



Must-Carry rules: Valuable Tool or Sacred Cow ?

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■ Agenda



- What are we talking about?
 - *On cows and other species of cattle*
- Snapshot of goals, addressees, beneficiaries in EU Member States
 - *On the milk, the milking parlors and the cowboys*
- The effect of Art. 31 USD
 - *On the farmer's attempts to rationalise the milking process*
- Some gaps and anomalies – the wrong incentives?
 - *On cows escaping through the holes in the fence*
- The way forward?
 - *On giving the cow a simple haircut, a complete restyling or ... putting her on the BBQ*

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N.B. Apologies for not providing a full text.

Background literature, however, can be found in:

- ***IRIS Special***, ‘*To Have or Not to Have: Must-carry Rules*’, 2005, http://www.obs.coe.int/oea_publ/iris_special/2005_02.html
- ***Cullen International***, ‘*Study on the Regulation of Broadcasting Issues under the New Regulatory Framework*’, December 2006, pp.32-36 and pp.77-89 (+ annex 1: Tables 4, 14-17)
http://ec.europa.eu/information_society/policy/ecommm/library/ext_studies/index_en.htm#2007
- ***EPRA Background Paper*** (Deirdre Kevin)

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■ What are we talking about?

- Must-carry = obligation imposed on network operators to carry specific content (such as broadcasting channels)
- But: sometimes carriage obligations are ‘disguised’ in regulations with the same effect:
 - Broadcasting licences: in DE channel allocation in broadcasting licences for content providers in cable TV networks
 - Capacity reservation obligations: in IT (DTT) network providers have to provide access to transmission capacity (up to 20% of total capacity) to independent providers of content of ‘particular value’ (in terms of programme quality or media pluralism)
 - ‘Specific order insertion’ obligations: in PL cable operators are obliged to follow a specific sequence for programming to be ‘introduced’ (1. nationwide public radio and TV programmes, 2. regional public radio and TV programmes, 3. national programmes of ‘social’ broadcasters, 4. programmes of other national and foreign broadcasters)

■ What are we talking about?

- Must-offer = obligation on broadcaster to offer its content to one or more broadcasting platforms
- But, again: sometimes overlap with regulations having the same effect
 - Coverage obligations on public service broadcasters (universal coverage obligation, obligation to offer content to all networks on fair, reasonable and non-discriminatory terms...)
 - (rules on “listed special events”)

■ What are we talking about?



**FIRST LESSON:
there is more must-carry/
must offer than you would expect...!**

(There is more cattle than just cows)

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■ Snapshot of situation MS



PURPOSE

- Often only 1 regulatory aim, usually defined in broad terms:
 - Media pluralism, cultural diversity
 - Universal access to PSB channels
 - Industrial policy (support for domestic / local content)
- Some MS link to a number of very specific general interest objectives (e.g. DK)
 - Such as:
 - programme diversity
 - news, information, education, art, entertainment
 - cultural and societal debates
 - freedom of speech, freedom to receive information
 - national language and culture
 - plurality
 - European content
 - Content suited for youth and children

■ Snapshot of situation MS



ADDRESSEES

- Primarily cable networks
- Exceptions:
 - Satellite operators: e.g. FR, LT
 - DTT:
 - Ensure access to mux capacity to broadcasters with public service obligations (e.g. AU, FI, IT, PL, PT, SI, UK...)
 - Give spectrum directly to broadcasters instead of to network or mux operators (e.g. FR)
 - Emerging networks (mobile, IP TV): e.g. FR, LT, PL, BE-FR (SE in some cases)

■ Snapshot of situation MS



BENEFICIARIES

- Mainly content offered by broadcasters with public service obligations
- But: wide variety
 - Sometimes only PSB, sometimes also other channels with public service obligations (local/regional news, education, cultural identity...)
 - Sometimes only independent providers which provide programming that contributes explicitly to social goals, like educational content addressed to school students, content strengthening information pluralism by thematic news channels, content improving the relationship between citizens and public administration... (IT)
 - Sometimes only national, sometimes also local/regional channels
 - Sometimes only PSB, sometimes also commercial channels (even pay-TV or teleshopping channels)
 - Mostly domestic channels, sometimes also foreign channels

■ Snapshot of situation MS



REMUNERATION

- Varies widely:
 - Sometimes networks pay broadcasters
 - Sometimes broadcasters pay networks
 - Sometimes there are no payments at all
 - Sometimes remuneration is specified in the law (although method of compensation is determined by commercial agreement)

- Very often, data is lacking!

■ Snapshot of situation MS



MUST OFFER

- Explicitly: CZ, FR, NO, BE-FR (some), UK (not implemented)
- Implicitly (coverage obligations for e.g. PSB): most MS

■ Snapshot of situation MS



SECOND LESSON: There is no “one size fits all”

(Each cowboy has his favourite cow breed, his preferred milking method and his own way of herding the cattle.)

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■ Effects of Art. 31 USD



AIMS: * harmonisation – * rationalisation

- Member States may impose reasonable ‘must-carry’ obligations
 - for the transmission of specified radio and television broadcast channels and services,
 - on undertakings under their jurisdiction providing electronic communications networks used for the distribution of radio or television broadcasts to the public where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcasts.
- Such obligations shall only be imposed
 - where they are necessary to meet clearly defined general interest objectives
 - and shall be proportionate and transparent.
- The obligations shall be subject to periodical review.
- Neither paragraph 1 of this Article nor Article 3 (2) of Directive 2002/19/EC (Access Directive) shall prejudice the ability of Member States to determine appropriate remuneration, if any, in respect of measures taken in accordance with this Article while ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks. Where remuneration is provided for, Member States shall ensure it is applied in a proportionate and transparent manner.

■ Effects of Art. 31 USD

■ EFFECTS:

- * confusion, interpretation problems

(N.B. Underlined = susceptible to different interpretation or not implemented; cf. Cullen Report)

- * introduction/extension of must-carry rules by some MS

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

■ Effects of Art. 31 USD



LESSON 3:

**Art. 31 USD: a story of high aspirations...
...and reverse effects**

*(The farmer sought to rationalise the milking process
but failed to align the cows in the milking parlor.)*

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■ Some gaps and anomalies

- To the benefit of broadcasters that would have access to transmission facilities anyway?
- Imposed on network operators that would grant access anyway?
- Not mirrored by must offer?

■ Some gaps and anomalies



OLD DAYS (oversimplifying): must-carry as extension of universal coverage obligation of PSB
- was matter of regulating two party-relationship between:

public service broadcaster
(two-three channels)



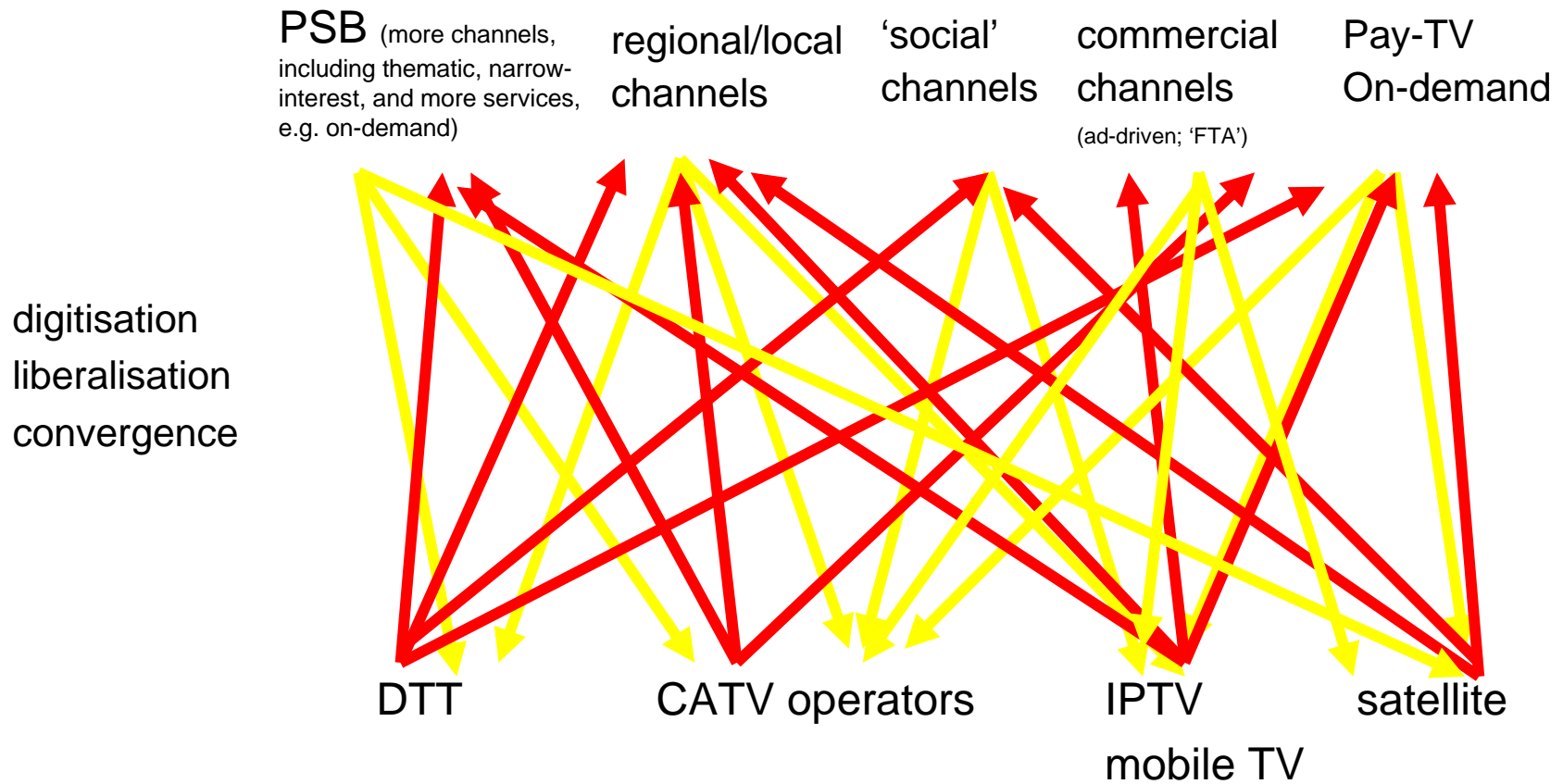
CATV operators

to ensure that viewers would have access to 'public' content (paid for by them through licence fees)

TODAY: audiovisual landscape more complex...

Some gaps and anomalies

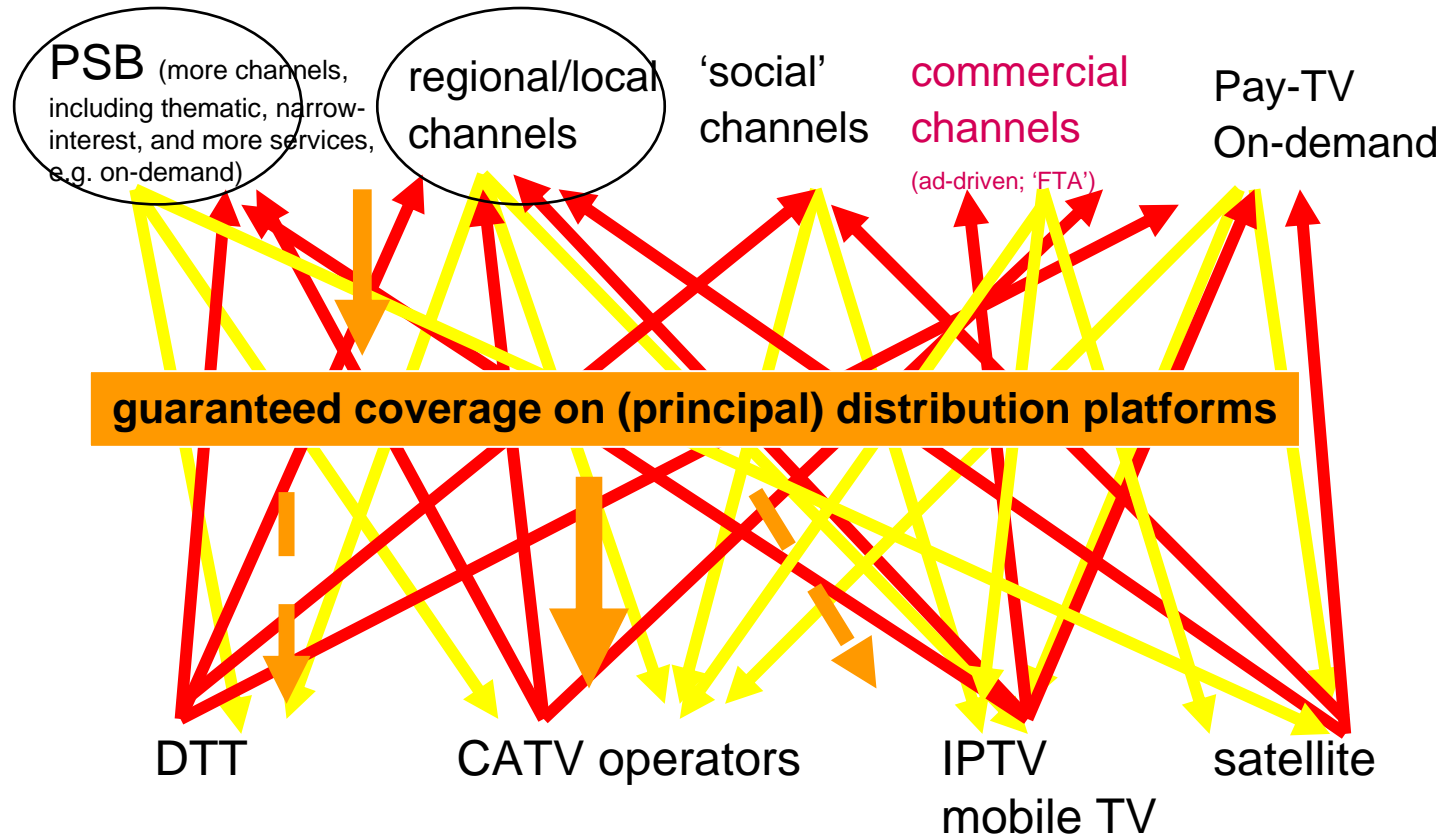
More competition both in content provision and network provision/distribution



Some gaps and anomalies

More competition in content, but only some have MC status...

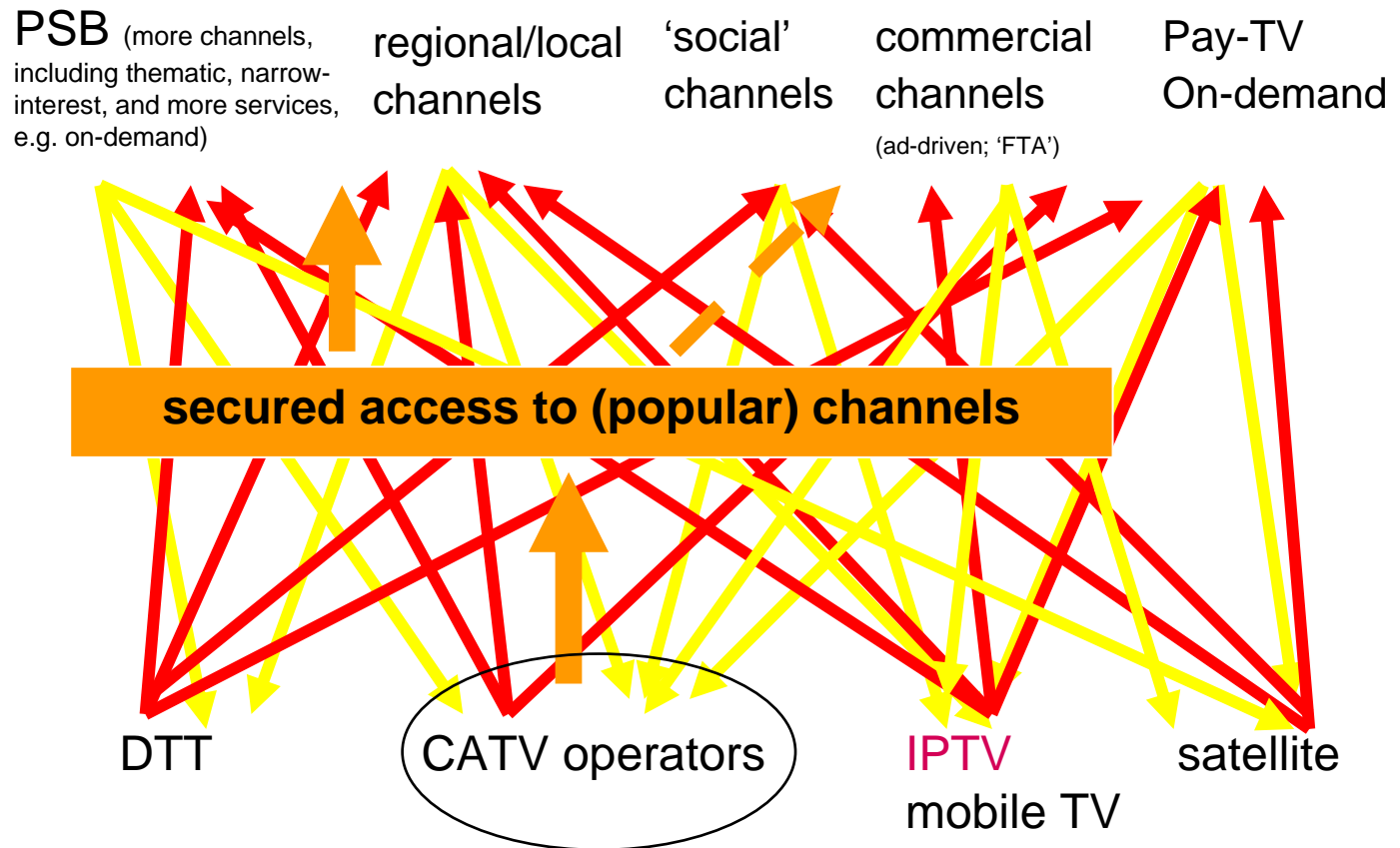
=> affects competition between MC and non-MC broadcasters on related markets for advertising and premium content rights (e.g. sports, films)



■ Some gaps and anomalies

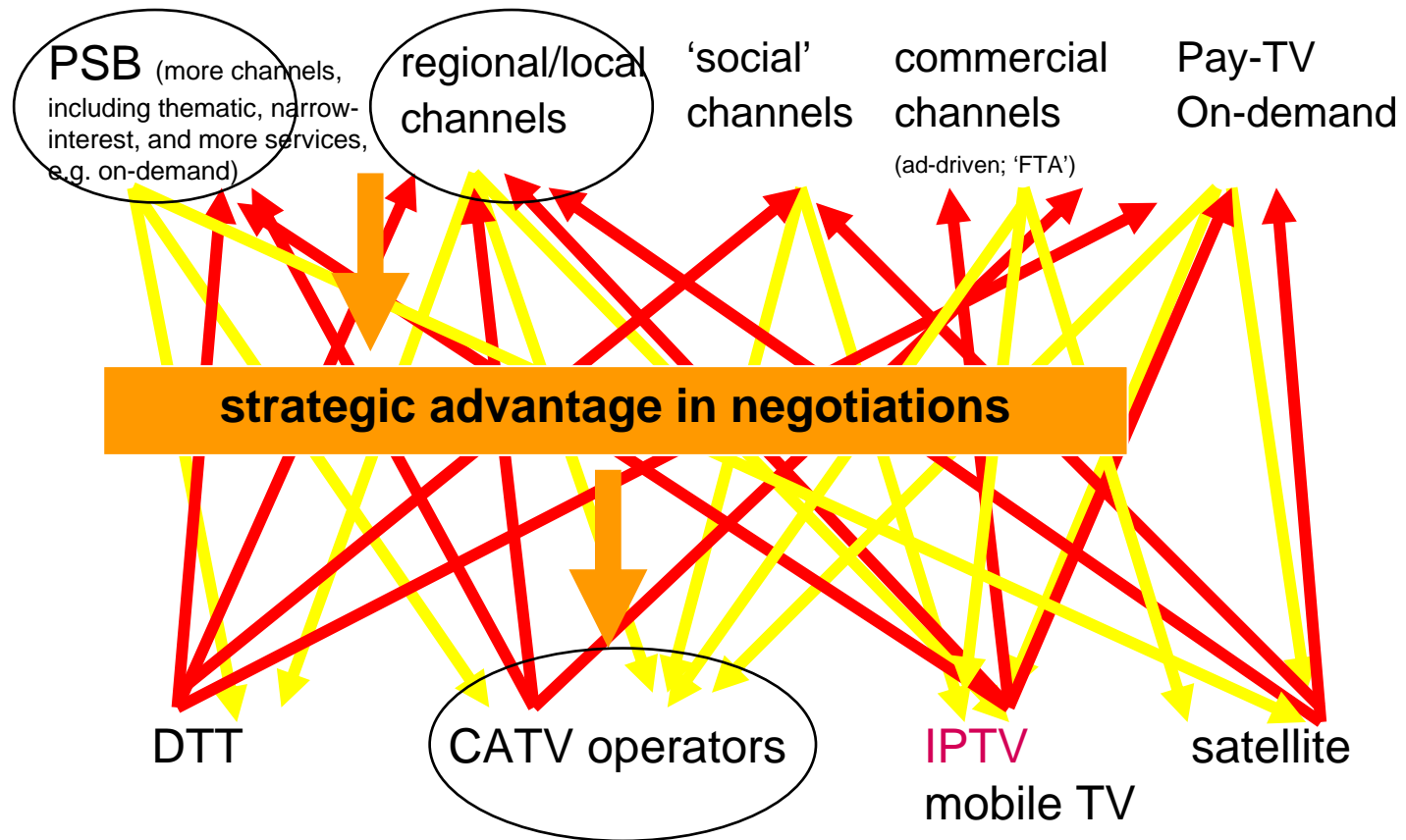
More competition in networks, but only some have MC obligations...

=> Affects competition between distribution platforms



■ Some gaps and anomalies

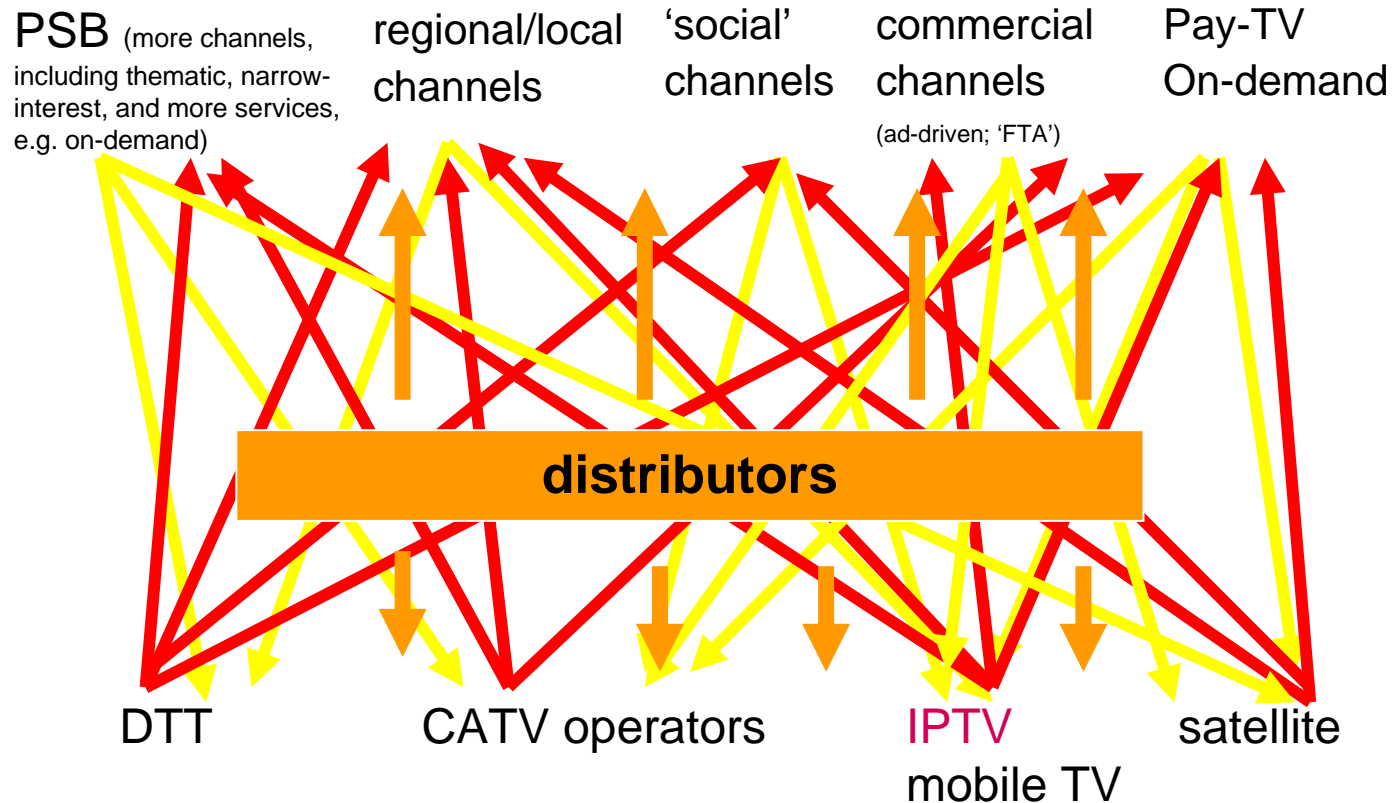
More competition in content & networks, but only one-directional MC regulation... => MC-status hands broadcasters advantage in commercial negotiations over carriage



Q: Need to mirror must-carry with must-offer?

Some gaps and anomalies

Emergence of distributors (content platform operators, aggregators) not affiliated to network operator



Q: Who has to ensure access by public to specified contents? Is must-carry about ensuring capacity on a network (for a content provider? A distributor?) or about ensuring distribution (for a content provider) towards the public, or both?

■ Some gaps and anomalies



LESSON 4:

Must-carry can give the wrong (economic) incentives and/or lead to undesired market effects.

(If the cowboy fails to use the proper fence -or forgets to mend it on time- it only keeps in those cows who would not escape anyway...)

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■ The way forward

- Increased capacity offered by digital technology will
 - *decrease* weight and economic costs of MC in terms of burden imposed on platform providers
 - Believers: 'MC can be maintained, will hardly be a burden'
 - *increase* likelihood that platform providers will include MC channels even without MC obligation, because they will be motivated to fill up additional capacity with quality content.
 - Non-believers: 'MC will phase out in time, we don't need it anymore'
- Probably truth in the middle: MC may still be justified in some cases; too simple to conclude that the added capacity of broadcast transmission platforms (> digitisation) means that there is no longer *any* justification for must-carry in *any* Member State (cf. Cullen Report)
- ***So: no need to sacrifice the whole cow (don't put her on the BBQ!), she just needs some restyling...***

■ The way forward



Some food for thought

Purpose

- Cf. Art. 31 USD: “*necessary to meet clearly defined general interest objectives*” – ECNS reform proposals: “*clearly and specifically defined*”
- Can be cultural reasons, but never economic (case law ECJ)
 - “Cultural policy (*in casu maintenance of pluralism and safeguarding freedom of expression of the different social, cultural, religious, philosophical or linguistic components in the region*) may constitute an overriding requirement relating to the general interest which justifies a restriction on the freedom to provide services” (ECJ, C250/06, UPC v. Belgium)
- Recommendation: be as specific as possible (not just “media pluralism”, but “preservation of programming in minority language in bilingual regions”, “guaranteeing citizens’ access to local and national news, information, education, cultural and societal debates, etc. in their own language”...)

■ The way forward

Some food for thought

Beneficiaries: which channels should have MC-status?

- 'Channels', not 'broadcasters' (cf. ECJ, C250/06, UPC v. Belgium) and accessibility services (cf. ECNS reform proposals)
- Reasonable number
 - Difficult to put exact number to it: differs > total capacity of network, number of subscribers, policy goal...
 - *In some cases the cow will need to be put on a diet...*
- Only channels serving the public interest: [...]

■ The way forward

Some food for thought

Beneficiaries: which channels should have MC-status?

- [...] Only channels serving the public interest:
 - Publicly funded channels

But can be broader:

 - Also private channels with a public service remit (e.g. regional TV) or offering general interest content that would otherwise not be distributed under normal market conditions (e.g. school TV, community media...)
 - Even (in exceptional circumstances) pay-TV (<-> **Cullen Report 2006**) if serving public interest – e.g. educational channels to which schools can subscribe – or on-demand (e.g. PSB news on demand)

■ The way forward

Some food for thought

Beneficiaries: which channels should have MC-status?

- [...] Only channels serving the public interest: how / who selects?

Idea of “Market-based approach for selection”: tendering system (e.g. beauty contest > criteria like diversity, impartiality, informational pluralism, local pluralism...) (cf. **Cullen Report 2006**)

■ The way forward

Some food for thought **Addressees**

1. Which (and how many) platforms?

- Only one (with universal coverage? with substantial coverage?)
or on various (all) platforms?
 - German case: MC on cable still justified if channels are accessible via DVB-T? (case C-336/07, pending)
- Art. 31 USD: “significant number of end-users” and “principal means”
 - What is a significant number? E.g. PL: cable networks with more than 250 subscribers; **Cullen Report 2006**: 40% of total households
 - Rules out new and emerging platforms (no significant number of end-users) and ‘complementary’ platforms (not principal means)
 - But does (should) not rule out simultaneous application of MC to various platforms

■ The way forward

Some food for thought **Addressees**

1. Which (and how many) platforms?

- Is must-carry about access to specific content
 - on all platforms?
 - at least one platform?
- Is it a question of 'OR'?
 - If yes: universal coverage / access should be independent of network you subscribe to (<-> USO in telecoms where you lose protection if you change networks), hence, apply to all networks with 'significant' penetration (level playing field)
- Or, can it be 'AND'?
 - all platforms: guaranteed access to PSB channels (publicly funded)
 - at least one platform (with wide coverage): guaranteed access to other channels serving public interest
 - selected via tendering procedure or by RA on basis of predefined criteria
- For Member States to decide < population density, rate of penetration of different platforms (cf. **Cullen Report 2006**)

■ The way forward

Some food for thought

Addressees

2. Extend to associated facilities

- **Cf. Cullen Report 2006:** must-carry status should imply access to associated facilities, such as CAS, API, EPG, but also DRMs, multiplex, search engines, etc. (in other words: all network elements that are indispensable to reach potential viewers)

■ The way forward



Some food for thought Addressees

3. Rethinking must-carry in the digital age: multi-layered approach:
 - couple must-carry with must-offer
 - in order to contribute to a level playing field, all broadcasters with MC status should have an accompanying must-offer obligation to provide their programmes to all platform providers under non-discriminatory terms and conditions; cf. **Cullen Report 2006**
 - but also with must-distribute
 - in case of non-vertically integrated network providers there may be a need to define
 - obligation to distribute certain content (distributor) separately from
 - obligation to reserve sufficient capacity (network operator)

■ The way forward

Some food for thought **Remuneration**

- No payment by or to network operators for carriage of MC channels, which should be provided without need for specific payments by the viewers (cf. 'bill and keep' principle in telecoms); cf. **Cullen Report 2006**
 - Might seem logic, but skeptical about practical implementation
- Targeted subsidies for transmission in case of problems with universal coverage for programming offered pursuant to public service remit (e.g. rural areas)

Reviews

- Regular reviews: ECNS reform proposals state 'every 3 years'
- Greater attention to consumer interest: include public consultation in review; cf. **Cullen Report 2006**

Create the right conditions for a healthy cow

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