. Fortunately, however, the Commission has made some effort to interpret Article 31 in two Working Documents,¹⁹ the first concerning broadcasting aspects within the new regulatory Framework in general and the second specifically addressing the topic of must-carry. Both documents were produced for the Communications Committee, which is composed of national experts in the field of electronic communications and is chaired by the Commission.

1. *Reasonableness*

A must-carry obligation must be reasonable, meaning it should be proportionate and transparent in the light of clearly defined general interest objectives. Notwithstanding the other conditions found in Article 31, from a material point of view, this concept does not add anything substantial to the must-carry provision apart from the fact that it could be seen as an additional warning to Member States to refrain from either enacting extensive or extending existing must-carry legislation. This is illustrated by Recital 43, which explains the reasonableness concept.²⁰ It basically binds together the various principles and conditions set out in the remainder of the Article.

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

¹⁹ European Commission Working Document, The 2003 regulatory framework for electronic communications – Implications for broadcasting’ (Document ONPCOM02-14) of 14 June 2002 and European Commission Working Document ‘Must-carry’ obligations under the 2003 regulatory framework for electronic communications networks and services of 22 July 2002 (hereinafter “Commission Working Document”), also *available at* http://europa.eu.int/information_society/policy/ecomms/doc/todays_framework/digital_broadcasting/working_doc_must_carry.pdf.

²⁰ Universal Service Directive, PE-CONS 3673/01,22, Recital 43 (“‘Must-carry’ obligations imposed by Member States should be reasonable, i.e. they should be proportionate and transparent in light of clearly defined general interest objectives, and could, where appropriate, entail a provision for proportionate remuneration.”), also *available at* http://europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/documents/03673en1.pdf.

to must-carry obligations?

2. *Scope of Article 31*

Starting with the first category – *which* undertakings – Article 31 clearly targets network operators only.²¹ It is useful to further discuss this limitation, as we may ask whether or not this approach fits the realities of today's converging environment.

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

Depending on the country and/or business model, undertakings can fulfill different functions within the electronic communications arena. Relevant for must-carry is the distinction between network operator and service provider. In countries such as Belgium, the Netherlands, and the UK, a cable operator is both the provider of a network and a provider of content packages to the cable subscriber. In other countries, however, these two functions may be managed by separate entities, a state of affairs which is subsequently reflected in the respective national law. For instance, in France the cable network was owned by France Télécom, while the basic content packages were offered by other entities. As a consequence, the French must-carry legislation is not applicable on network operators,²² but on service

²¹ Universal Service Directive, PE-CONS 3673/01, 51, Art. 31, para. 2 (“undertakings providing electronic communications networks.”) *also available at* http://europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/documents/03673en1.pdf.

²² France Télécom only managed the network, not the end-user relationship, apart from France Télécom Câble which as a subsidiary of FT offered content packages over cable before it merged with NC Numéricâble in 2004.

distributors.²³

After establishing that it is only network operators who are targeted by Article 31, a further question is what kind of networks fall within its reach. In conjunction with Recital 44, Article 31 quite directly states “*Networks used for the distribution of radio or television broadcasts to the public include cable, satellite and terrestrial broadcasting networks. They might also include other networks to the extent that a significant number of end-users use such networks as their principal means to receive radio and television broadcasts.*” The reference to a significant number of end-users using a certain network, hints at the application of competition law within Article 31. It is obvious that must-carry concerns the broadcasting market, and in this market one can imagine that certain technologies are predominantly used for receiving broadcasting programs – cable, satellite and terrestrial network. A significant number could then possibly exist once more than 40% of end-users of a particular technology would use it to receive broadcasting.²⁴

On the one hand, this interpretation of the Article means that – as is further addressed below – it is fully justified to impose must-carry obligations on different networks within the same Member State²⁵ as long as those networks are individually used by a significant number of end-users. On the other hand, in a situation where different technological networks are widely used, one could also decide to withdraw national must-carry legislation altogether.

The second question that needs to be answered concerns the services that would encompass a must-carry obligation. It is very clear from Article 31 itself that radio and television broadcast channels are covered.²⁶ However, it

²³ In addition, in France the competition between platforms – cable and satellite – made this approach even more acceptable. In case of satellite, it is historically not the network operator (e.g. Astra) but rather a service provider (e.g. TPS) who offers services to end-customers.

²⁴ The threshold of 40% stems from general competition law, where an undertaking with market share of 40% on a relevant market comes under scrutiny for possible dominance.

²⁵ A particular Member State has only authority over those undertakings in its jurisdiction. Foreign network operators cannot, based on the free movement of services, be regulated by the receiving Member State.

²⁶ “Broadcast” refers to the definition given by relevant European legislative acts and the interpretation of the Court of Justice, most recently in the *Mediakabel* case, Case C-89/04 of 2 June 2005, meaning a linear point to multipoint broadcast.

also refers to “services.” The Commission Working Document specifically addresses “*broadcast services*,”²⁷ an expression which immediately excludes any on-demand service.²⁸

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

A word that is often overlooked and taken too lightly is that of “*specified*” in relation to radio and television broadcast channels and services that need to be specified in order to be granted a must-carry status. “*Specified*” is closely connected with the concept of transparency, addressed below. Especially in certain Member States where the national must-carry legislation refers to broadcasting *organizations* in general, it is expected that a more equitable system would be put in place whereby each must-carry channel is individually identified in the law.²⁹

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

3. *Clearly defined general interest objectives*

According to Article 31 a must-carry obligation is justified when one or more “*clearly defined general interest objectives*” are fulfilled. This gives rise to a number of things. First of all, it obliges Member States to motivate their decision to grant a must-carry status to a specified broadcast channel and/or service. As we will see below, this is still one of the difficulties still persisting in current national must-carry legislation. The objectives pursued by

²⁷ See *supra* n.7.

²⁸ Along the same line of thought, CAS and EPG systems do not qualify as “broadcast services” within the meaning of Article 31. See also the statement by Commissioner Liikanen, *supra* n. 12.

²⁹ The law governing media related aspects for the Brussels Region in Belgium and the subsequent Ministerial Decree refer only to broadcasting organizations, which sometimes operate several channels, Ministerial Decree of 17 January 2001. The discussion whether only primary law or also secondary law could specify the broadcast channels and services is not addressed in this paper. It is however assumed that secondary legislation could also suit this purpose.

must-carry legislation are often not clear.

Secondly, there is the question of the general interest objectives, which may be invoked to justify the imposition of a must-carry obligation. Recital 43 refers in this context to “*in the legitimate interest of general public policy considerations.*” These considerations are not defined at a European level, but they include pluralism and cultural diversity. Recital 43 goes on to state that the objectives are to be defined in accordance with Community law. In addition, and in accordance with EU case law it should be noted that objectives of an economic nature cannot be considered as general interest objectives.

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

An easier question to answer is whether general interest objectives are limited to channels of the public service broadcasters. The short answer to this is: no. The Commission Working Document,³⁰ but also the Commission

³⁰ See *supra* n.7.

comments on the first reading report of the European Parliament³¹ clearly highlight that general interest objectives can also be invoked in connection with other broadcast channels. However, whether and when other broadcast channels would in actual fact fulfill these objectives remains to be seen.

It seems somewhat odd – unfortunately – that the Commission initially gave its opinion about which channels could receive a must-carry status, by including the reference “*in pursuit of a public service remit.*”³² Toward the end of the legislative process and afterwards, however, the Commission openly refrained from taking a position as to which channels could benefit from must-carry.³³

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

In this context, cultural policy may be deemed a general interest objective.³⁴ However, this does not mean that Member States are free to claim

³¹ Amended proposal for a Directive of the European Parliament and of the Council on universal services and users' rights relating to electronic communications networks and services, OJ 2001 C332 E/292.

³² DG Information Society Working Document of 27 April 2000 clarifies in relation to the proposed Section 26 “Thus, the section would not alter the current rules allowing Member States to impose ‘must-carry’ obligations on public communications network operators but would limit such obligations to channels that fulfill a public broadcasting sector function.”

³³ See Commission Working Document, *supra* note 16, (“[T]he designation of individual broadcasters benefiting from ‘must carry’ obligations . . . are not addressed under Article 31.”).

³⁴ The Court has held in Case C-288/89 *Collectieve Antennevoorziening Gouda v. Commissariaat voor de Media* [1991] ECR I-4007, para. 22 and 23, Case C- 353/89 *Commission v Netherlands* [1991] ECR I-4069, para. 3, 29 and 30, and Case C-148/91 *Veronica Omroep Organisatie v. Commissariaat voor de Media* [1993] ECR I-487, para. 9, (that the Mediawet is intended to establish a pluralist and noncommercial radio and television broadcasting system and thus forms part of a cultural policy whose aim is to safeguard the freedom of expression in the audiovisual sector of the various components, in particular social, cultural, religious and philosophical ones, of the

cultural objectives whenever they feel like it³⁵ and for whatever channel.³⁶

4. *Proportionality*

A must-carry rule should be “*proportionate*.” With reference to the previous paragraph, considering whether less intrusive measures can be applied to meet these objectives is one aspect of this principle. Such consideration could lead to the conclusion that must-carry rules are not necessary in a particular situation. The first paragraph of Article 31 reinforces this approach by stipulating that these rules “*shall only be imposed where they are necessary to meet [...] objectives*.”³⁷ The measure – *i.e.* the

Netherlands. It also follows from those three judgments that *such cultural policy objectives are objectives of general interest which a Member State may lawfully pursue* by formulating the statutes of its own broadcasting bodies in an appropriate manner); Case C-23/93 TV10 [1994] ECR I-4795 §18 and §19.
³⁵ Case C-211/91 Commission v Belgium [1992] ECR I-6757 §9 (*Cultural policy objectives adduced by the Belgian Government reveal that in reality the purpose of the measure complained of is to restrict genuine competition with the national broadcasting stations in order to maintain their advertising revenue. As regards the objective of preserving and developing the artistic heritage, suffice it to note, as the Commission does, that the measure complained of is in reality likely to reduce demand for television productions in Dutch*); Case C-17/92 Distribuidores Cinematográficos [1993] ECR I-2239 §20 and §21 (Apart from the fact that *cultural policy is not one of the justifications set out in Article 56*, it is important to note that the Decree-Law promotes the distribution of national films whatever their content or quality. In those circumstances, the link between the grant of licenses for dubbing films from third countries and the distribution of national films pursues an *objective of a purely economic nature which does not constitute a ground of public policy within the meaning of Article 56 of the Treaty*).

³⁶ It is not conceivable that with regard to a PayTV channel or a niche channel (one subject channel – e.g. home shopping) a general interest objective could be invoked to justify their inclusion in must-carry legislation.

³⁷ See Case C-288/89, *Collectieve Antennevoorziening Gouda v. Commissariaat voor de Media (Mediawet I)*, 1991 E.C.R. I-4007, para. 15, which states:

[A]s the Court has consistently held, the application of national provisions to providers of services established in other Member States must be such as to guarantee the achievement of the intended aim and *must not go beyond that which is necessary* in order to achieve that objective. In other words, it must not be possible to obtain the same result by resorting to less restrictive

must-carry obligation – also needs to be indispensable to attain the objective that has been set out.³⁸

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

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

Further, when half or more of the broadcast channels in the basic package must be carried, one could rightfully argue that the impact on the network operator is disproportionate. The Working Document³⁹ and a COCOM paper⁴⁰ from the Commission hint toward the possibility to lift the disproportionate character of such a measure by providing remuneration.

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

³⁸ See Case C-222/95, *Parodi v. Banque H. Albert de Bary et Cie (Parodi)*, 1997 E.C.R. I-3899, para. 31 (“If such a requirement is to be accepted, it must be shown that it constitutes a condition which is indispensable for attaining the objective pursued.”).

³⁹ See *supra* n. 17.

⁴⁰ European Commission Communications Committee Working Document, *An approach to [financing] the transport of ‘must-carry’ channels, in relation to Article 31 of the Universal Service Directive*, COCOM03-38 (Sept. 2, 2003).

Interestingly enough the COCOM paper even seems to suggest that remuneration could be required in certain cases to avoid a clash with the proportionality principle, even though remuneration as referred to in paragraph 2 of Article 31 is only an option for Member States.⁴¹

An additional question, currently more theoretical, concerns the simulcast⁴² of a must-carry channel. When a network operator offers an analogue and a digital package, would it be proportionate for a must-carry channel to obtain mandatory distribution via both technologies, and possibly without remuneration? The Federal Communications Commission (“FCC”) in the US already decided in 2001⁴³ on the primary question of whether a TV channel could claim both analogue and digital distribution, that it infringes cable operators’ rights under the First Amendment to oblige them to carry both formats.⁴⁴

5. *Transparency*

The introduction of the transparency concept was most probably inspired by other existing European legislation.⁴⁵ The transparency principle – and similarly the proportionality principle – has become popular European jargon in those areas of law where Member States still retain discretionary powers on the regulation of certain undertakings and services. In the field of must-carry, transparency has the potential to increase legal certainty by

⁴¹ *Id.* at 3 (“Nevertheless, the general criteria indicated under article 31 of the Universal Service Directive may imply, under specific circumstances, that some form of remuneration should be provided in order for the must-carry obligation to be considered proportionate or reasonable.”). See *infra* Part 3.7.

⁴² This Article defines “simulcasting” as distributing a radio or television channel to subscribers in analogue and digital format. In order to watch the digital format a subscriber needs a decoder or set top box.

⁴³ CARRIAGE OF DIGITAL TELEVISION BROADCAST SIGNALS, 16 F.C.C.R. 2598 (2001) (The discussion about simulcast must-carry or “dual carriage” in US terms has been re-opened with the advent of HDTV).

⁴⁴ To date the FCC has not resolved the digital “multi-casting” or analog/digital must-carry issues.

⁴⁵ For instance: Article 13, Directive 98/10/EC of the European Parliament and the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment, OJ L 101/24, 1 April 1998 and Directive 98/34/EC as amended by Directive 98/48/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 204, 21 July 1998.

obliging Member States to clearly identify in advance those channels and services that would benefit from must-carry. By doing so, a more predictable environment is created for those undertakings subject to the must-carry obligation. The use of the term “specified” in Article 31 is a further application of this principle.

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

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

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

6. *Periodic Review*

With reference to the above, the initial proposal did not state “*subject to periodical review*” but rather, “*limited in time.*”⁴⁶ At (regular) intervals, the appropriate authority needs to assess whether the necessary conditions for applying its must-carry legislation are still justified in the light of technological and market developments. In its Commission Working Document the Commission states: “*The obligation to review the must-carry regime on a regular basis should encourage Member states to re-evaluate the need for and scope of must-carry rules and, in particular, regularly assess, taking into account technology and market developments and the views of interested parties, whether such rules still match the necessity and proportionality requirements.*” Although Article 31 does not provide any

⁴⁶ EUR. PARL. DOC. (COM 392)(2001)(The suggestion to replace “limited in time” by “subject to periodic review” was made in the first reading of the report, due to pressure from Member States and broadcasters who did not want to see must-carry legislation being phased out.

indication as to which direction a review could take place, the sentence above in the Commission Working Document clearly points to a reduction of the must-carry burden on the network operators concerned.

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

7. *Member states can determine appropriate remuneration*⁴⁷

The cable industry held high hopes, at the launch of the Communications Review process in 1999, that they would be able to ensure once and for all compensation or remuneration in return for the obligation to carry specific broadcast channels. The initial Commission documents, which addressed must-carry, seemed to “go in the right direction.”⁴⁸

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

As already mentioned above, the “shall” became “the ability of Member States” and “if any” in the adopted text, and the reference to network capacity was replaced by non-discrimination between network operators, proportionality and transparency. Although not much was left from the original proposal, other suggestions made during the decision making process were fortunately not upheld.⁴⁹

Probably as an effort to encourage Member States to provide compensation for the must-carry obligation, despite the adopted text, in 2002

⁴⁷ The words “remuneration” and “compensation” are used interchangeably.

⁴⁸ DG Information Society Working Document (EC) of 27 April 2000. (“Member States shall ensure that network operators receive adequate compensation for the transmission of ‘must-carry’ channels, taking into account the network capacity required.” The Commission proposal modified the sentence slightly “Member States shall ensure that the undertakings subject to ‘must-carry’ obligations receive appropriate compensation on reasonable, transparent, and non-discriminatory terms taking into account the network capacity required.”).

⁴⁹ EUR. PARL. DOC. (COM 392)(2001)(“The value of those broadcast channels to operators”).

the Commission engaged Eurostrategies to do a study on the cost of must-carry.⁵⁰ In general terms, Eurostrategies came to the conclusion that different models for payment between cable operators and broadcast channels existed for the (re)transmission of channels. In addition, they proposed a particular cost modeling method to assess the transportation costs for the cable operator, which subsequently would lead to a guideline price fixed by a regulator with parameters allowing for deviation from the guideline price. The transportation costs they proposed were going to apply to all broadcast channels carried on a cable network, whether must-carry or not. Next to the technical transportation costs, however, Eurostrategies also seemed to suggest that the value of the must-carry channel would have to be taken into consideration when deciding on the final price.

Cable operators, broadcasters, the Commission and Member States, all of them for different reasons, were not enthusiastic about the outcome of the study. This resulted in a status quo situation, or to put it in other words, the issue of remuneration disappeared from the European agenda.⁵¹ The emphasis from cable operators subsequently shifted more toward the copyright problem attached to the must-carry obligation.⁵²

Furthermore, Paragraph 2 of Article 31 remains silent on which entity could be held responsible for the payment of remuneration in case it is prescribed by law. The obvious question here is whether it should be the Member State or the broadcaster concerned. One could possibly argue that in the case of must-carry status and remuneration for both public and commercial channels, it would be non-discriminatory to require the Member State to pay the latter for all channels, as it would in any case pay remuneration for the Public Service Broadcaster (hereinafter "PSB").⁵³

⁵⁰ EUROSTRATEGIES, ASSESSMENT OF THE MEMBER STATES MEASURES AIMED AT FULFILLING CERTAIN GENERAL INTEREST OBJECTIVES LINKED TO BROADCASTING, IMPOSED ON PROVIDERS OF ELECTRONIC COMMUNICATIONS NETWORKS AND SERVICES IN THE CONTEXT OF THE NEW REGULATORY FRAMEWORK, (2003).

⁵¹ Even though the Commission tried to stretch the issue further by launching an inquiry amongst Member States to list what existed in practice and what their views were, without any publicly available result to date.

⁵² This will be dealt with under Chapter 4.

⁵³ Under the presumption that the PSB is financed through public means.

An alternative line of thought suggests the creation of a must-carry compensation fund⁵⁴ financed by the platforms delivering broadcast channels in a particular Member State but which are not burdened by any must-carry obligation in that Member State. Such funding makes sense only if the networks concerned are assigned - next to the must-carry obligations - the task of achieving universal coverage and perhaps other associated general interest obligations, such as an affordable price for the distribution of a basic content package.

A complementary problem in relation to possible remuneration relates to signal delivery costs.⁵⁵ Signal delivery costs come into play, in particular, in connection with regional/local broadcasters who claim not to be in a position to pay for delivering their broadcast signal to the cable operator. It seems disproportionate to require cable operators to bear these additional costs.

In comparison, the U.S. established a compulsory license scheme in section 111 of the 1976 Copyright Revision Act, which permitted a cable operator to transmit local and distant broadcast signals for a predetermined fee. The fee is set by the Copyright Royalty Judges (formerly the Copyright Royalty Tribunal) based on the number of imported signals and multiplied by a number set by the Judges to find the percentage of the cable operator's gross revenues that must be charged. However, the retransmission of distant signals decreased once cable operators realized it was more cost efficient to transmit satellite-delivered non-broadcast signals. Today in the U.S., most cable subscribers watch satellite-delivered non-broadcast programming, which has caused the copyright model to shift from a compulsory license to a negotiated contract.⁵⁶

Simultaneous with the decline of the compulsory license scheme in the U.S., Congress permitted "re-transmission consent" (RTC) as an alternative to must-carry obligations and to supplement the Section 111 royalties in the

⁵⁴ Similar to a universal service fund as known in the telecommunication sector.

⁵⁵ From a technical distribution viewpoint, a distinction can be made between signal delivery costs and transportation costs. The former concerns costs endured to bring the broadcast signal to the network operator; the latter relates to costs of transporting the broadcast signal over the operator's network.

⁵⁶ See Michael Botein & Edward Samuels, *Compulsion Licenses in Peer-to-Peer File Sharing: A Workable Solution?*, 30 S. ILL. U. L.J. 69, 76-77 (2005) [Note: MLP staff has added this paragraph to demonstrate the must-carry remuneration model in the U.S.].

1992 Cable Act. Although the 1992 Cable Act permits a cable operator to disregard must-carry obligations if a broadcaster and cable operator cannot reach an RTC agreement, most broadcasters have sought such agreements eagerly. Many of the RTC agreements include reciprocal dealings rather than outright economic value. Such dealings include carrying a broadcaster's additional cable networks, advertising time for broadcasters, and sharing production facilities. In the U.S., RTC agreements are the generally accepted mode of compensation for retransmitting broadcast signals.⁵⁷ [*MLP staff has added the previous two paragraphs to demonstrate the comparison to U.S.*]

II IMPLEMENTATION – FROM A PATCHWORK TO A UNI-COLORED BLANKET?

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

PLEASE SEE FIGURE ON NEXT PAGE

⁵⁷ *See Id.* at 78-79 [Note: MLP staff has added this paragraph to demonstrate the rise of the re-transmission consent approach to must-carry in the U.S.].

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| COUNTRY | SPECIFIED BROADCAST CHANNELS | CABLE ONLY | CLEARLY IDENTIFIED GENERAL INTEREST OBJECTIVES | ONLY PUBLIC SERVICE CHANNELS | COPYRIGHT PAYMENT |
|--------------------|------------------------------|------------|--|------------------------------|-------------------|
| <i>Austria</i> | YES | YES | NO | NO | YES/NO |
| <i>Belgium</i> | YES/NO* | NO/YES** | YES/NO | YES/NO | YES |
| <i>Czech Rep.</i> | NO | NO | NO | NO | YES |
| <i>Denmark</i> | YES | NO | YES | NO | YES |
| <i>Finland</i> | NO | YES | NO | NO | NO |
| <i>France</i> | YES | NO | NO | NO | YES/NO |
| <i>Germany</i> | NO | YES | YES | NO | YES |
| <i>Hungary</i> | YES | YES | NO | NO | NO/YES |
| <i>Ireland</i> | YES | YES | NO/YES | NO | NO |
| <i>Malta</i> | NO | NO | NO | NO | NO |
| <i>Netherlands</i> | YES/NO | YES | YES | NO | YES/NO |

| COUNTRY | SPECIFIED BROADCAST CHANNELS | CABLE ONLY | CLEARLY IDENTIFIED GENERAL INTEREST OBJECTIVES | ONLY PUBLIC SERVICE CHANNELS | COPYRIGHT PAYMENT |
|---------------|------------------------------|------------|--|------------------------------|-------------------|
| <i>Poland</i> | YES | YES | NO/YES | YES | YES |
| <i>Sweden</i> | YES/NO | YES | YES/NO | NO | YES |
| <i>UK</i> | YES | NO | YES | YES | NO |

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

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

It is clear from this chart that Article 31 has not been fully implemented in all Member States. Some of them have not (as yet) amended their national legislation at all – e.g. Sweden, the Netherlands – on the argument that their media law cannot be affected by the new regulatory Framework, even though the Commission in its 9th Implementation Report pointed to the contrary.⁵⁸

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

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

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

The next question is whether or not Article 31 led to the rationalization of channels qualifying for a must-carry status. The rationalization mechanism is part of the proportionality objective as pursued by Article 31. Depending on how broadly public service broadcasting is defined⁵⁹ only very few Member States that have limited the must-carry legislation to public service broadcast channels – the UK, Belgium (Flanders), Poland. On the other hand, there are still Member States where home shopping channels – e.g. Germany, Malta – and Pay-TV channels – Belgium (Brussels) – have a must-carry status. In numerous Member States, a combination is applied – national PSB, regional broadcast channels, national private channels, foreign PSB, foreign private

⁵⁸ 9th *Implementation Report*, at 38, COM (2003) 715 final (Nov. 19, 2003) (“Most national measures transposing the new regulatory framework do not introduce must-carry rules; they are usually embedded in other pieces of national legislation, such as audiovisual laws. Nevertheless, such must-carry rules must comply with the principles set out in the Universal Service Directive, namely that they should only be imposed where they are necessary to meet clearly defined general interest objectives and shall be proportionate and transparent”).

⁵⁹ Does it include regional/local broadcast channels that might be financed privately?

channels.

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

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

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

Possible remuneration for must-carry is not mentioned in the overview for the simple reason that no Member State has put in place an appropriate remuneration mechanism for must-carry.⁶⁰

III IS THERE COPYRIGHT EVERYWHERE?

One of the concerns already touched upon – see also the implementation overview – is that of copyright.⁶¹ Traditionally, in most countries affected by must-carry legislation, no provision was made contemplating payments for (re)transmission over cable networks regarding copyright in the strict sense and/or neighboring rights. This approach was based on a variety of arguments.⁶² This has changed, however, in recent years.

⁶⁰ Hungary is the exception where a fund has been created, similar to a universal service fund, whereby the private broadcasters pay the remuneration (copyright) for the PSB's must-carry status.

⁶¹ Reference here is made to copyright in a very broad sense – for simplification reasons – covering “copyright in the strict sense” and “neighboring rights.” Reference is made to “copyright in the strict sense” or “neighboring rights” separately when required within the context.

⁶² Ranging from the “service area” principle, preventing “double payment” to the argument that “no retransmission over cable is taking place.”

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

In many of these countries, payments by cable operators are already being made as regards third party copyrights, meaning all rights not owned/acquired by the must-carry broadcaster. In the so-called collective cable contracts between cable operators, mostly national and foreign PSB channels, and copyright collecting societies that existed for instance in Belgium, Germany, Ireland, the Netherlands, the national PSB must-carry channels formally did not receive any payment for retransmission over cable. In some of these countries and others, there was an agreement with the government that no copyright payment was due for the must-carry channels (Sweden, Denmark, and Finland). Separately, the Austrian copyright law (Article 17) explicitly states that, for the transmission of the national PSB must-carry channels over cable, the PSB channels are “communicating to the public” and not the cable operators.⁶³ In the Austrian example, the doctrine of “mere conduit”⁶⁴ is applied, whereby the cable operator’s network is only used as a technical facility, which should not automatically lead to an act subject to copyright.

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

The Commission included a sentence in the invitation for comments regarding possible illegal state aid practices conducted by the public broadcasters & NOB – the Dutch PSB systems operator. In this invitation for

⁶³ Berne Convention for the Protection of Literary and Artistic Works art. 11*bis* (1)(ii), Sept. 9, 1886, 828 U.N.T.S. 221. In copyright terms, this means that there is no “retransmission” taking place.

⁶⁴ Directive 2000/31/EC of the European Parliament and of the Council of June 8, 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) 2000/17, art. 12, 2000 O.J. (L 178) 1 (EC); WIPO Copyright Treaty, statement attached to art. 8, *adopted* Dec. 20, 1996, S. TREATY DOC. No. 105-17 (1997), 36 I.L.M. 65.

comments, the Commission seems to hint that cable operators are being favored because they do not have to pay any copyright to the Dutch PSB until today.⁶⁵ It should be borne in mind that this opinion of the Commission is a preliminary view, on which a final decision is awaited. For the time being, this preliminary view does not seem to acknowledge the fact that the Dutch PSB channels have a must-carry status and more importantly, that they are being financed by the Dutch taxpayer, while foreign PSB or private broadcasters are not. A difference in treatment should subsequently be allowed, nevertheless bearing in mind that a payment in return for a copyright relevant authorization for the transmission of a broadcast channel is not required per se.

IV FROM MUST-CARRY TO MUST-OFFER?

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

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

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

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

⁶⁵ See Ad-hoc measures to Dutch public broadcasters and NOB Invitation to submit comments pursuant to Article 88(2) of the EC Treaty 63/1, 2004 O.J. (C 61) 8, 9. This arrangement is under pressure as the musical rights society (and Dutch PSBs) are suing cable operators in order to obtain copyright payment for the retransmission of the Dutch PSB. The final word has not been said, *see also* Letter from the Dutch Secretary of State for Media to the Dutch Parliament (Aug. 17, 2005), concerning the non-payment of copyrights for the retransmission of the Dutch PSBs.

from the distributor.

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

It is not clear whether or not it is valuable to introduce a “must-offer”⁶⁶ obligation for certain broadcasters instead of must-carry. Public Service Broadcasters, in any case, have a must-offer obligation, it is their *raison d'être*, based on their commitments toward the government and ultimately to the general public. It is one of the primary tasks of a PSB to offer its full programming to all platforms present in a particular Member State, especially when these platforms need to acquire exclusive rights from other content providers in order to differentiate their television offers.

In a recent Working Document,⁶⁷ the Commission expressed its views on how Article 31 is to function within the new regulatory Framework in years to come:

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

⁶⁶ “Must-offer” already explicitly exists in the UK, Ireland, and Belgium (Flanders) for the PSB.

⁶⁷ *Commission Working Document: Annex to the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on accelerating the transition from analogue to digital broadcasting*, COM(2005) 204 final (May 24, 2005).

introduced or existing ones would be extended.

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

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

A second remark is the reference to the Access Directive, which is important as regards to the way in which Article 31 functions in the context of the new regulatory Framework. This reference is recognition of the fact that ex-ante access obligations, based upon the market analysis procedure, is an alternative to must-carry.⁶⁸ One of the advantages for targeted network operators is that such an access obligation is not for free. Irrespective of the cost model used by the NRA, an operator would be allowed to recuperate its costs. However, it remains unclear whether a shift from national must-carry

⁶⁸ This line of reasoning is used in Italy.

legislation to access obligations will take place in the medium term.⁶⁹ Access obligations based on the new regulatory Framework do not take into account general interest objectives and would apply to all broadcasters alike. Access obligations would, nevertheless, create greater transparency in a rapidly changing broadcasting market.

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

⁶⁹ In the Netherlands, both systems already existed in parallel under the old telecoms framework. The new regulatory Framework has not led to a repeal of must-carry legislation.