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The Future Of Must-Carry: From Must-Carry To A Concept Of Universal Service In the Info-Communications Sector

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**FROM MUST-CARRY TO A CONCEPT OF UNIVERSAL SERVICE
IN THE INFO-COMMUNICATIONS SECTOR**

By
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INTRODUCTION

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

This idea is not only defended by representatives of the electronic communications sector and by some scholars, but is also present in current

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

discussion in European Commission circles. The wording of Article 31 of the Universal Service Directive³ (“reasonable obligations,” “necessary to meet clearly defined general interest objectives,” “proportionate,” “subject to periodical review”), suggests that the intention was to *limit* must-carry obligations, even to let them gradually “fade out,” rather than to support their maintenance.

Consequently, it may have surprised the Commission to hear that some Member States – where must-carry obligations did not exist before – seized the opportunity of the implementation of the 2002 regulatory package to introduce must-carry rules.⁴ Moreover, Article 31 does not seem very successful in achieving the harmonization it pursues. A comparison of the must-carry regimes in the Member States⁵ shows that important differences still exist when it comes to the number and nature of must-carry channels, the kinds of networks subject to must-carry obligations, and the financial conditions for must-carry (in terms of transport fees as well as copyright arrangements).

Supporters of the must-carry rules emphasize that it is widely held in Europe that governments are to ensure the universal coverage of general interest contents. Incidentally, is it not the case that the ongoing debate on PSB⁶ shows that Member States are very reluctant – if not utterly opposed – to abandoning the idea of publicly supported and universally available audiovisual contents?⁷ For the Member States, must-carry obligations seem a logical and necessary measure in the *transmission* layer in order to achieve public policy goals set at the *content* level. It is also argued that must-carry obligations should be countered with “must-offer” obligations on the side of the content providers. Hence, in the digital age must-carry obligations could

³ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), Apr. 24, 2002, 2002 O.J. (L 108) 51 – 77.

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

⁵ See the paper by Thomas Roukens in this issue of *Media Law & Policy*.

⁶ Public Service Broadcasting (“PSB”).

⁷ No Member State puts into question the fundamentals of PSB – on contrary, the vast majority of European countries adhere to a strong public broadcaster that ensures the availability of a wide range of contents on different (if not all) distribution platforms.

be seen as part of a larger concept of “universal service obligations with regard to content.”

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

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

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

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

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

The structure of the subsequent chapters is as follows. After a brief outline of some of the gaps in the current must-carry regimes, an analytical

⁸ Although this framework might seem theoretical at first sight, the fact that it has already served effectively as a starting point for the new broadcasting legislation in the French-speaking part of Belgium proves its viability.

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

I

THE GAPS: WHAT IS WRONG WITH MUST-CARRY TODAY?

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

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

On the other hand, the European Commission disapproved strongly of the Flemish Community's⁹ proposed introduction of must-carry rules to the benefit of new commercial channels in Flanders, in its recent Broadcasting Decree of 7 May 2004.¹⁰ The intention of the Flemish government was to grant new broadcasters a *temporary* must-carry status (namely, during the first two years after their take-up) in order to give them enough “try out” time to prove their value, gain sufficient market share and be in a position to negotiate access with cable operators on purely commercial terms after the expiry of their special status. According to the Flemish government, this measure was supposed to stimulate the development of innovative programmes in Flanders, and provide in turn a fair balance between the interests of content providers and cable operators.

⁹ The northern, Dutch-speaking part of Belgium.

¹⁰ Decreet 7 Mei 2004 houdende wijziging van sommige bepalingen van de decreten betreffende de radio-omroep en de televisie, gecoördineerd op 25 Januari 1995, en van sommige andere bepalingen betreffende de radio-omroep en de televisie, *Belgisch Staatsblad / Moniteur Belge*, 8 August 2004. This Decree implements the European Directives on electronic communications networks and services in Flanders as far as broadcasting transmission is concerned.

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

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

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

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

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

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

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

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

exclusive partnerships with competing platform operators.

Let me further clarify this point by referring to the circumstances in Flanders last year, when the Decree of 7 May 2004 was being prepared for introduction in Parliament. At a certain moment, the question arose as to whether must-carry obligations had to be applied in a “technologically neutral” manner, in the sense that not only CATV operators, but also the operators of other electronic communication networks would be subject – immediately after the entry into force of the new decree and regardless of their subscriber base at that moment – to compulsory distribution of specific radio and TV channels. Such an idea might have been to the advantage of Belgacom,¹¹ in search of “a ticket” to the contents of those Flemish broadcasting organizations that attract large audiences, in particular those of the commercial broadcaster VMMA.¹² Why would Belgacom need such a “ticket”? Because there were, at the time, rumors about an exclusive partnership between VMMA and cable operator Telenet in the context of digital television.¹³ Were this scenario to become a reality obviously Belgacom would find itself in a major competitive disadvantage when launching its own digital TV platform.¹⁴ And how would it get such a “ticket”? Via the must-carry rules: under the former must-carry regime¹⁵, commercial broadcasters in Flanders offering so-called general interest channels¹⁶ – such as the SBS channel VT4 and the popular VMMA channels VTM, Kanaal2 and JimTV – had must-carry status. For Belgacom, being

¹¹ See Belgacom, the incumbent Belgian telecommunications operator, at, <http://www.belgacom.be> (last visited Mar. 5, 2006).

¹² See Vlaamse Media Maatschappij, <http://www.vmma.be> (last visited Mar. 5, 2006).

¹³ It should be noted that the likelihood and scope of such exclusive cooperation remains unclear, as one of the conditions imposed by the Belgian Competition Council in the Telenet/Canal+ merger case states explicitly that “Telenet cannot conclude exclusive distribution contracts with the aforementioned open channels that are currently transmitted over its cable networks...” (translated from the Dutch); Competition Council, decision n° 2003 – C/C – 89 of 12 November 2003.

¹⁴ Which it will try to compensate via its recent acquisition of the exclusive broadcasting rights for the Belgian football league.

¹⁵ E.g. prior to the enactment of the Decree of 7 May 2004.

¹⁶ These are channels that offer a wide variety of contents in different domains (information, entertainment, culture, sports, education) to various segments of the public and bring at least two daily news reports prepared by independent journalists (articles 65-70 Gecoördineerde Decreten betreffende de radio-omroep en de televisie, *Belgisch Staatsblad / Moniteur* 8 April 2005).

subject to the obligation to (re)transmit these must-carry channels would implicitly give it the right to include the most popular Flemish channels¹⁷ in its program package. Hence, it could use the must-carry obligations to enforce access to *contents* (contrary to what these rules were intended for, *i.e.* guaranteeing access to *networks*). Although Belgacom was never able to put this strategy to the test,¹⁸ questions about its legitimacy and appropriateness remain. Meanwhile, both Belgacom and Telenet have launched an iDTV platform in Belgium, offering basic packages that include all popular Flemish TV channels.

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

What if mobile operators put pressure on public broadcasters to offer news services exclusively to their customers and not via the networks of their competitors? And what if some mobile operators are not interested in investing in technical equipment and network and/or storage capacity required to offer such services to their end-users (for instance, because their commercial strategy is focused on offering cheap telephone rates and not content services). Should public broadcasters in that case bear themselves the financial burden of being present on *all* platforms (in order to fulfill their duty

¹⁷ In particular the programmes of the public broadcaster VRT, the local channels, and the VMMA and SBS channels.

¹⁸ Since, on the one hand, must-carry rules no longer include the commercial general interest channels and, on the other hand, the idea of expanding the scope of must-carry obligations to Belgacom was never taken up by the Flemish legislator (as this would be contrary to Article 31 Universal Service Directive, at least as long as Belgacom's network is not used for reception of broadcasting contents by a significant number of end-users).

¹⁹ For instance, because they were co-produced with the operator of the television platform, who therefore insists on exclusivity.

²⁰ See www.vrtnieuws.net (last visited March 5, 2006).

²¹ And not the customers of other ISP's, such as Telenet or Tiscali (due to discussions about the costs for server capacity). A few weeks after the launch of the news site, Telenet accepted to bear the costs of hosting the website, but customers of alternative ISP's still could not receive the video streams. Only when VRT decided to pay the costs for hosting the servers did all (Belgian) internet users gain equal access to the contents on its news site.

of universal coverage), or can we consider the decision about the presence or absence of public broadcasters on various platforms as a purely commercial issue (which in turn depends on the financial situation and business models of network operators)?

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

D. The growing complexity of the audiovisual landscape

The audiovisual landscape in which the initial must-carry regimes emerged is no longer the prevailing scene. Must-carry cannot be regarded anymore as a simple question of extending the universal coverage obligation of public broadcasters to cable operators. Digitization, liberalization and convergence of telecommunications and broadcasting have led (and are still leading), on the one hand, to a multiplication of content providers and on the other to an increase in the number of network operators.

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

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

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

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

II
RETHINKING MUST-CARRY IN THE DIGITAL AGE:
A LAYERED APPROACH

A. The Layers: Transmission versus Content Regulation

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

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

Similarly, Commissioner Viviane Reding has already announced at various occasions²³ that she wants to transform the “Television without

²² See, *e.g.*, the Framework Directive (European Parliament and Council Directive 2002/21 of 7 March, 2002 O.J. (L 108) (EC), 24 April 2002, p. 33 (on a common regulatory framework for electronic communications networks and services)), and the four specific directives (Access Directive 2002/19/EC, Authorisation Directive 2002/20/EC, Universal Service Directive 2002/22/EC and Privacy in Electronic Communications Directive 2002/58/EG).

²³ For instance, at the Conference of the European Cable Communication Association in Brussels on 18 January 2005, “Challenges ahead for the European Commissioner for Convergence”, or in her opening speech for the seminar on the revision of the Television without Frontiers Directive in Luxembourg on 30 May 2005, “La modernisation de la directive Télévision sans Frontières,” *at* http://europa.eu.int/information_society/newsroom/cf/comnews.cfm?type=sp (last visited Mar. 5, 2006).

Frontiers” Directive²⁴ into a directive dealing with all audiovisual contents, in other words regulating the whole “content layer” (as a counterpart of the transmission regulation in the electronic communications directives).²⁵ In December 2005, the Commission published a legislative proposal to modernise the Television without Frontiers Directive. Its proposal for a new “Audiovisual Media Services Directive” introduces a ‘horizontal’ and ‘technology-neutral’ approach to content regulation, imposing obligations on all audiovisual media services, both linear and non-linear, and irrespective of the underlying platform or distribution means.²⁶ Please note that the view of the Commission is not shared by all of the Member States, nor is it supported by an important part of the industry itself. The legislative proposal is highly contested by the new media players – in the online, broadband and mobile sectors – who fear that the extension of the scope of the Television without Frontiers Directive to cover not just television services but also new media (including those offered via the Internet and mobile telephone networks) could dampen the growth of these important and rapidly developing areas.²⁷

²⁴ Directive 89/552/EEC of the Council of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, O.J. (L 298), 17 October 1989, p. 23, as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997, O.J. (L 202), 30 July 1997, p. 60.

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

²⁶ See *Commission Proposal for a Directive of the European Parliament and of the Council Amending Council Directive 89/552/EEC*, COM (2005) 646 final (Dec. 13, 2005), available at http://ec.europa.eu/comm/avpolicy/reg/tvwf/modernisation/proposal_2005/index_en.htm.

²⁷ See Peggy Valcke, *Convergent Content Regulation – Towards a Horizontal and Graduated Legal Framework for ‘Regulatable’ Content*, TELEMATICS AND INFORMATICS (special issue on NEXT GENERATION BROADBAND)(forthcoming 2006); Peggy Valcke and David Stevens, *Re-regulation of the Info-Communications Market - Delivering Content Services under the new European Framework for Audiovisual Media: Fair Play or Unfair Competition?*, Proceedings of the 45th FITCE Congress on “Telecom Wars: The Return of the Profit”, Athens (Greece), Aug. 30 - Sept. 2, 2006 (forthcoming), general information at www.fitce2006.gr.

B. The players in the value chain

The French Community of Belgium (whose must-carry-regime will serve as an example in a following section of this paper) has taken these two layers – transmission and content – as a starting point for its new Broadcasting Decree of February 2003.²⁸ It distinguishes between three different categories of players in the value chain – two in the content layer and one in the transmission layer – and structures its broadcasting rules around these categories:

- the “**editors of broadcasting services**” (or “content providers”), are those who produce (have the editorial responsibility over) broadcasting channels or other information services²⁹
- the “**distributors of broadcasting services**” (or “service providers”), are those who aggregate or package channels and services (either their own productions or acquired from third parties) into various bundles and offer these to end-users³⁰
- the “**network operators**” (or “network providers”), are those who control the technical exploitation of broadcasting networks and provide transmission capacity for the delivery of radio and TV broadcasts and other information services, including those who provide value added network services such as encryption, decoder systems, etc.³¹

It should be noted that, in practice, market players will often perform several functions simultaneously; hence, they would fall under more than one

²⁸ *Belgisch Staatsblad / Moniteur Belge*, 17 April 2004.

²⁹ *"Editeur de services: la personne morale qui assume la responsabilité éditoriale d'un ou de plusieurs services de radiodiffusion en vue de les diffuser ou de les faire diffuser"; art. 1, 13°*

³⁰ *"Distributeur de services: toute personne morale qui met à disposition du public un ou des services de radiodiffusion de quelle que manière que ce soit et notamment par voie hertzienne terrestre, par satellite ou par le biais d'un réseau de télédistribution. L'offre de services peut comprendre des services édités par la personne elle-même et des services édités par des tiers avec lesquels elle établit des relations contractuelles. Est également considérée comme distributeur de services, toute personne morale qui constitue une offre de services en établissant des relations contractuelles avec d'autres distributeurs"; art. 1, 12°*

³¹ *"Opérateur de réseau: toute personne morale qui assure les opérations techniques d'un réseau de radiodiffusion nécessaires à la transmission et la diffusion auprès du public de services de radiodiffusion "; art. 1, 22°*

of the above categories. A radio station transmitting over the air, for instance, acts at the same time as content provider (editing its own radio program), service provider (offering its program to the listener) and network provider (operating its own broadcasting equipment). The Flemish commercial TV broadcaster, VMMa, is both editor and provider of broadcasting services, but not a network operator (since it has no transmission facilities of its own, but distributes its channels over the networks of the cable operators).

In the case of UK cable operator NTL, the broadcasting service provider and the network provider are one and the same entity: NTL operates the network and it bundles channels of third parties (editors of broadcasting services) into different packages to sell them to its cable subscribers (for instance, the "Base Pack," "Family Pack," on demand channels, extra services, etc.³²).

Maintaining the network and offering program packages to end-users are different operations, however, which can be performed by separate entities. Taking again the example of cable distribution, this can be illustrated by BeTV (formerly Canal+) in the French-speaking part of Belgium,³³ which sells its premium packages to the cable subscribers of the Walloon CATV operators (without operating these cable networks itself).³⁴

The U.S. system is similar to the European examples mentioned previously. For instance, HBO is both an editor and distributor of broadcast services but without a network operator, it would have no way to distribute those services. Additionally, in the U.S., most cable operators like TimeWarner and Comcast are editors, distributors and operators but satellite operators are solely network operators. [*MLP staff has added this paragraph to compare the U.S. video systems.*]

C. A layered model for must-carry

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

³² See NTL at www.ntl.com (last visited March 5, 2006).

³³ In Flanders, Canal+ has been taken over by Telenet and has been renamed "Prime."

³⁴ This distinction was blurred in Flanders after the take-over of (the Flemish branch of) Canal+ by Telenet. It should also be noted that Canal+ performs to a certain extent the role of network provider, since it maintains its own conditional access system (offering its own decoders to the cable subscribers).

As already explained, this paper is based on the premise that even in an era of abundant information flows and lack of transmission scarcity governments still view it as their task to ensure that all their citizens have access to a minimum and specific package of information services at an affordable price: a “basic offer” or “basic package.” Against this background, I take the position that must-carry rules should be understood as part of a larger concept of “universal service obligations with regard to content” (hence, we could also speak of a “universal service package” instead of a “basic package,” which is probably – in order to avoid misunderstandings with the basic packages that, for instance, cable operators offer to their subscribers – a better expression to mean an offer that is legally defined as containing all general interest contents to which every citizen should have access at reasonable conditions).

The key questions in the universal service obligations-debate (USO-debate) are, similar to questions asked as regards USO in telecommunications, as follows:

- What should be the content of the universal service package (USP)?
- Who will deliver this basic package?
- What are the terms (financial & commercial)?

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

1. *On the level of the editors of broadcasting services “must-offer”*

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

2. *On the level of the distributors of broadcasting services: "must distribute"*

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

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

3. *On the level of the network operators: "must-carry"*

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

III

CASE STUDY: THE FRENCH COMMUNITY IN BELGIUM

After the theory, the practice: how can we translate these different steps and concepts into legislation? This chapter is a case study. I address the system of must-carry that was introduced in the French Community of Belgium by the Broadcasting Decree of 27 February 2003.³⁵

- A. Editors of broadcasting services: 'right to compulsory distribution' & 'must-offer'

At the level of the editors of broadcasting services,³⁶ the Broadcasting Decree introduces the "right to compulsory distribution."³⁷ This right guarantees certain content providers the inclusion in the basic offer of the distributor. Its main features are listed in articles 48-51 of the Broadcasting

³⁵ Cf. *supra*, note 28.

³⁶ Cf. *supra* "les éditeurs de services," "de uitgevers van diensten"

³⁷ "le droit de distribution obligatoire," "het recht op verplichte verdeling"

Decree, as follows:

- the right to compulsory distribution is attributed by the French Community government
this right is attributed to editors of broadcasting services for one or more specific channels or services
- it can be enforced in relation to the distributors of services mentioned in article 82, § 2 (*cf. infra*)
- in order to be entitled to the right of compulsory distribution the editor has to enter into an agreement with the French Community government and both the editor and its broadcasting service should fulfill certain conditions (that are listed in article 50):
 - *the broadcasting service shall (§1):*
 - contribute to the (cultural) patrimony of the French Community
 - consist of a ‘full’ program (*i.e.* one that brings a substantial amount of daily hours of original content)
 - include at least one (general) newscast every day
 - *the content provider is required to (§2):*
 - make investments in the audiovisual production of the French Community (calculated in terms of annual turnover and employment figures).³⁸

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

It should be noted that the French Community Broadcasting Decree also contains a list of ‘traditional’ must-carry obligations – more specifically in its provisions dealing with distributors of broadcasting services (title VI, chapter 1 of the Broadcasting Decree) – which bring a degree of inconsistency

³⁸ It is difficult not to be under the impression that this requirement comes down to “buying” a right of compulsory distribution. For a similar reason, the former must-carry regime in the French Community was criticized in legal scholarship from an internal market perspective: Jeroen Capiiau, “Een Europese vinger in de Belgische *must-carry* pap”, *Auteurs & Media* 2002/5, 387-401 (390, note 17).

to the system of compulsory distribution.³⁹ According to article 82, § 1, the following programs (services) must be included in the basic offer of the cable distributor (*cf. infra*):

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

B. Distributors of broadcasting services

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

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

- Article 81 prescribes that there should be at least one distributor of broadcasting services offering the 'basic package', more specifically via cable (as I will explain immediately).
- Article 81, §1 stipulates: "*the network operators mentioned in article 97 guarantee the distribution on their networks of a basic offer containing at least the broadcasting services mentioned in article 82. The basic offer is supplied by a distributor of broadcasting services. If there is no (separate) distributor, the network operator is obliged to perform the distribution activity and to offer the basic package.*"

The three main elements of this provision are:

- the distribution of a basic package must be guaranteed...
 - *i.e.* a package including at least the services of the content editors mentioned in article 82, namely on the one hand - the public and local broadcasters mentioned in § 1, and - on the other hand the

³⁹ I believe it would have made more sense to list all broadcasting service editors with must-carry status (or more correctly stated: enjoying a right of compulsory distribution – be it on the basis of the Decree itself, or because they have been appointed by the French Community government – in article 48 (and therefore also including the public and local broadcasters mentioned in article 82, § 1)).

editors referred to in § 2, which have been granted the right of compulsory distribution on the basis of article 48;

- ...via cable...
 - as article 81 refers to “the network operators mentioned in article 97” and article 97 applies to “operators of teledistribution networks” – the latter defined as “broadcasting networks via coax cables”⁴⁰ – the scope of this obligation is limited to cable operators in the traditional sense (*i.e.* operators of coax cable networks)
- ...by at least one distributor of broadcasting services
 - *i.e.* either a distributor independent of the cable operator, or – in the absence of such separate distributor – the cable operator itself.

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

By Decree of 22 December 2005, the French Community removed the word “coaxial” from the definition of “teledistribution networks” in Article 1, 36° of its Broadcasting Decree, hence broadening its scope to other cable networks than the traditional coax cable networks and bringing IPTV providers like Belgacom (using the PSTN) under the scope of the must-carry provisions in Article 81 and 82.⁴¹

⁴⁰ See the definition of “teledistribution network” in article 1, 36° : “*Réseau de télédistribution: réseau de radiodiffusion mis en œuvre par un même opérateur de réseau dans le but de transmettre au public par câble coaxial des signaux porteurs de services de radiodiffusion*” (emphasis added by the author).

⁴¹ See, Communauté française de Belgique Décret du 22 décembre 2005 modifiant le décret du 27 février 2003 sur la radiodiffusion [Belgium's French Community - Decree of 22 December 2005 amending Decree of 27 February 2003 on Broadcasting], *available in French at* http://www.ejustice.just.fgov.be/cgi/article_body.pl?numac=2006200260&caller=list&article_lang=F&row_id=1&numero=1&pub_date=2006-02-13&set3=set+character_variant+%27french.ftl%27&dt=DECRET&language=fr&fr=f&choix1=ET&choix2=ET&fromtab=+moftxt&trier=promulgation&bron=COMMUNAUTE+FRANCAISE&text1=coaxial&sql=dt+%3D+%27DECRET%27+and+bron+%3D+%27COMMUNAUTE+FRANCAISE%27+and+%28+text+contains+++%28+%27coaxial%27%29+++%29++&rech=2&tri=dd+AS+RANK+&set1=set+stopfile+%27MOF.stp%27 (last visited Aug. 17, 2006).

C. Network Operators

Article 81 (referring to article 97) imposes the obligation to transport the basic offer (*i.e.* to provide sufficient network capacity for the delivery of this basic package) on cable operators in the traditional sense (*i.e.* only operators of coax cable networks; *cf. supra*).⁴²

IV
CLOSING REMARKS

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

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

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

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

- **What** should be the content of the universal service offer: which content providers are to be included, and more precisely, which particular content services are to be included among those on offer?
 - *i.e.* will the content of public or also commercial broadcasters be included? As far as the public broadcasters are concerned: are their

⁴² Here as well (*cf. supra*, note 39), the Decree is not entirely consistent in my view. I would have expected the obligation to provide sufficient network capacity for the distribution of the USP to be set out in the provisions dealing with transmission networks, *i.e.* title VI (articles 90 and those following it).

general interest channels the only ones to be included or will their thematic channels (culture or sports channels) be also part of the universal service package? Which criteria are to be applied for the selection of commercial broadcasters: their contribution to culture and language, their coverage of events of major importance for society⁴³ ...?

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

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

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

⁴³ In the sense of Article 3a of the "Television without Frontiers" Directive.