

**Plenary Session**  
**Must-Carry rules: Valuable Tool or Sacred Cow?**

**Background paper: EPRA/2008/06**  
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**(amended version)**

**1. Introduction:**

*Background*

The title of this plenary session captures well the nature of the debates and controversies over the regimes of must-carry rules in European states. Indeed it is possible, from the outset, to suggest that must-carry rules remain a “valuable tool”, while at the same time in certain circumstances they are beginning to be considered as a “sacred cow”. Two different perspectives are apparent in the debates over carriage rules for broadcasting and must carry regimes: competition policy and cultural policy. The competition policy approach is not just a criticism of a development of an imbalance in competition in many states where certain broadcasting organisations retain unfair advantages over others, but also a criticism of the lack of recognition of the existence of an abundance of information and reception possibilities. From the cultural perspective, on the other hand, it is considered that must-carry rules are still valid where market intervention is required to ensure certain cultural and political objectives are achieved, those that address the “public interest” or the “general interest”, while at the same time promoting market diversity. As Valcke (2005) notes: “... *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.*”

And the battle is no longer just the traditional one between public and private broadcasters, but also between broadcasters in general and the telecommunications sectors. In addition it is a battle between the various transmission means (platforms), both the traditional – terrestrial, cable, satellite – and the new – IPTV and mobile broadcasting. The challenge is therefore to balance both the broad European goals and those of the different member states, and to find a balance between fair market practices and competition, and cultural and political goals that ensure that the media continues to play its democratic and cultural role in European societies.

Of relevance to these debates, and in the context of comparative information from the EPRA members outlined below, is the fact that the media markets of European states are very different in terms of development, strengths and weaknesses, and with regard to dominant means of transmission of broadcasting. At the same time all markets are dealing with a rapid revolution in technology, which is changing the nature of broadcasting. Digitisation has allowed for an enormous increase in the number of channels and services available, while technological change has presented a variety of new ways in which people can receive information. For the industry, for traditional network operators of broadcasting transmission services and for broadcasters, these changes present a huge challenge regarding their strategies for the future. Must-carry can present additional financial burdens on operators in the form of costs for operators such as copyright fees.<sup>1</sup> A recent study carried out for the European Commission (Cullen International 2006), reveals that this issue is addressed in a variety of ways across the EU: in some cases copyright fees are paid by operators who in turn receive payments for carriage from the broadcasters, as in Germany; in Finland and

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<sup>1</sup> The issue of remuneration has not been dealt with in detail here as it was considered that the questionnaire already was considerably detailed. Cullen International (2006) addresses this issue in detail.

Latvia, the legislation ensures that no copyright fees apply to must-carry channels. This issue is addressed further below with regard to problems with implementation of rules (section seven).

### *European Union regulation*

Technological change and convergence has brought the regulation of telecommunications and broadcasting together, and while both have traditionally had universal service goals, only broadcasting has a tradition of content regulation. This convergence is obvious in the trend of converging media regulatory bodies and also in the convergence of EU media policy (for example from "Television" to "Audiovisual Media Services"). The Universal Services Directive adopted in 2002<sup>2</sup> addressed the issue of must-carry under Article 31 with the aim of clarifying the conditions applicable to must carry:

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

Of significance regarding the implementation of this Article of the Directive are the concepts: "significant number of end users" and "general interest objectives", both of which will be referred to in this paper with regard to must-carry regimes. In addition the requirements for a proportional and transparent system with periodical reviews form the basis of some of the challenges initiated by the EU and industry actors regarding national regimes. Problems of implementation and legal challenges are outlined in section seven.

In December 2007, the Commission presented its proposals for a reform of the Telecoms package including the Universal Service Directive and Article 31. The Article now contains accessibility services alongside radio and television broadcast services. "General interest objectives" must be "clearly and specifically defined by each Member State in its national law". In addition the language concerning reviews has been made stronger whereby:

*The obligations referred to in the first subparagraph shall be reviewed by the Member States at the latest within one year of the time-limit for implementation of the amending act, except where Member States have carried out such a review within the previous 2 years. Member States shall review "must carry" obligations at least every three years.*

This represents a proposal for a stronger control at the EU level of the nature of must-carry regimes in the member states. The following section outlines some of the broader "general interest objectives" of must-carry as regards the "regulatory aims" of these systems.

### *Must-carry regimes in the EPRA member jurisdictions and their regulatory aims<sup>3</sup>*

The regulatory aims of the MC rules in most jurisdictions have been primarily focused on providing access for all to the public service channels. This is the case in most jurisdictions, and in many it represents the only aim of this regime (for example in Denmark, Greece, Hungary, Latvia, Macedonia, Malta, Montenegro, Netherlands, Norway, Romania, Sweden). Of interest is the fact that this group combines countries with both very strong and well-established public service broadcasters (Nordic states and the Netherlands) and also countries that have quite weak public service broadcasters who have never really established a strong market share since privatisation (for example Greece, Latvia,

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<sup>2</sup> For an analysis of the development of the Directive and its implementation see Roukens (2005).

<sup>3</sup> Based on responses from EPRA members to questionnaire on this issue. Many thanks to all the EPRA members who responded, representing 30 European jurisdictions. Thanks also to Emmanuelle Machet, Peggy Valcke and Susanne Nikoltchev for their comments on the questionnaire.

Macedonia, Montenegro etc.). For Luxembourg the only aim is to ensure a diversity of content. For most other countries, there are at least two to three regulatory aims that concern access to public service channels and diversity (of content and/or the market). Only in Israel, Austria, Ireland and Germany are must-carry rules described as having also a regulatory aim of promoting new services. (See Table 1 for an overview of the regulatory aims).

**Table 1: Regulatory aims of Must-Carry rules**

Regulatory focus and aims	Countries
<b>One Regulatory aim:</b> access for all to PSB channels (and/or those with PSB obligations)	Denmark, Greece, Hungary, Latvia, Macedonia, Montenegro, Netherlands, Norway, Romania, Sweden
<b>One Regulatory aim:</b> - diverse offer of content	Luxembourg
<b>One Regulatory aim:</b> - market diversity and promoting presence of smaller broadcasting organisations	Andorra
<b>Two regulatory aims:</b> - access for all to PSB channels and those with PSB obligations - and diverse offer of content	Belgium French Community, Lithuania, Malta, Poland
<b>Two regulatory aims:</b> - access for all to PSB channels and those with PSB obligations - market diversity and promoting presence of smaller broadcasting organisations	France*, Slovakia, Spain – Catalonia, Ukraine
<b>Two regulatory aims:</b> - diverse offer of content - Market diversity and promoting presence of smaller broadcasting organisations	Germany, Portugal
<b>Three regulatory aims:</b> - diverse offer of content - access for all to PSB channels and those with PSB obligations - market diversity and promoting presence of smaller broadcasting organisations	Switzerland, Belgium Flemish Community, Czech Republic
<b>Four regulatory aims:</b> - access for all to PSB channels and those with PSB obligations - diverse offer of content - market diversity and promoting presence of smaller broadcasting organisations - promotion of new services	Austria, Bosnia and Herzegovina, Israel, Ireland
<b>Other approaches:</b> To ensure access by most people to PSB channels if a platform emerged which served a significant number of people who had no free-to-air alternative.	United Kingdom

\* France with regard to cable, to ensure access to local information or local channels of public initiative.

Although the majority of jurisdictions represented in the EPRA membership have must-carry (MC) regimes, there are some exceptions:

- There are no MC obligations in Italy, but an alternative approach allows the Regulatory Authority to apply special treatment to content of particular value, either in terms of quality of programming or information pluralism;
- Although they exist, the UK has never implemented the MC provisions in broadcasting legislation. With few exceptions (analogue cable), platform providers have carried all public service channels, on the grounds that their customers expect this, and they would not attract customers if they failed to do so. Analogue cable customers (as cable becomes digitised, the number of analogue homes is decreasing) receive the main public service channels but not the BBC's digital-only channels.
- There are currently no must-carry obligations in Cyprus, however these issues are being addressed in the context of the development of a DTT strategy.

The following sections of this report outline the current status of must-carry rules with reference to the relevant platforms, channels and content. It will also illustrate the role of regulatory authorities in the establishment and implementation of must-carry regimes, and look at some of the problems in implementation of regimes. This includes both external examinations of the systems on the part of the EU, and national legal challenges on the part of industry actors. It also examines some alternative approaches to this system, which have already been implemented, are due to be implemented in the near future, or are being considered.

## **2. Types of platforms with must carry obligations**

### *Traditional transmission platforms*

Traditionally, cable television has been the distribution platform to which MC rules have been applied, and these rules frequently apply to both analogue and digital cable. Such regimes were first introduced in European countries with the emergence of cable, as there were concerns that cable companies would not otherwise carry the public service channels, which were paid for by the public (Roukens, 2005). In addition, these channels are considered to offer content of public interest. Regarding the traditional means of transmission (see table 2, A), in several jurisdictions it is still the case that only cable transmission is subject to MC regimes: Andorra, Belgium Flemish, Bosnia and Herzegovina, Czech Republic, Hungary, Latvia, Luxembourg, Netherlands, Poland and Sweden.

Several countries list analogue terrestrial broadcasting as a platform to which MC rules have been applied (Israel, Denmark, Norway, Luxembourg and Switzerland), while digital terrestrial television platforms (DTT) also have MC obligations in many jurisdictions (Israel, Slovakia, Denmark, Norway, Belgium French speaking community, Austria, Luxembourg, Macedonia and Catalonia). In most jurisdictions the legislation implementing DTT and the policies for authorising multiplexes have generally insured that the public service broadcasters are allocated at least one multiplex, hence already fulfilling the aim of ensuring access for the public to PSB channels. Satellite broadcasting has obligations in Germany<sup>4</sup>, Israel, Luxembourg and Romania.

A large number of EPRA members now have regimes that cover both terrestrial and cable transmission: Austria, Belgium French, Bulgaria, Denmark, Germany, Greece, Ireland, Israel, Luxembourg, Macedonia, Malta, Norway, Slovakia, Spain Catalonia, Switzerland.

### *New transmission platforms*

Concerning new services, many jurisdictions are implementing MC rules with regard to Internet Protocol television (IPTV), for example: Denmark, Belgium (French), Lithuania, Sweden, Poland, Catalonia,). In Poland, according to the questionnaire response, although MC obligations only exist for cable networks, on May 31, 2006 the National Broadcasting Council of Poland issued a standpoint on the TV services over DSL (TVoDSL) and recognised these services as programme services retransmitted over cable networks. Hence the MC rules apply here also.

There are also obligations on platforms for 3G mobile broadcasting (Belgium (French), Lithuania, Czech Republic, Spain Catalonia) and for DVB-H mobile broadcasting (Denmark, Belgium (French), Lithuania, Austria, Germany, Spain Catalonia,). In the Danish case DVB-H will be launched by the company "Boxer" on one MUX from 2010, and will be obliged to provide 15% of the capacity to the PSB, DR.

In Germany, a pilot trial was also carried out (up until April 2008) with mobile broadcasting in the DMB standard but without any particular MC rules. The focus on the scheme was to test the technology, but it is also likely that MC was not applied as the capacity of this standard is lower than that of DVB-H (only 5-6 channels). The pilot mobile broadcasting project in DVB-H (2008) aimed at providing a German wide service. The tender

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<sup>4</sup> In Germany current legislation covers only cable. From September 2008 (with the 10<sup>th</sup> Amendment to the Interstate Broadcasting Treaty) MC applies to all platforms outside the exceptions outlined on pages 5-6.

requirements had general specifications regarding content: distribution of popular channels; news, music and sport content; regional channels; and radio channels. In Austria a limited (in time) access has been set for nation-wide terrestrial channels to the DVB-H platform (MUX D).

#### *Recent changes*

German legislation has specific MC rules regarding the allocation of analogue and digital cable networks. With the 10th amendment to the Interstate Broadcasting Treaty, which is scheduled to enter into force on 1 September 2008, the designation and allocation of wireless transmission capacities in general will be regulated by law. Also there will be a regulation of all platforms, not only a regulation of cable networks.

The new Television Act of 2007 in Portugal established a technologically-neutral approach with regard to MC rules, and obligations will be imposed upon all operators of electronic communications networks used for television broadcasting. However, for the time being new types of services such as mobile and Internet broadcasting will not be covered as such services are only starting to develop.

In Malta, after a recent amendment to the Broadcasting Act, MC obligations, which can only be applied with respect to broadcasting content that has "general interest objectives", will eventually be applied across different technology platforms. These platforms include electronic communications networks such as the cable network, digital terrestrial television stations and non-linear audiovisual services, the programme content of which is now to be licensed by the Authority.

#### *Must carry obligations for network operator or distributor of channels?*

In response to the question as to whether MC obligations are imposed on the network operator and/or the distributor of channels, the answers were varied. As Roukens (2005) notes, Article 31 of the Universal Service Directive applies to electronic communications network providers, however, in different countries, companies often fulfil different functions in the communications sector: for example in Belgium, the Netherlands and the UK, cable operators are network providers and at the same time content package providers; in France the cable network is owned by France Telecom, while the content is provided by different companies (content aggregators).

The obligations apply to network operators in Bosnia and Herzegovina, the Czech Republic, Germany, Latvia, Poland, Portugal, Slovakia, Sweden, Macedonia, and the Netherlands and to distributors of channels in Montenegro, Lithuania, Belgian French community, Romania and Catalonia. The rules apply to both in Austria, France, Luxembourg, Denmark and Israel. In the Danish case, it is explained that the rules apply to the network operator regarding cable, while they also apply to the distributor of content in relation to DTT (the "gate-keeper"). Similarly, in Austria, obligations apply to network operators (cable networks, multiplex-platform operators); distributors of channels for mobile TV (Programme aggregator, i.e. the mobile network operator) are only subject to indirect restrictions according to the concession (license) for the multiplex-operator; some operators of terrestrial sites (ORS, a subsidiary company of ORF) are subject to access regulation (site sharing, again the "gate-keeper").

#### *Definitions regarding "a significant number of end users"*

Only a couple of jurisdictions have clear definitions that distinguish where a network has or has not a significant number of end users. In Slovakia, the MC rules are not applied to a cable operator where "the number of users of a particular cable network is irrelevant with respect to the number of households using another mode of reception in a particular area" (Art. 17 of the Act No. 308/2000 Coll. on broadcasting and retransmission).

In Germany, the exemptions to MC rules (as outlined in the legislation in force from September 2008) apply to the following platforms:

- platforms in open networks (Internet, UMTS etc.),

- platforms concerning on unaltered retransmission of a total supply,
- wired platforms with less than 10.000 homes connected or
- wireless platforms with less than 20.000 users.

Other questionnaire responses referred to competition law regarding significant market power or dominant broadcasters/service providers, wherein market share is a consideration in the implementation of MC rules (Macedonia, Romania).

**Table 2. Platforms to which Must-Carry obligations apply**

**A. Traditional Platforms: Terrestrial, Cable and Satellite**

<b>Must-carry applies to Cable only</b>	<p><b>Analogue cable only:</b> Bosnia and Herzegovina, Luxembourg</p> <p><b>Digital cable only:</b> Andorra, Belgium Flemish</p> <p><b>Both:</b> Czech Republic, Hungary, Latvia, Netherlands, Poland, Sweden, Ukraine</p>
<b>Terrestrial and Cable</b>	<p><b>Analogue Terrestrial:</b> Luxembourg, Malta*, Switzerland,</p> <p><b>Digital Terrestrial:</b> Austria, Belgium French, Germany**, Greece, Ireland, Luxembourg, Macedonia, Malta*, Slovakia, Spain Catalonia</p> <p><b>Both digital and analogue terrestrial:</b> Bulgaria, Denmark, Israel, Norway,</p> <p><b>Both digital and analogue cable:</b> Austria, Belgium French, Bulgaria, Denmark, Germany**, Ireland, Israel, Lithuania, Malta*, Macedonia Montenegro (and MMDS), Norway, Slovakia, Spain Catalonia</p> <p>- Luxembourg (digital only), Switzerland (analogue only)</p>
<b>Cable and Satellite</b>	<p><b>Both digital and analogue cable, and satellite:</b> France, Romania</p>
<b>Terrestrial, Cable and Satellite</b>	<p><b>Digital Terrestrial:</b> Germany**, Portugal</p> <p><b>Both digital and analogue terrestrial:</b> Israel, Luxembourg</p> <p><b>Both digital and analogue cable:</b> Germany**, Israel, Luxembourg (digital cable only), Portugal</p> <p><b>Satellite:</b> Germany**, Israel, Luxembourg, Portugal</p>

**B. New Media Platforms: Mobile Broadcasting 3G, DMB, DVB-H; IPTV, xDSL**

Mobile broadcasting	<p><b>Mobile 3g:</b> Belgium French, Spain Catalonia</p> <p><b>Mobile DVB-H:</b> Austria, Belgium French, Denmark, Germany**, Lithuania, Spain Catalonia</p>
Internet Broadcasting	<p><b>IPTV/ TV over DSL:</b> Belgium French, Denmark, Lithuania, Poland, Romania, Sweden, Spain Catalonia, Ukraine</p>

\* In Malta, although there is no analogue terrestrial platform, as the law currently stands MC would apply if one existed. A recent amendment to the Broadcasting Act implies that MC will in the future be applied across more platforms (see main text).

\*\* In Germany current legislation covers only cable. From September 2008 (with the 10<sup>th</sup> Amendment to the Interstate Broadcasting Treaty) MC applies to all platforms outside the exceptions outlined in the text above.

*Carriage obligations imposed on providers of conditional access systems (CAS)*

There were few examples where any obligations are imposed on CAS. In fact one of the main examples refers to must-offer rules, wherein in Israel, the PSBs, the two major private channels, two music channels and the Israeli channel in the Russian language must make their content available on subscriber television platforms (must-offer).

In Germany, the providers of platforms that disseminate broadcasting and comparable telemedia must guarantee that the technology used allows for a pluralistic offering. To ensure plurality of opinion, the providers of broadcasting and comparable telemedia shall not either directly or indirectly through conditional access systems, application programming interfaces, user interfaces, or other technical specifications for manufacturers of receivers be unreasonably impeded from broadcasting their offerings or treated differently from similar providers without an objectively justifiable reason.

### **3. Types of channels**

As regards the type of channels, given the significance of the regulatory aim (outlined earlier) of ensuring access for all to public service channels, these are they channels most likely to be listed as MC. In Hungary the regime also includes access for local non-profit programme providers, and in Poland it includes national "social broadcasters". In some jurisdictions, *only* the PSBs (and similar such as non-profit) are listed in must carry rules: Andorra, Bosnia and Herzegovina, Hungary, Latvia, Macedonia, Montenegro, Norway, and Sweden. In contrast, the Irish MC rules do not list public service channels, the most likely reason being that the public service broadcaster originally (although not anymore) controlled the cable system so this was not necessary.

Several jurisdictions also list certain private/commercial channels (Austria, Belgium French, the Czech Republic, Germany, Ireland, Israel, and Luxembourg) with the aim of promoting diversity. In Lithuania all non-encoded channels with national reach are part of the MC regime. Teleshopping channels are included only in Luxembourg, Germany and Switzerland.

As part of the further aim of ensuring diversity of offer, local or regional channels and windows are frequently listed as MC: in Austria, both Belgian communities, Catalonia, the Czech Republic, Denmark in, France, Germany, Luxembourg, Netherlands, Poland, Slovakia and Ukraine. In certain jurisdictions minority channels are included (Israel, Germany, Romania and Ukraine). In Israel this is the Russian language Israeli channel. Foreign channels are listed in Belgium, Denmark, Germany Luxembourg, the Netherlands, Poland, Romania and Switzerland. For example, in Denmark the DTT MUX operator must carry at least one channel from neighbouring countries (Norway, Sweden, Germany), which should be a "broad" channel, whether PSB or commercial, but this can be a different channel in different parts of Denmark.

It is also possible for additional channels to be added to the list in some jurisdictions. In the case of Israel, the Council for Cable and Satellite Broadcasting can determine additional channels that they license as MC over digital platforms. In Norway, MC obligations may be considered in the future for Local TV as well as for a nationwide Public Open Channel that has recently been licensed.

In some regimes, the channel list places higher significance on some channel types rather than others, in particular where capacity may not allow all types to be included. The Polish MC channels over cable are listed in an order of priority: national programme services of public radio and television; regional programme services of public radio and television, received in the given area; programme services of domestic social broadcasters, receivable in the given area; programme services of other domestic broadcasters, receivable in the given area; programme services of other domestic and foreign broadcasters. It is possible to have a different sequence of priority based on a decision by the National Council, where this is justified. In Germany, the allocation of analogue cable network systems has to be made in a determinate order. Therefore each State law defines rules for an optimal utilisation of available capacities. Regulations under State law concerning the allocation of analogue cable channels are permitted provided they are required in order to achieve clearly defined public interest objectives (Art. 51 b (3) Interstate Broadcasting Treaty).

In several countries the list of must carry types of channels extends to four (Poland), five (Luxembourg) or six types of channels (Germany).

**Table 3. Types of channels included in Must-Carry obligations**

Types of channels and range of channels specified under MC	Groups of countries and detail of channel types
<p><b>One channel type:</b> PSB channels/ channels with PSB obligations (including non-profit)</p>	<p><b>National PSB:</b> Bosnia and Herzegovina, Latvia, Macedonia, Montenegro, Norway, Sweden, Hungary <b>Local PSB:</b> Hungary <b>Local non-profit programme providers:</b> Hungary</p>
<p><b>Two channel types:</b> Public service and foreign</p>	<p><b>National PSB:</b> Belgium Flemish, the Netherlands <b>Local PSB:</b> Netherlands <b>Minority PSB (where they exist):</b> Netherlands <b>PSB of other linguistic communities:</b> Belgium Flemish <b>Foreign:</b> Belgium Flemish, the Netherlands (the Flemish PSB)</p>
<p><b>Two channel types:</b> Public service and commercial</p>	<p>Lithuania (all channels of national scope)</p>
<p><b>Two channel types:</b> Public service and local/regional</p>	<p>France (plus the Parliamentary channel) Slovakia Spain - Catalonia Ireland</p>
<p><b>Two channel types:</b> Commercial and community channels <b>Three channel types:</b> Public service, commercial and local/regional</p>	<p><b>National PSB:</b> Austria, Belgium French, Czech Republic <b>Local PSB:</b> Austria <b>National commercial:</b> Austria, Belgium French, Czech Republic <b>Local channels of commercial:</b> Austria <b>Other local/regional:</b> Austria, Belgium French, Czech Republic Denmark</p>
<p><b>Three channel types:</b> Public service, local/regional, foreign</p>	<p>Switzerland</p>
<p><b>Three channel types:</b> Public service, teleshopping, foreign</p>	<p>Ukraine</p>
<p><b>Three channel types:</b> Public service, local/regional, minority</p>	<p>Israel (RA can determine other MC in digital broadcasting regarding channels that it licenses)</p>
<p><b>Three channel types:</b> Public service, commercial, minority</p>	<p>Romania</p>
<p><b>Three channel types:</b> Public service, minority, foreign</p>	<p>Poland* (and in addition social broadcasters<sup>5</sup>)</p>
<p><b>Four channel types:</b> Public service, commercial, local/regional, foreign</p>	<p>Luxembourg</p>
<p><b>Five channel types:</b> Public service, commercial, teleshopping, local/regional, foreign</p>	<p>Germany* (must carry also includes open access channels)</p>
<p><b>Six channel types:</b> Public service, commercial, local/regional, teleshopping, minority, foreign</p>	

\* In the cases of Poland and German channel types have a priority listing.

#### 4. Types of content

Alongside specific channel types, MC rules frequently list specific types of content that must be made available over platforms. This includes local information and news (Austria, Belgium French speaking community, Germany, Lithuania, Luxembourg, Ukraine); cultural information (Belgium French speaking community, Germany, Lithuania, Luxembourg, Switzerland, Ukraine); accessibility services (e.g. for disabled viewers) (Denmark, France, Germany, Portugal and Switzerland); and Complementary services (e.g. teletext etc.) (Germany).

For example, in Denmark the PSB multiplex must carry simultaneous sign language translation of the main news broadcasts on DR 1, DR 2 and TV 2. On the DVB-H platform, the platform provider (Boxer) is obliged to ensure that a minimum of 50% of the schedule is constituted of entertainment, sports, music, news, and popular science, with each category

<sup>5</sup> A social broadcaster: "propagates learning and educational activities, promotes charitable deeds, respects the Christian system of values, being guided by the universal principles of ethics, and strives to preserve national identity in the programme service" and does not transmit advertising or tele-shopping.



having a minimum of 5% of schedule time. This is described in the questionnaire response as being a system of “must bring programme types” rather than “must-carry” of channels.

A further regulation in the Austrian Private TV Act relates to access for channels to platforms on the basis of content provided. This determines access for local cable TV broadcasters to cable networks in the respective local area provided that the programme offers local information/ reporting and contains 120 minutes daily self produced broadcast/programme. An additional regulation allows access for one private channel to cable networks provided that this programme contains 12 hours daily self produced broadcast with content relating to Austria that is not only of local or regional interest. This channel should also contribute to pluralism of opinion.

In the Netherlands, if local public service broadcasters also broadcast programmes aimed at specific audience groups or age groups or minorities, broadcast network providers shall be required to transmit these programmes - in full, unaltered and at the same time as the original transmission - to all those connected to the broadcasting network. This obligation for broadcasting network providers applies to a maximum of 2 TV and 5 radio channels of the local public service broadcaster.

Some broader obligations regarding content were mentioned in the responses to the questionnaire, which may also be relevant in other jurisdictions, including: the obligations to broadcast original work, support the audiovisual industry and the creation of employment in the industry (Belgium French speaking community); for channel distributors the obligations to promote European programming (Luxembourg); the allocation of proper channel numbering (Israel). In Bosnia and Herzegovina there is a range of MC content for Public Service Broadcasters: 40% of programme time in any week shall consist of news and other informative or educational programming (public service announcements or that of NGOs, and international organisations and discussion programmes involving the public in relation to political economic, cultural and social issues all count as news or information programming); minorities and vulnerable groups must be presented in at least one hour of news or information programming per week; children’s programming of at least 10 hours per week.

#### *Obligations regarding enhanced quality services*

With a view to reserving capacity for future innovations in broadcasting, it has been noted that High Definition Television (HDTV) requires more capacity than normal broadcasting. Very few jurisdictions have obligations regarding such enhanced quality services, for example whether obligations also cover HDTV broadcasts of public channels. This is the case in Switzerland, Romania and Hungary.

## **5. Alternative/ complementary approaches**

### *Must-offer*

An alternative or complement to must-carry rules are the must-offer rules. While must-carry have the aim of ensuring that certain channels have access to certain platforms, the must-offer idea promotes the approach that channels must offer their content to certain platforms. In this sense, the concept is not just about diversity of offer but also has an economic goal. Access to certain content is often the only way to ensure the viability of certain platforms. In many states the public service and/or commercial channels are necessary for the success of a service, particularly where they have strong audience figures. In France the Public Service channels must make themselves available over digital terrestrial and also cable networks. Must-offer rules exist in Israel where the PSBs, the two major private channels, two music channels and the Israeli channel in the Russian language must be available on subscriber television platforms. In Norway, the national PSBs and the national private commercial channels with PSB obligations must offer their content over analogue terrestrial and digital terrestrial nationwide networks. In the Czech Republic the PSB and commercial channels must offer their content on cable and mobile platforms. In Ukraine, licensed broadcasters must make their content available to cable and IPTV. A general rule also applies to broadcasters in the new Portuguese Television Act (2007).

According to the Portuguese response to the questionnaire, the Television Act states that “[f]or the purposes of the preceding paragraph [concerning must-carry], television operators responsible for the organisation of the television programme services referred therein must provide the delivery of their signals”.

In the case of the UK, the legislation allows the possibility to require broadcasters of designated MC channels to offer these channels to designated satellite and cable networks (these powers have never been implemented).

The Austrian jurisdiction provides an example of where must-offer is not specifically described as such. It rather derives from the obligations placed on the public service broadcaster to be present on platforms without specifying which platforms, i.e.: “*ORF must ensure that, subject to technical development and economic feasibility, all inhabitants of the national territory who are authorised to operate a radio or television receiver are consistently and permanently provided with one region-wide and two nation-wide radio programmes and two nation-wide television programmes*” (see also section seven regarding implementation of rules). As regards DTT, the licences for the multiplex platforms MUX A and B (2 nationwide layers) were granted to ORS (a subsidiary company of ORF), and ORS has to comply with several requirements concerning the procedure and the diversity of programmes on MUX B.

#### *Other*

Section 3 of article 66 of the Catalonia Broadcasting Act establishes that other requirements may be incorporated by regulation regarding obligatory transmission of given radio or television channels if a significant number of final users of the distributor’s services use the distributors’ networks as the main means for reception of radio and television programmes, and on condition this is necessary to achieve clearly defined objectives in the general interest and when done in a proportional, transparent manner that is reviewed periodically. There is also the requirement that broadcasting service distributors (art. 67 of the Catalan Broadcasting Act) have the obligation to assign at least 40% of their total broadcasting service to independent programmers, from the outset of their activity.

In Bosnia and Herzegovina, the service providers are obliged to publish a permanent offer for distribution of programmes for a group of licensed broadcasters in Bosnia and Herzegovina in the zone of coverage of their distribution where they operate. Any such licensed terrestrial broadcaster that accepts the offer for distribution of its programme has the right to be treated under the same conditions in terms of distribution in relation to all other stations from the same group.

## **6. Role of the regulator**

The way in which MC obligations are implemented and the extent to which the regulatory authority (RA) plays a role in the implementation of the regime varies widely throughout the jurisdictions of the EPRA members. The most typical mode of implementation is the existence of rules in the authorisations for service providers (for example in Latvia, Israel, Slovakia, Montenegro, Denmark (DVB-H), Lithuania, Czech Republic, Austria, Luxembourg, Poland, Romania, Macedonia, Switzerland, Hungary). “Must offer” obligations in licensing agreements exist only in Israel, Norway and Ukraine. In Germany, platform operators do not need a license but rather they must notify the appropriate State Media Authority at least one month prior to the start of the platform and submit to the Authority how it plans to fulfil the must carry obligations outlined in the law. Similarly, in the Belgian French community the system is one of “declaration” by the operators of intention to provide services. CSA monitors compliance with MC.

#### *Stronger role in decisions on MC channels*

In the majority of cases the types of content are specified in the legislation and the RA does not have any say in the type of channels or content. In Israel, the Communication Act empowers the Council for Cable and Satellite Broadcasting to order multi-channel platforms to carry channels that have received a licence from the council (the Council has issued

licenses as such to a number of television channels- Israeli History Channel, the Nature Channel, an interactive dating channel and a teleshopping channel). These channels are MC on digital services only.

#### *Some discretion in choosing channels*

In Slovakia, while MC rules are specified in the legislation, discretion is granted to the Council on Broadcasting and Retransmission to grant exemptions from the rules. In Lithuania, the regulator decides what programmes shall be re-broadcast in accordance with the Law on Provision of Information to the Public (art. 33. 1 and the Licensing Rules p. 9.), whereby the Commission "shall establish television programmes obligatory for the rebroadcasters to rebroadcast taking into consideration the artistic value of these programmes and its importance to the viewers residing in the territory of the licensed activities of the rebroadcaster".

In the case of the Czech Republic the regime will change after digital switchover. Whereas now the channels and content are specified in the law, after switch-off the regulator will have a much stronger role in the process. The UK legislation, the Communications Act 2003 (sections 272, 273) includes backstop powers to require broadcasters of designated MC channels to offer these channels to designated satellite and cable networks. However, these powers (which existed in previous broadcasting legislation) have never been implemented. A decision by Ministers would be required before Ofcom could implement them.

#### *Reviews of the must-carry rules*

According to responses to the questionnaire, quite a few countries carry out regular reviews of their MC regimes, and these include the Czech Republic (where this will need to take place after digital switch-over), Austria, Luxembourg, Belgium (Flemish speaking), Sweden, Poland, Ukraine, Germany, Romania, and the Netherlands. In the case of Germany, Art. 53 a Interstate Broadcasting Treaty regulates that the MC rules shall be reviewed on a regular basis every three years. This will happen for the first time on 31 August 2011 in accordance with Art. 31 (1) of the Universal Service Directive.

The Dutch response notes that, given the dominance of cable as a means of transmission, the Dutch authorities will maintain the MC obligations for cable operators. Nevertheless the Dutch authorities are closely monitoring the market shares of cable and other infrastructures and will take immediate action when the market developments require this.

In several jurisdictions, rules have already been updated in the development of new legislation addressing the digital media environment (Israel, Slovakia, Hungary, Norway, Czech Republic, Austria, Ukraine, Germany, Catalonia).

Most RAs stress that they play no role in the review of MC regimes, but rather have a role in implementing the policy and monitoring compliance. Several indicate that they contribute significantly to the consultation process when the legislator reviews the system (Austria, Germany, Malta). In the case of Israel, given the stronger role that it plays, the Council has the power to determine its policy regarding those channels that it can designate as must-carry.

#### *Recent and current reviews*

As mentioned earlier, many jurisdictions have updated their media legislation in preparation for digitisation. Some recent changes to legislation have brought about changes to MC regimes, implying that these rules will be applied to all platforms and not just cable: the 10th amendment to the Interstate Broadcasting Treaty in Germany; the new Television Act of 2007 in Portugal. Malta is currently carrying out review of its regime. The questions being addressed are: the criteria that will be used to classify a broadcast channel as one meeting "general interest objectives"; the process to be used by the Broadcasting Authority (BA) to allot capacity to the qualifying broadcasts; the relationship between must-carry obligations and "general interest objectives"; the application of must-carry obligations across transmission platforms; the conditions attached to the usage of frequencies reserved for

broadcasting that meets “general interest objectives”. A three month extension to the consultation period was requested by the main television and free-to-air stations in order to clarify a number of technical issues, which they raised concerning frequency networks and their opposition to being carried by a single network operator and their desire to be received independently in the same way that their free-to-air channels were accessed under the analogue system. Currently the Authority is still studying the feedback received from the consultation process. Further deliberations and other potential future developments are outlined under section eight.

**Table 5. Role of the Regulator in Must-Carry Regimes**

<b>Role in implementation, monitoring, development and decision-making</b>	<b>Countries</b>
<b>Implementation and monitoring</b>	
<b>Must-carry rules in authorisations for service providers</b>	Austria, Czech Republic, Denmark, Hungary, Israel, Latvia, Lithuania, Luxembourg, Macedonia, Montenegro, Poland, Romania, Slovakia, Spain - Catalonia, Switzerland,
<b>Licenses with must offer</b>	Israel, Portugal, Ukraine, (Spain from 2010)
<b>Legislation with potential must-offer</b>	- Austria: PSB obliged to be present on all platforms (a type of must-offer). - UK powers (never used) that could oblige MC channels to offer content
<b>Other</b>	- Belgian French system: involves a declaration regime by the operators of intention to provide services. CSA monitors compliance with MC. - Germany: providers must only notify intention to provide services and how these will be met.
<b>Role in monitoring and implementation only</b>	Denmark, Montenegro, Luxembourg, Montenegro
<b>Development and decision-making re. must-carry</b>	
<b>Role in review process</b>	Malta: involvement in consultations and making proposals Austria: involvement in consultations
<b>Discretion re selection of must carry channels</b>	Israel: RA can nominate additional must-carry channels that it has licensed, in the digital environment. Slovakia: discretion granted to RA to grant exemptions from the rules. Czech Republic (after switch-off)

## **7. Issues of implementation**

### *Legal challenges to Must-Carry regimes*

Several infringement procedures have been initiated by the European Commission against member states regarding the implementation of the Universal Service Directive 2002/22/EC. Mainly they are concerned with whether or not the obligations are: strictly necessary to meet clearly defined general interest objectives; proportionate and transparent; and subject to periodic review.

The Commission initiated a procedure against Belgium in 2006 regarding the must-carry rules of the Belgian French Community claiming that the procedures for designating must-carry channels lacked transparency and clarity, and that the law should limit the number of channels to be listed as must-carry. In addition, a case was heard at the European Court of Justice (ECJ) on this issue. The case was brought by cable operators against the Belgian state relating to the obligation imposed on them to broadcast television programmes transmitted by certain private broadcasters designated by the authorities. The cable operators claimed that "must carry" rules were distorting competition and constituted an unjustified restriction on freedom to provide services. The Court ruled that Article 49 EC does not preclude legislation such as "must carry" rules where they both: pursue an aim of general interest such as pluralism of television programmes; and where they are

proportionate, transparent and non-discriminatory. It is the task of the national court to establish if these criteria are met. Although the Belgian French Community media law has been updated in 2007, the Commission (communicating in a press release of May 6th 2008) does not feel that this has addressed its concerns regarding "the issue of proportionality, transparency and non-discrimination".

The European Commission has also launched an infringement procedure against the Netherlands because the EC considers the Dutch regulations to be in violation of article 31 of the European Union Universal Service Directive 2003. To date no decision has been reached on this procedure.

There are two examples of legal challenges to the must-carry rules in Germany. The first concerns an infringement procedure against Germany initiated on 12 October 2006 by the European Commission regarding the transposition of the requirements laid down in the Universal Service Directive 2002/22/EC. The Commission is concerned that the must-carry rules in the various Länder do not conform to the requirements of the Directive. In the German case this refers to the obligation to have 100% of all available cable channels reserved for stations identified by the State, and this raises concerns about the proportionality of the regime. No decision has been reached yet in this case. However, it is arguable that the application of must-carry to all platforms from 2008 (under the 10th Amendment to the Interstate Broadcasting Treaty, mentioned above) may address this issue of proportionality.

In addition, at the national level, the rules are also currently being challenged by a German cable network provider at the Administrative Court of Hanover, which submitted its legal concerns to the ECJ on 19 July 2007 (C-336/07). The ECJ now has to determine whether the provisions of the state media law comply with the requirements laid down in the Universal Service Directive 2002/22/EC. Questions include to what extent the media authority is completely free to determine which channels should have a must-carry status; and whether the channels now available on digital terrestrial networks must still remain available on cable networks. A decision is expected in 2009.

In France, at the national level, the "must carry" obligation to broadcast digital public channels on analogue cable network is currently being challenged by some operators.

In Slovakia (at the national courts), a legal dispute that was running has been resolved by the adoption of current regime. The major cable operators had complained that the previous regulation of must-carry rules was too rigid without taking into consideration the particular differences between platforms.

#### *Other problems of implementation*

While in several jurisdictions there have been no particular legal challenges, the responses to the questionnaire reveal other problems regarding implementation. Some of these directly involve gaps or inconsistencies in the legislation, or the need for legislation to be updated with reference to the new digital environment.

For example, according to the Lithuanian legislation, all channels with national reach are automatically MC. The law presents a dilemma as digital platforms are now creating a possibility for many more channels to become national in scope, and hence legally have MC status, which implies that, legally, cable operators should carry them. The cable operators do not however, have the capacity to retain their current package of channels, and include additional new "national scope" channels.

A similar comment was added in the response from the Czech Republic where it was noted that: "*cable operators do not want to carry new DTT channels. They would prefer to chose by themselves which channels to transmit*". And also in France, "*with regard to the challenge of must carry obligations, it can be noticed that some operators on analogue cable*

*network lack sufficient room to distribute the channels required by the law instead of the ones they had chosen before”.*

In Denmark, the PSB (DR) is developing new channels in both DAB (Digital Audio Broadcasting) and DTT, but it is not, however, clear when a new channel has MC status. New legislation in this area is anticipated.

In Macedonia, it is felt that the current legal framework is not adequate in the light of developments and the issue will be examined in the context of the work of the National Board for Digitalisation.

#### *Specific problems of implementation over new media platforms*

Other implementation issues have arisen with regard to the application of the rules in relation to new media platforms such as IPTV or mobile broadcasting. The development of new platforms can be hindered by certain factors such as the platforms having the ability to offer certain channels, which would increase their attractiveness, and raises the issue of the “must offer” concept. In the Belgian French speaking community, it is noted that many local broadcasting services have refused to have their channels distributed over new platforms (for example xDSL) and the regulator notes that in the absence of a must offer obligation, they cannot address this issue. On the other hand, the response from the Belgian CSA also notes that current obligations may be too high for the new market entrants such as mobile and xDSL platforms.

A related problem occurred in Germany in the planning stage of the launch of DVB-H (mobile broadcasting). The company, Mobile 3.0 that was granted the license for the pilot project is expected to provide a nation-wide trial and the aim is to have the system up and running before the 2008 European Football Championships. Although the German regulators collectively, via the ALM decided on this company after the tender process, Mobile 3.0 still has to negotiate its license and content conditions with each of the 14 regulators who decide on these conditions (given state competence for broadcasting). The State governments allocate capacities to the Media Authorities, who in turn will allocate capacity to Mobile 3.0 for DVB-H. Mobile 3.0 had problems in its negotiations with the Public Service Broadcasters. The PSBs wanted to be allocated 1/16 of the capacity, which would imply that any future increase in the overall capacity would guarantee them additional capacity. The proposal of Mobile 3.0 was that the PSBs would both get one of the 16 channels available. The Media Authorities have tried to mediate between the State Governments, the commercial broadcasters, the PSB channels and Mobile 3.0 to make sure that the project can start in mid-2008. At least the PSB channels have conceded their point of view and the process of issuing the licenses and capacities at the State level is moving ahead.

In Austria, with respect to IPTV, the question arose as to whether section 3 of ORF-G<sup>6</sup> can be read as must offer rule. One leading Austrian telecommunications operator wanted to offer IPTV and was interested in distributing the programmes of ORF, the public service broadcasting corporation, for these purposes. At first no agreement was found and so KommAustria had to deal with the question, as to whether ORF was obliged to offer its programmes. In the end the companies reached an agreement. Hence there has been no final decision about the legal question behind this case.

Although the new Portuguese legislation applies must-carry across all platforms, for the moment, IPTV and mobile broadcasting must be considered as ‘nascent’ services and the imposing of obligations is not considered as appropriate. This however does not prevent the need to monitor, on a regular basis, the evolution of these services in the audiovisual market.

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<sup>6</sup> “ORF must ensure that, subject to technical development and economic feasibility, all inhabitants of the national territory who are authorised to operate a radio or television receiver are consistently and permanently provided with one region-wide and two nation-wide radio programmes and two nation-wide television programmes.”

In contrast, while there are no regulations concerning platforms other than cable networks, on May 31, 2006 the National Broadcasting Council of Poland issued a standpoint on the TV services over DSL (TVoDSL) and recognised these services as being programme services retransmitted in cable networks. Hence must-carry rules apply.

#### *Issues of copyright and remuneration*

The issue of rights-holders and copyright also arose in the responses with regard to new platforms. In Lithuania, the legal provisions regarding these issues apply also to new platforms regardless of technical means of distribution: *"New platforms are subject to both Must-Carry and the provisions of authors' rights... this becomes problematic as the programme providers claim they don't have the necessary rights for certain parts of the programme to be transmitted for that large coverage and that kind of technology. In fact they (programme providers) expect the distributors of the programmes (mobile TV operators, IPTV) to pay them for their programmes, motivating their expectations on the reasonable fear, that their ratings will go down, because new media platforms will attract more viewers, thus those new platforms will attract more advertising, which means, that the programme providers will suffer financially in the end. So practically we face the situation, where the new media platforms have to obey the must-carry rules and they are willing to do so, but as there are no must-offer rules, the programme providers are reluctant to offer their programmes due to the above mentioned reasons."*

### **8. Future developments**

Given the challenges outlined above, several jurisdictions have, or are planning to, take stock of carriage obligations such as must-carry. Many have already introduced technologically-neutral systems across most platforms. The new strategy in Spain at the federal level is to replace the must-carry system with must-offer rules from 2010, although to date there is no concrete information on how this will be applied.

Valcke (2005) has examined the possibility of replacing must carry rules with a new concept, the creation of "universal service obligations with regard to content". She proposed the introduction of a "universal service package" rather than a "basic package" whereby this would be: "an offer that is legally defined as containing all general interest contents to which every citizen should have access at reasonable conditions". This would require three steps: identifying which content providers should be considered as having the right to have (and also the obligation to have) their content included in such a package; in terms of distribution, at least one distributor would be identified whereby they would also have the right and obligation to distribute this package, and hence be allocated the necessary access and capacity to do so; and at least one network operator with universal coverage would be obliged to carry the package. These steps she determines as "must offer", "must distribute" and "must carry".

The CSA in Belgium has recently been studying the possibility of introducing such a system, which would most likely be applied to platforms with "significant numbers of end users", i.e. the more traditional platforms of broadcasting transmission who have the ability to provide universal service. They propose a consultation with industry and consumer groups on this issue.

### **9. Conclusion**

The nature of must-carry regimes vary quite widely in the EPRA member countries, and the responses to the requirements of the Universal Service Directive are also varied. The regulatory aims outlined in the paper indicate the various "general interest objectives" that guide the decision-making in different states. These are however very different: in some countries a priority is the protection of PSBs, while in the UK must-carry has never been implemented as the PSBs are channels that are desired by platform operators in order to insure the financial viability of their platforms. It is also the case that commercial/private channels play various roles in different countries and many states list (at least national)

commercial broadcasters as must carry with the objective of ensuring diversity in the market place and in content. Minority language, local or regional and foreign channels all have a role to play in diversity for different reasons: in countries with minority groups, in federal states with different language communities etc.

Cable is the transmission platform most frequently subject to must-carry rules. However this is changing with many countries introducing a technologically-neutral approach to platforms with significant numbers of end users. While many states have updated their legislation in this regard, it is apparent that cable operators in many jurisdictions are questioning these obligations, particularly where the number of channels are increasing (either due to the development of additional digital PSB channels, or as is the case in Lithuania with the automatic must-carry status of channels that become nation-wide over other platforms).

Several jurisdictions have clear must-offer rules: Czech Republic, France, Israel, Norway, Ukraine; or similar obligations on, for example, the public service broadcaster to be present on all platforms of significance (Austria); or the potential in the legislation to oblige channels to make themselves available (UK). Spain is planning on moving to a must-offer system after digital switch-over. The questionnaire responses to issues of problems of implementation noted that certain new platforms (IPTV and mobile broadcasting) were having problems gaining access to certain content and that the introduction of must-offer rules would be useful in such circumstances. Examples of this were noted in Germany, Austria, Lithuania, and Belgium (French).

The role of the regulatory authority is relatively limited in most EPRA countries regarding this issue aside from the responsibility to monitor and implement the regime. Some RAs play an important role in the development of policy and consultations during review processes, while there are some with stronger competences in the selection or decision-making re. must-carry content and channels (Israel, Slovakia, and in the future the Czech Republic).

A considerable number of legal challenges have been undertaken at both the EU and national level questioning the nature of the must-carry rules with regard to proportionality and transparency. Proposals from the EC regarding the reform of the Telecoms package will introduce more stringent examinations of the "general interest objectives" on which must-carry regimes are based. In Malta, a current review is examining precisely the concept of "general interest objectives" before MC is applied across more transmission platforms.

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