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Subject: 'Must-carry' obligations under the 2003 regulatory framework for electronic communications networks and services

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INTRODUCTION AND PURPOSE

The present document provides a detailed presentation of Article 31 of the Universal Service Directive. It is intended to serve as ‘user guide’ on must-carry under the 2003 framework. As an introduction to the subject matter however, some background information on must-carry rules is provided first.

The actual monitoring of the application of the package will start in 2003, after the new provisions are applied in practice. The Commission has notably indicated that it will monitor the application of both access and must-carry rules at Member State level, “*taking into account any problems that public service or other specified broadcasters may have in gaining access to satellite and other broadcast networks*”.¹ The need for further Guidelines will be considered at that time in the light of member States' implementation measures. Studies will be used to investigate specific issues, such as the economic impact of must-carry rules on market players.

1.1. Background on must-carry and electronic communications networks

1.1.1. National measures concerned

Must-carry obligations have long been in place in most Member States², as is the case in other parts of the world (e.g. USA). Generally speaking, these rules require certain television or radio channels to be carried over certain networks. The reasons invoked are typically the universal accessibility of certain radio and television programmes and the need to guarantee a pluralistic offer to the public. Must-carry rules usually benefit broadcasters (public and private) with a public service remit, but commercial broadcasters also benefit in certain countries.

These rules were traditionally applicable to cable networks. The presence of a channel on analogue terrestrial was usually ensured through the granting/reservation of frequencies for the broadcaster concerned, together with a universal coverage requirement. Satellite broadcasting was unregulated in many countries and there was no real problem of capacity on transponders.

Some Member States are considering extending ‘must-carry’ or similar rules to other networks or have done so recently (e.g. Ireland for DTTV, France on satellite, UK for cable). In particular, the provision of multiple channels and services on a single frequency band (multiplexing) leads certain Member States to impose rules on digital terrestrial broadcasting in addition to, or instead of, the granting of frequencies to broadcasters. Alternatively, or in addition to must-carry, some Member States subject public service broadcasters to ‘must-offer’ requirements, i.e. an obligation to provide certain channels to certain network operators (e.g. UK on satellite).

Traditionally, broadcasting regulation in Member States has covered both content and infrastructure (unlike the new regulatory framework which requires separate regulation of content and infrastructure). Thus current ‘must carry’ rules may apply to either network

¹ Commission Statement on ‘must-carry’ obligations made in plenary meeting of the EP on 12 December 2001.

² Except Greece, Italy and Luxembourg. See OVUM and Squire Sander and Dempsey, “An inventory of EU ‘must-carry’ regulations”, Report to the Commission, February 2001; available at the following URL address : <http://europa.eu.int/ISPO/infosoc/telecompolicy/en/OVUM-mustcarry.pdf>

operators or content providers, or both. For instance, the French requirement that certain public service channels must be included in the commercial offer of satellite pay-TV operators is an obligation placed on the content provider and not the network operator. Similarly, rules on multiplexing, which impose conditions on the aggregation of the signal of various channels into one digital signal before transmission, may not apply to network operators.

1.1.2. Impact of must carry rules on network operators

These measures can have a considerable impact on network operators, since they restrict the operators' ability to use their own capacity freely and in a competitive way. This impact is all the more important since competition, in particular on broadband, has moved many cable operators from "mere" radio and television markets to the "triple play", i.e. not only into broadcasting but also in internet access and voice telephony, where they compete with internet access providers and more traditional telecommunications companies. It should be noted that, next to must-carry obligations, other rules may constrain the operation of cable networks in order to ensure an affordable cost for the consumer, such as price controls.

Must-carry obligations can also impose a cost burden on network operators which operate in a commercial environment. In some Member States, 50 % or more of the capacity available on cable television networks is dedicated to must-carry channels. In certain countries, compensation can be asked from broadcasters or subscribers.

Costing

There are several ways to calculate the cost of must-carry obligations, ranging from an average pricing rule to an efficient component pricing rule. In the former case, the cost of must-carry obligations will depend on the cost of each element of the network used to fulfil the obligations. In the latter case, the cost will depend on the cost of each of the network element plus the profit forgone as the network has to be used for the must-carry obligations instead of providing other electronic communications services.

Such rules may have been tolerated by network operators in the past, when they had 'special or exclusive rights'. To a certain extent, mandatory retransmission of certain channels may have been considered an "inevitable burden" in the past, "in exchange" for a monopoly for (cable) retransmission of television programmes in a given region. Such rights however no longer exist today or will have to be abolished shortly, and the proportionality, if not the necessity of certain must-carry rules is called into question by most network operators. At the same time, must-carry may be appropriate in the absence of alternative delivery mechanisms, including situations where subscribers are locked-in to a given platform.

In any event, cable operators will face increased capacity problems in the short term, because of the need to carry both analogue and digital channels during the changeover from analogue to digital; must carry rules, if not well managed can amplify such problems.

In the longer-term, capacity constraints may become less of a problem with digitalisation, as is already the case with satellite broadcasting. However, certain technologies, such as digital terrestrial broadcasting, will not escape capacity constraints in the foreseeable future.

1.2. Article 31 of the Universal Service Directive

The new regulatory framework for electronic communications networks and services builds on the conclusions of the Convergence Green Paper consultation and the Communications Review. The "Universal Service" Directive included in the package is of particular

importance for national must-carry obligations, since it includes a provision on ‘must-carry’ obligations bearing on network operators. (Article 31 of the Universal Service Directive). This provision is explained in more detail below³.

The **Universal Service Directive** includes a provision on “must-carry obligations” (Article 31 of the Directive).

Article 31 of the “Universal Service” Directive

"Must carry" obligations

1. Member States may impose reasonable "must carry" obligations, for the transmission of specified radio and television broadcast channels and services, on undertakings under their jurisdiction providing electronic communications networks used for the distribution of radio or television broadcasts to the public where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcasts. Such obligations shall only be imposed where they are necessary to meet clearly defined general interest objectives and shall be proportionate and transparent. The obligations shall be subject to periodical review.
2. Neither paragraph 1 of this Article nor Article 3(2) of Directive 2001/19/EC (Access Directive) shall prejudice the ability of Member States to determine appropriate remuneration, if any, in respect of measures taken in accordance with this Article while ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks. Where remuneration is provided for, Member States shall ensure that it is applied in a proportionate and transparent manner.

While recognising the ability of Member States to impose or maintain reasonable must-carry rules on network providers under their jurisdiction, Article 31 aims at ensuring that these rules are proportionate, transparent, kept limited to what is necessary to meet clearly defined general interest objectives, and reviewed regularly.

Additional conditions are also prescribed for the cases where remuneration is provided for. These different conditions are further analysed, below.

³ For an general analysis of the implications of the new framework on broadcasting, see the ONP working document entitled ‘The 2003 regulatory framework for electronic communications – Implications for broadcasting’ (Document ONPCOM02-14). The package consists of: one Framework Directive; three specific Directives respectively covering authorisations, access, and universal service and user’s rights; a data protection directive; and a spectrum decision (See OJ No L108 of 24 April 2002, p.1 onwards.) (Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, (“Framework Directive”); Directive 2002/20/EC of the European Parliament and of the Council on the authorisation of electronic communications networks and services, (“Authorisation Directive”); Directive 2002/19/EC of the European Parliament and of the Council on access to, and interconnection of, electronic communications networks and associated facilities (“Access Directive”); Directive 2002/22/EC of the European Parliament and of the Council on universal service and users’ rights relating to electronic communications networks and services (“Universal Service Directive”). The latter “Radio Spectrum Decision” establishes a policy and legal framework in the Community in order to achieve the harmonisation of the use of the radio spectrum (Decision 676/2002/EC of the European Parliament and of the Council on a regulatory framework for radio spectrum policy in the European Community). The scope of this Decision is wider than simply electronic communications, covering other Community policy areas using radio spectrum, e.g. transport, research and development. The “data protection directive” is still under negotiation. A common position on the proposal for a Directive of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector (“Data Protection Directive”) was adopted on 28 February 2002 and could be agreed before the summer 2002. A directive will also consolidate the various updates the “liberalisation” directive to be adopted under Article 86 EC.

1.2.1. The scope of Article 31 of the Universal Service Directive

Generally speaking, Article 31 is not intended to cover all possible must-carry rules. The dividing line is as follows.

Article 31 covers “rules imposed on undertakings providing electronic communications networks (...)”⁴. In line with the rest of the regulatory framework as indicated above, it does not cover the content of the services delivered.

For instance, the issue of which broadcasters benefit from 'must carry' obligations, in line with the regulatory framework, is not addressed. Similarly, Article 31 does not cover rules on the presentation of broadcast contents in listings and navigation facilities, such as the prominence or visibility given to certain broadcasters' services within an electronic programme guide (EPG)⁵. These are content issues, which are not addressed by the framework.

Rules dealing with those issues should nevertheless comply with general Community law, such as Article 49 EC Treaty implying non-discrimination and proportionality.

1.2.1.1. Networks concerned

Article 31 applies to “*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*”.

Currently the principal means to receive radio and television broadcasts are via the traditional “broadcast” platforms, namely cable, satellite and terrestrial broadcasting networks. The vast majority of households will continue to use a traditional “broadcast” platform for reception of broadcast channels in the foreseeable future. The use of other networks (e.g. 3G mobile networks or fixed telecommunications networks using DSL technologies) for broadcasting purposes is so far limited, and extension of must-carry rules to such networks would be disproportionate at the present stage of technological and market development. Extension of these obligations to other networks would only be legitimate if a significant number of end-users were to use such networks as their principal means to receive radio and television broadcasts.⁶

1.2.1.2. Associated facilities

Article 31 does not give broadcast content providers access to associated facilities, e.g. conditional access systems (CAS)⁷. Access to such facilities is already covered by Articles 5 and 6 of the Access Directive, which grants any broadcast content provider access to CAS

⁴ see section 1.2.1.1

⁵ This is explicitly recognised in Article 6 (4) of the Access Directive.

⁶ Recital 44 explicitly states that “*Networks used for the distribution of radio or television broadcasts to the public include cable, satellite and terrestrial broadcasting networks. They might also include other networks to the extent that a significant number of end-users use such networks as their principal means to receive radio and television broadcasts*”.

⁷ ‘*Associated facilities*’ are facilities associated to an electronic communications network and/or service which enable and/or support the provision of services via that network and/or service. It includes conditional access systems and electronic programme guides (Article 2 (e), Framework Directive).

under fair, reasonable and non-discriminatory conditions. Taken together, those provisions preclude the imposition of must-carry obligations on CAS or other associated facilities, such as APIs or EPGs.

Digital broadcasters need access to conditional access systems and other associated facilities like APIs in order to deliver their content to the consumer. Under Community legislation in force⁸, the providers of conditional access systems have to provide access on fair, reasonable and non-discriminatory terms (FRND). This approach is carried forward in the Access Directive.

The Access Directive provides for access to conditional access systems to be available to all broadcast content providers, including the ones that benefit from “must-carry” rules, on FRND terms (See Article 6). It allows Member States to extend such access to other associated facilities for digital broadcasting, such as API and EPGs to the extent that is necessary to ensure accessibility for end-users to digital radio and television broadcasting services specified by the Member State (Article 5 (1a)). Moreover, under the Access Directive, access obligations can be imposed on providers of associated facilities which are SMP, subject to the market analysis regime in the Framework Directive.

Because access rules give a right of access and in a manner that is normally more economically efficient, it was deemed to be neither necessary nor proportionate to impose additional must carry obligations on conditional access systems and other associated facilities.

Article 6 (3) of the Access Directive allows a Member State to modify the FRND rules provided for under Article 6 (1) or withdraw them from operators found to have no “significant market power” (SMP) further to market analysis⁹. In that particular case, accessibility for end-users to channels and services specified in accordance with Article 31 Universal Service Directive, must not be *adversely affected by such amendment or withdrawal*.

1.2.1.3. Broadcast channels and services

Must-carry obligations may be adopted for the transmission of **radio and television broadcast channels and services**. The “broadcast services” category may include e.g. teletext and services designed to enable appropriate access by disabled users. Recital 43 explicitly states that “*Must-carry*” obligations may include the transmission of services specifically designed to enable appropriate access by disabled users”. Article 31 excludes services which are not broadcast.

As already indicated, the designation of individual broadcasters benefiting from 'must carry' obligations, and rules on the prominence of certain channels on EPGs are content issues, which are not addressed under Article 31.

⁸ Directive 95/47/EC of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals (OJ L281/51, 23.11.95)

⁹ According to Article 14 of the Framework Directive, an undertaking is deemed to have significant market power “*if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately, consumers*”.

1.2.2. Requirements applicable to national must-carry rules covered by Article 31 USD

While explicitly recognising the ability of Member States to impose reasonable must-carry rules on network providers under their jurisdiction, Article 31 (1) ensures that these rules are reviewed regularly and kept:

- limited to what is necessary to meet clearly defined general interest objectives;
- proportionate;
- transparent¹⁰.

The obligation to review must-carry regime on a regular basis should encourage Member states to re-evaluate the need for and scope of must-carry rules and, in particular, regularly assess, taking into account technology and market developments and the views of interested parties, whether such rules still match the necessity and proportionality requirements. The other criteria mentioned can be further explained as follows.

1.2.2.1. Limited to what is necessary to meet clearly defined general interest objectives

Must-carry obligations must be limited to what is “*necessary to meet clearly defined general interest objectives*”. (Recital 43 refers to obligations laid down “*in the interest of legitimate public policy considerations*”.) These objectives should be *clearly defined*. Such objectives would normally include considerations linked to pluralism or cultural diversity. These rules are not *per se* limited to radio and television broadcasts of public broadcasters. Recital 43 notes that “*such obligations should only be imposed where they are necessary to meet general interest objectives clearly defined by Member States in conformity with Community law*”. In line with relevant case law of the European Court of Justice, economic considerations would not be considered general interest obligations¹¹.

Clear definitions of the general interest objectives at stake will also facilitate the test as to whether the rules bearing on network operators are *necessary* to meet these objectives.

1.2.2.2. Proportionate

Must-carry rules should be proportionate. The principle of proportionality is well-established in Community law¹². To be short, it requires that the means used to attain a given end should be no more than what is appropriate and necessary to attain that end. In order to establish that a proposed measure is compatible with the principle of proportionality, the action to be

¹⁰ Recital 43 indicates that “*Member States should be able to lay down proportionate obligations on undertakings under their jurisdiction, in the interest of legitimate public policy considerations, but such obligations should only be imposed where they are necessary to meet general interest objectives clearly defined by Member States in conformity with Community law and should be proportionate, transparent and subject to periodical review.*”

¹¹ See for instance the judgement of the Court in case C-211/91, *Commission v Belgium* [1992], ECR I - 6757.

¹² See for instance the judgment of the Court in cases C-288/89, *Stichting Collectieve Antennevoorziening Gouda et al. v Commissariaat voor de Media*, and C-352/85, *Commission v the Netherlands* (so-called ‘Mediawet I and II’ cases) [1991] resp. ECR I-4221 and I-4007.

taken must pursue a legitimate aim, and the means employed to achieve the aim must be both necessary and the least burdensome, i.e. it must be the minimum necessary to achieve the aim.

Must-carry rules will be least burdensome when they minimise the market distortions, i.e. when a Member State uses the most economically efficient means to ensure universal access to specified radio and television broadcast channels and services if this is the general objective pursued. Remuneration can be one means of ensuring that the universal access to specified radio and television broadcast channels and services is secured in an economically efficient way.

Similarly, while the question of what channels and services actually benefiting from must-carry is not an issue dealt with by Article 31, the high number of channels and services benefiting may however constraint capacity to an extent which would be disproportionate.

1.2.2.3. Transparent

Transparency increases legal certainty. In particular, it will provide the market players concerned with the maximum legal certainty as regards the actual consequences of a given must-carry regime on their business, including the content of their offer to the public. The requirement that the radio and television broadcast channels and services benefiting from must-carry must be “*specified*”, i.e. that they should be clearly identified in advance, should be viewed in this context.

National practices for imposing must-carry vary considerably. The proposed framework does not require a change as to which body imposes such obligations (national, regional or local) but it may require the procedures to be made more transparent. Transparency can be achieved through a description of the must-carry regime in the general authorisation provisions, as is done in many Member States (see also point 1.2.3, below).

1.2.2.4. Requirements in case of remuneration

There is no obligation on Member States to ensure remuneration for network operators in return for must carry obligations. However, where remuneration is provided, Member States will have to ensure that there is no discrimination between network operators, and that it is applied in a proportionate and transparent manner (see Article 31 (2)). This provision aims to take account of the cost burden on network operators operating in a commercial environment, taking into account the network capacity required for transmitting the programmes.

Nevertheless, the general criteria indicated under Art 31 (1) of the Universal Service Directive may imply, under specific circumstances, that some form of remuneration should be provided in order for the must-carry obligation to be considered proportionate or reasonable. In any event, must-carry rules must respect Community law, including state aid rules where applicable.

1.2.3. *Relationship with the general authorisation of networks*

In accordance with the Authorisation Directive (Article 6 and Annex 1), must-carry obligations in line with Article 31 are among the conditions that can be attached to the general authorisation to provide electronic communication networks.