



**Organization for Security and Co-operation in Europe
Office of the Representative on Freedom of the Media**

**BEST PRACTICES REGARDING MUST-CARRY AND MUST-OFFER RULES FOR
CABLE OPERATORS AND BROADCASTERS
FOR THE GOVERNMENT OF THE FORMER YUGOSLAV REPUBLIC OF
MACEDONIA**

Commissioned by the Office of the OSCE Representative on Freedom of the Media
from Jean-François Furnémont, Founding partner of Wagner-Hatfield, independent
consultancy in public affairs, policy and regulation.

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1. Introduction

The European audiovisual landscape has been characterized in the recent years by two trends – convergence and digitization – which have challenged the concept of must-carry¹. One can easily wonder if must carry-rules are still necessary and proportionate when convergence has favored the development of multiple distribution platforms and when digitization has allowed for an abundance of channels on all these platforms.

The concept of must-carry, which is to protect broadcasters against an abuse of power of distributors or networks operators, has also been put under pressure by the fact that in some circumstances, the balance of power on the audiovisual market has been inverted: some broadcasters are a must-have that the distributors cannot afford not to offer to their consumers. Therefore, the issue is not only about obligations in terms of must-carry imposed on distributors, but also about obligations of must-offer² imposed on broadcasters.

¹ Must-carry can be defined as an obligation imposed by a public body (usually a Ministry or a regulatory authority) on a network operator (usually by wire – i.e. cable or IPTV network – but also by air – i.e. terrestrial or satellite network) to distribute (i.e. to make available to their consumers) specific radio and/or television channels. Must-carry can (but does not necessarily) include provisions about which party (network operator or broadcaster) covers the different kinds of distribution costs (technical costs, author's rights...).

² Must-offer can be defined as the “mirroring” obligation of must-carry: it is the obligation imposed on a broadcaster to make a specific radio and/or television channel available to the network operator which wishes to distribute it. Like must-carry, must-offer can also (but does not necessarily) include provisions about the economic conditions at which the channel is made available by the broadcaster (free of charge, with compensation...).

2. European benchmark

2.1. The EU regulatory framework

Before studying the situation and the recent developments in selected European countries, and considering the status of a candidate country, it is essential to stress that must-carry rules fall under the EU regulatory framework for electronic communications and are thus under the scrutiny of the European Commission.

According to article 31 §1 of the “universal service” directive, *“Member States may impose reasonable must-carry obligations, for the transmission of specified radio and television broadcast channels and complementary services, particularly accessibility services to enable appropriate access for disabled end-users, on undertakings under their jurisdiction providing electronic communications networks used for the distribution of radio or television broadcast channels to the public where a significant number of end users of such networks use them as their principal means to receive radio and television broadcast channels. Such obligations shall only be imposed where they are necessary to meet general interest objectives as clearly defined by each Member State and shall be proportionate and transparent. The obligations referred to in the first subparagraph shall be reviewed by the Member States at the latest within one year of 25 May 2011 except where Member States have carried out such a review within the previous two years. Member States shall review must-carry obligations on a regular basis”*³.

Article 31 §2 adds that, in terms of remuneration of this must-carry obligation imposed on the networks, *“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 that it is applied in a proportionate and transparent manner”*.

The European Commission has in the past launched infringement procedures against some EU countries on the basis of this article. The most recent cases are the actions taken against Belgium (for the situation in the Brussels-Capital Region) in 2011⁴ and against Germany (for the situation in the Land of Lower Saxony) in 2008⁵.

³ Directive 2002/22/EC of the European Parliament and the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services. See also recitals 43, 44 and 45 of the Directive.

⁴ European Court of Justice, *European Commission v Kingdom of Belgium*, 3 March 2011, C-124/10.

⁵ European Court of Justice, *Kabel Deutschland Vertrieb und Service GmbH & Co. KG v Niedersächsische Landesmedienanstalt für privaten Rundfunk*, 22 December 2008, C-336/07.

The decisions of the European Court of Justice in these two cases have highly influenced the regulatory framework and the legal developments regarding must-carry in all European countries⁶.

In contrast, the issue of must-offer is not regulated at the EU level and remains fully the competence of the Members States, since it is out of the scope of the regulatory framework for electronic communications as well as out of the scope of the Audiovisual Media Services Directive (AVMSD).

⁶ Nico van Eijk and Bart van der Sloot, “Must-carry Regulation: a Must or a Burden?”, in Iris Plus *Must-carry: Renaissance or Reformation?*, Strasbourg, European audiovisual Observatory, 2012-5.

2.2. General trends throughout Europe

Despite the context mentioned in the introduction, and despite the fact that originally must-carry rules introduced in the article 31 of the universal service Directive were meant to be limited in time⁷, must-carry currently remains a widely used public policy tool throughout Europe, and is more and more completed by must-offer provisions.

In general, only the public service broadcaster benefits from must-carry, but it is also frequent that, in order to promote the diversity of the offer, some private broadcasters or smaller broadcasters (local or regional) also benefit from must-carry.

According to a report to be published soon by the European Audiovisual Observatory, the current situation in the EU countries selected for this report is the following:

Table 1: must-carry and must-offer rules across the EU

<i>Country</i>	<i>Must-carry PSB</i>	<i>Must-carry other</i>	<i>Must-offer PSB</i>	<i>Must-offer other</i>
<i>Austria</i>	Yes	Yes	No	No
<i>Belgium FR</i>	Yes	Yes	Yes (local TV)	No
<i>Belgium NL</i>	Yes	Yes	No	No
<i>Cyprus</i>	No	No	No	No
<i>Czech Republic</i>	Yes	Yes (local TV)	No	No
<i>Denmark</i>	Yes	No	No	No
<i>Estonia</i>	Yes	Yes	No	No
<i>Finland</i>	Yes	Yes	No	No
<i>France</i>	Yes	Yes (local TV)	Yes	No
<i>Germany</i>	Yes	Yes	No	No
<i>Greece</i>	No	No	No	No
<i>Hungary</i>	Yes	Yes (local TV)	Yes	Yes
<i>Ireland</i>	Yes	Yes	Yes	Yes
<i>Iceland</i>	Yes	Yes	Yes	Yes
<i>Italy</i>	No	Yes (local TV)	Yes	No
<i>Lithuania</i>	Yes	No	No	No
<i>Malta</i>	Yes	Yes	Yes	Yes
<i>Poland</i>	Yes	Yes	Yes	Yes
<i>Romania</i>	Yes	Yes	No	No
<i>Slovenia</i>	Yes	Yes	No	No
<i>Spain</i>	No	No	Yes	Yes
<i>Switzerland</i>	Yes	Yes	No	No

⁷ Thomas Roukens, “What are we carrying across the EU these days? Comments on the interpretation and practical implementation of article 31 of the universal service directive”, in *Iris Special To Have or Not to Have – Must-carry Rules*, Strasbourg, European Audiovisual Observatory, 2005.

<i>Sweden</i>	Yes	No	No	No
<i>United Kingdom</i>	Yes	Yes	Yes	Yes

Source: European audiovisual Observatory, must-carry rules in Europe, 2015 (to be published).

2.3. Choice of the case studies

The choice of five relevant case studies has been made first by selecting three cases where there are must carry rules and where:

- the main mode for TV reception is the cable platform;
- while being dominated by cable reception, the market is also facing significant competition from at least another platform.

Six countries or regions (see table 2 below) fitted these criteria, and we selected among them the three situations where the regulatory framework is the most sophisticated and where the cultural diversity of the population influences the regulatory framework, i.e. French speaking Community of Belgium, Dutch speaking Community of Belgium and Switzerland.

Table 2: countries with similar TV reception mode

Country	Cable	Terrestrial	IPTV	Satellite
<i>former Yugoslav Republic of Macedonia</i> ⁸	58%	25%	12%	1%
<i>Belgium</i>	69%	1%	23%	8%
<i>Denmark</i>	72%	17%	15%	13%
<i>Finland</i>	59%	26%	9%	5%
<i>Netherlands</i>	68%	10%	15%	7%
<i>Switzerland</i>	79%	3%	22%	7%

Source: European audiovisual observatory, 2013 yearbook + AVMU, Analysis of the broadcasting market for 2013.

We also decided to select two case studies from the countries which appeared, in table 1 above, to apply must-carry and must-offer rules for public service broadcasters and other broadcasters. Four countries fitted this criteria (Hungary, Iceland, Ireland and the United Kingdom), and we selected among them Ireland and Iceland, which also happen to have a rather sophisticated regulatory framework.

⁸ The data for 2014 show a clear progression of IPTV: cable 49%, terrestrial 15%, IPTV 27%, satellite 4%. See http://avmu.mk/images/Podatoci_od_istrazivanje.pdf, page 88.

2.4. Case study n°1: Belgium FR

2.4.1. Networks concerned

Until the launch of IPTV in 2005 by the incumbent national telecom operator, the cable operators in the French speaking Community of Belgium had benefitted from a situation of almost monopoly in their respective coverage zone, since satellite reception was (and remains) marginal and since the terrestrial platform was (and remains) used only by the public broadcaster.

Due to this almost monopoly, must-carry obligations were naturally imposed on all these cable operators, to the benefit of the public broadcaster and local broadcasters, but also to the benefit of the most important private broadcaster.

In the recent years, the distribution market has changed, mainly due to the roll-out of IPTV, and this explain why today must-carry is imposed on all wire networks (cable and IPTV networks) “*provided that a significant number of people use their networks as the primary means of receiving audiovisual media services*”⁹. This “*significant number*” is determined by the regulatory authority (CSA), which considers that must-carry applies to all networks which have more than 25% market share (i.e. all the cable operators and the national IPTV operator). Each year, the CSA assesses the situation on the market and takes a decision determining the networks on which must-carry obligations are imposed.

There are no must-carry rules on the terrestrial network (which is anyway only used by the public service broadcasters) and lighter rules for satellite networks (but only for those with more than 25% market share, which is a theoretical situation considering the joint dominance of cable operators and the IPTV operator).

2.4.2. Broadcasters concerned

The competent authority to grant must-carry to broadcasters is the Government of the French speaking Community of Belgium. The broadcasters which currently benefit from must-carry are the following:

- the public service broadcaster (RTBF, 3 channels);
- local broadcasters in their respective coverage area (1 channel in each area);
- broadcasters, designated by the Government, which are partly owned by RTBF (currently only the international French speaking channel TV5 Monde has been designated);
- 2 channels of the public service broadcaster of the Dutch speaking Community of Belgium (VRT), provided that RTBF benefits from must-carry in this Community;
- 1 television of the public service broadcaster of the German speaking Community of Belgium (BRF), provided that RTBF benefits from must-carry in this Community.

⁹ Consolidated Act on Audiovisual Media Services, article 82 §1. Available (only in French) at <http://www.csa.be/documents/1440>

Private broadcasters can also benefit from must-carry if they have concluded with the Government a convention according to which: a. they showcase the cultural heritage of the French speaking Community; b. they offer a minimum daily number of hours of programmes, of which one part must be first runs; c. they broadcast at least one daily news and current affairs program; d. they invest at least 24% of their revenues in the production of domestic audiovisual works; e. they employ at least 60 people¹⁰. Considering these rather heavy conditions for a small and highly competitive audiovisual market, no broadcaster has ever used this opportunity.

2.4.3. Distribution costs

Distribution costs are not regulated.

2.4.4. Must-offer

Until a few years ago, there were no provisions regarding must-offer. A recent modification of the legislation has led to the imposition of must-offer only on the local broadcasters. This was due to the fact that some of these local broadcasters, which had historical links with local cable operators (and even sometimes representatives of these cable operators on their Board) refused to be distributed on the newly created IPTV platform.

Table 3: summary of the regulatory framework in Belgium FR

<i>Must-carry for public service broadcaster</i>	Yes
<i>Must-carry for private broadcasters</i>	Yes, but only in theory
<i>Must-carry for local broadcasters</i>	Yes
<i>Must-carry for other broadcasters</i>	Yes
<i>Must-carry on cable networks</i>	Yes if more than 25% market share (it is the case)
<i>Must-carry on terrestrial networks</i>	No
<i>Must-carry on IPTV networks</i>	Yes if more than 25% market share (it is the case)
<i>Must-carry on satellite networks</i>	Yes if more than 25% market share (not the case)
<i>Must-offer on public service broadcaster</i>	No
<i>Must-offer on private broadcasters</i>	No
<i>Must-offer on local broadcasters</i>	Yes
<i>Regulation of distribution costs</i>	No

¹⁰ Consolidated Act on Audiovisual Media Services, article 49.

2.5. Case study n°2: Belgium NL

2.5.1. Networks concerned

In the Dutch speaking community of Belgium, must-carry is imposed on networks “*that serve as the most important resource to receive broadcasting programmes for a significant number of end users*”¹¹. This “*significant number*” is determined every three years by the Government, on the recommendation of the regulatory authority (VRM). So far it has used the threshold of 25% market share (which is also applied in the French speaking Community of Belgium) in order to determine the networks concerned by the obligation.

2.5.2. Broadcasters concerned

The competent authority to grant must-carry to broadcasters is the Government of the Dutch speaking Community of Belgium. The broadcasters which currently benefit from must-carry are the following:

- public service broadcaster (VRT, 3 channels);
- local broadcasters in their respective coverage area (1 channel in each area);
- 2 channels of the public service broadcaster of the French speaking Community of Belgium (RTBF);
- 1 channel of the public service broadcaster of the German speaking Community of Belgium (BRF);
- the channels of the public service broadcaster of the Netherlands (NPO).

On the recommendation of the regulatory authority, the Government can also include in the list other broadcasters provided that: a. they broadcast a full news programme, produced by an in-house editorial team mainly consisting of accredited professional journalists; b. they provide a varied, diverse and multicultural offer, which includes information and cultural programmes and their programming includes a certain percentage of Dutch language programmes; c. they subtitle a given percentage of their programmes for the deaf and the hearing impaired. The Flemish Government sets these percentages¹². However, no broadcaster has been granted this status so far.

2.5.3. Distribution costs

Distribution costs of the local broadcasters are regulated: they have to be distributed “*free of charge*”. The law specifies that “*the free aspect applies to the provision and the transmission of the broadcasting programme*”¹³.

2.5.4. Must-offer

There are no must-offer provisions.

¹¹ Act on radio and television broadcasting, article 185 §1. Available (in English) at <http://www.vlaamseregulatormedia.be/en/documents>

¹² Act on radio and television broadcasting, article 186 §2.

¹³ Act on radio and television broadcasting, article 186 §1 2°.

Table 4: summary of the regulatory framework in Belgium NL

<i>Must-carry for public service broadcaster</i>	Yes
<i>Must-carry for private broadcasters</i>	Yes, but only in theory
<i>Must-carry for local broadcasters</i>	Yes
<i>Must-carry for other broadcasters</i>	Yes
<i>Must-carry on cable networks</i>	Yes if more than 25% market share (it is the case)
<i>Must-carry on terrestrial networks</i>	Yes if more than 25% market share (not the case)
<i>Must-carry on IPTV networks</i>	Yes if more than 25% market share (not the case)
<i>Must-carry on satellite networks</i>	Yes if more than 25% market share (not the case)
<i>Must-offer on public service broadcaster</i>	No
<i>Must-offer on private broadcasters</i>	No
<i>Must-offer on local broadcasters</i>	Yes
<i>Regulation of distribution costs</i>	Yes, but only for local broadcasters

2.6. Case study n°3: Switzerland

2.6.1. Networks concerned

Like in the French speaking Community of Belgium, must-carry rules in Switzerland differ depending on whether wire networks (cable and IPTV networks) or terrestrial networks are concerned.

The obligations are heavier on wire networks than on terrestrial networks (see below), and there are no obligations on satellite networks.

Only wire networks “*which reach at least 100 households*” are subject to must-carry obligations¹⁴.

2.6.2. Broadcasters concerned

The competent authority to grant must-carry to broadcasters is the Swiss Government (“*Federal Council*”). The broadcasters which currently benefit from must-carry on wire networks and on terrestrial networks are the following:

- the public service broadcaster (SSR, 7 channels);
- the broadcasters which have a license and have concluded with the Government a convention (“*performance mandate*”), i.e. regional broadcasters in their respective coverage area (1 channel in each area).

On wire networks, the Government can also add to the must-carry “*programme services of foreign broadcasters which are to be transmitted by wire because of their special contribution to education, cultural development or free opinion-forming*”¹⁵. Through a by-law (“*ordinance*”), the Government has specified that these “*may be such programme services that are transmitted in a Swiss national language and which make a special contribution to fulfilling the performance mandate provided for by the Federal Constitution, in particular in that they: a. report in depth on social, political, economic or cultural phenomena within the framework of extensive editorial formats; b. give considerable space to artistic film productions; c. make special editorial contributions to the education of the public; d. broadcast special editorial productions for young people, old people or people with sensory disabilities; or e. regularly broadcast Swiss productions or regularly deal with Swiss topics*”¹⁶. In this ordinance, the Government has decided that such services are the following:

- ARTE (public channel owned by France and Germany);
- 3Sat (public channel owned by the German, Austrian and Swiss public broadcasters);
- TV5 Monde (international French speaking channel);
- ARD Das Erste (German public broadcaster);

¹⁴ Ordinance on radio and television of 9 March 2007, article 54. Available (in English) at <https://www.admin.ch/opc/fr/classified-compilation/20063007/index.html>

¹⁵ Federal Act on radio and television of 24 March 2006, article 59 §2. Available (in English) at <https://www.admin.ch/opc/en/classified-compilation/20001794/index.html>

¹⁶ Ordinance on radio and television of 9 March 2007, article 52.

- ORF 1 (Austrian public broadcaster);
- France 2 (French public broadcaster);
- Rai Uno (Italian public broadcaster);
- Euronews (pan European news channel), in the language of the linguistic region concerned.

Such a large amount of foreign channels can partly be explained by the fact that there are no national private broadcasters in Switzerland.

On wire networks, there is also the possibility to add a channel, on the request of a broadcaster, “*for a specific period*” and “*within a specific area*”, if “*a. the programme service contributes to a significant extent to the fulfilment of the mandate under the Constitution; b. broadcasting can reasonably be expected from the telecommunications service provider taking account of the available transmission capacities and its economic capacity*”¹⁷.

However, the number of channels which benefit from must-carry cannot exceed the amount of 30¹⁸.

2.6.3. Distributions costs

Distribution costs of broadcasters benefiting from the must-carry are regulated and the rules also differ depending on whether wire networks (cable and IPTV networks) or terrestrial networks are concerned.

On wire networks, the broadcasters have to be distributed “*free of charge and in adequate quality*”. However, if the compliance with must-carry obligations “*leads to an unreasonable economic burden*”, then the Government “*shall require the broadcaster to pay appropriate compensation*”¹⁹.

On terrestrial networks, broadcasters have to pay to the network operator a “*cost-based compensation*” whose chargeable costs are determined by the Government²⁰.

2.6.4. Must-offer

There are no must-offer provisions.

¹⁷ Federal Act on radio and television of 24 March 2006, article 60.

¹⁸ Ordinance on radio and television of 9 March 2007, article 53.

¹⁹ Federal Act on radio and television of 24 March 2006, article 59 §§ 3 and 5.

²⁰ Federal Act on radio and television of 24 March 2006, article 55.

Table 5: summary of the regulatory framework in Switzerland

<i>Must-carry for public service broadcaster</i>	Yes
<i>Must-carry for private broadcasters</i>	There are no national private broadcasters
<i>Must-carry for local broadcasters</i>	Yes
<i>Must-carry for other broadcasters</i>	Yes
<i>Must-carry on cable networks</i>	Yes if more than 100 households
<i>Must-carry on terrestrial networks</i>	Yes, but lighter than cable and IPTV networks
<i>Must-carry on IPTV networks</i>	Yes if more than 100 households
<i>Must-carry on satellite networks</i>	No
<i>Must-offer on public service broadcaster</i>	No
<i>Must-offer on private broadcasters</i>	No
<i>Must-offer on local broadcasters</i>	No
<i>Regulation of distribution costs</i>	Yes

2.7. Case study n°4: Iceland

2.7.1. Networks concerned

In Iceland, the same must-carry rules are imposed on all networks, as long as “a considerable proportion of the consumers in the country, or in a specific region, use the electronic communications network in question to receive television broadcasts”²¹.

2.7.2. Broadcasters concerned

The competent authority to grant must-carry to broadcasters is the Government. All the broadcasters under the jurisdiction of Iceland benefit from must-carry, except the teleshopping channels. However, if the amount of these channels exceed one third of the transmission capacity of the network, then priority has to be given to the public service broadcaster, followed by the channels which have the larger audience²².

2.7.3. Distribution costs

Distribution costs are regulated in such a way that the contracts between must-carry broadcasters and network operators should be ruled by the principle of equality: “When contracts are made, equality shall be observed regarding the carriage of television broadcasts under Articles 44 and 45 and regarding the application of those articles. Contracting parties shall be set the same terms in the same types of transaction, and they shall be provided with services and information on the same conditions, and of the same quality, as apply when the entity provides its own service departments, subsidiaries or partners with services and information. If an electronic communications undertaking carries a television broadcast on the basis of a contract or a decision, then the electronic communications undertaking shall observe equality between Icelandic television broadcasts and make all such broadcasts equally accessible to users”²³.

There is also a procedure in case no agreement can be reached between the parties, in which the regulatory authority (Media Commission) is involved: “If no contract is concluded regarding transmission, or if a dispute arises concerning transmission at a later stage, parties may refer the matter to the Post and Telecom Administration. The administration shall then seek to mediate a solution between the parties. If no solution can be effected, the dispute shall be resolved by a decision as quickly as possible. Before taking a decision, the Post and Telecom Administration shall seek the opinion of the Media Commission”²⁴.

2.7.4. Must-offer

Must-offer is imposed on all the broadcasters under the jurisdiction of Iceland, provided that the following conditions are met:

“a. That the transmission of television broadcasts to consumers via the electronic communications network in question is effected with satisfactory quality, and also with

²¹ Media Law of 20 April 2011, article 44. Available (in English) at <http://eng.menntamalaraduneyti.is/media/MRN-pdf/Media-Act-38-English-translation-nov-2011.pdf>

²² Media Law of 20 April 2011, article 44.

²³ Media Law of 20 April 2011, article 47.

²⁴ Media Law of 20 April 2011, article 47.

sufficient security, as to defend the legally-protected interests of the holders of copyright in the content transmitted. In the case of a paid-access television transmission, it shall be possible to apply access control. The Post and Telecom Administration shall set rules on minimum requirements regarding quality and security of transmissions.

b. That the content which permission is being sought to carry on an electronic communications network consists of an Icelandic television broadcast by an audiovisual media service provider which is established in Iceland under this Act, or a foreign television broadcast for which an Icelandic audiovisual media service provider has concluded an exclusive contract, or a broadcast of coverage of particular events which does not constitute an entire programme as provided for above, e.g. sporting or artistic events.

c. That provisions in contracts with copyright holders in the content which were made prior to the commencement of this Act do not prevent the carrying of the content on the electronic communications network”²⁵.

Table 6: summary of the regulatory framework in Iceland

<i>Must-carry for public service broadcaster</i>	Yes
<i>Must-carry for private broadcasters</i>	Yes
<i>Must-carry for local broadcasters</i>	Yes
<i>Must-carry for other broadcasters</i>	Yes
<i>Must-carry on cable networks</i>	Yes if considerable proportion of users
<i>Must-carry on terrestrial networks</i>	Yes if considerable proportion of users
<i>Must-carry on IPTV networks</i>	Yes if considerable proportion of users
<i>Must-carry on satellite networks</i>	Yes if considerable proportion of users
<i>Must-offer on public service broadcaster</i>	Yes
<i>Must-offer on private broadcasters</i>	Yes
<i>Must-offer on local broadcasters</i>	Yes
<i>Regulation of distribution costs</i>	Yes

²⁵ Media Law of 20 April 2011, article 45.

2.8. Case study n°5: Ireland

2.8.1. Networks concerned

In Ireland, must-carry is imposed on network operators “used by a significant number of end-users as their principal means of receiving transmissions of programme material”²⁶. It is the duty of the Government to determine what this “significant number” is, on the recommendation of the regulatory authority (BAI).

2.8.2. Broadcasters concerned

The competent authority to grant must-carry to broadcasters is the Government. The broadcasters which currently benefit from must-carry are the following:

- the free-to-air channels of the public service broadcaster RTE (2 channels);
- the Irish language public channel TG4;
- the Parliamentary channel Oireachtas Channel;
- the (to be launched) Irish Film channel;
- the private broadcasters which have concluded a contract with the regulatory authority, i.e. TV3 (which also benefits from must-carry for its second channel 3e, but exclusively on the terrestrial free-to-air platform) and UTV (which launched the channel UTV Ireland at the beginning of 2015 and has been added to the beneficiaries of must-carry).

According to such contracts, the private broadcasters have to: “a. be responsive to the interests and concerns of the whole community, be mindful of the need for understanding and peace within the whole island of Ireland, ensure that the programmes reflect the varied elements which make up the culture of the people of the whole island of Ireland, and have special regard for the elements which distinguish that culture and in particular for the Irish language; b. uphold the democratic values enshrined in the Constitution, especially those relating to rightful liberty of expression; c. have regard to the need for the formation of public awareness and understanding of the values and traditions of countries other than the State, including in particular those of other Member States; d. include a reasonable proportion of news and current affairs programmes”²⁷.

2.8.3. Must-offer and distribution costs

Must-offer is imposed on the public broadcaster RTE, on the Irish language public channel TG4 as well as on the private broadcasters which have concluded a contract with the regulatory authority, but the distribution remains “subject to agreement as to fair, reasonable and non-discriminatory terms of use”²⁸.

²⁶ Broadcasting Act 2009, article 77 (2), available (in English) at <http://www.bai.ie/wordpress/wp-content/uploads/Broadcasting-Act-2009.pdf>

²⁷ Broadcasting Act 2009, article 70 (2).

²⁸ Broadcasting Act 2009, article 77 (11).

Table 7: summary of the regulatory framework in Ireland

<i>Must-carry for public service broadcaster</i>	Yes
<i>Must-carry for private broadcasters</i>	Yes
<i>Must-carry for local broadcasters</i>	Yes
<i>Must-carry for other broadcasters</i>	No
<i>Must-carry on cable networks</i>	Yes if significant
<i>Must-carry on terrestrial networks</i>	Yes if significant
<i>Must-carry on IPTV networks</i>	Yes if significant
<i>Must-carry on satellite networks</i>	Yes if significant
<i>Must-offer on public service broadcaster</i>	Yes
<i>Must-offer on private broadcasters</i>	Yes
<i>Must-offer on local broadcasters</i>	Yes
<i>Regulation of distribution costs</i>	Yes, but partly

3. Lessons learned and best practices

From this European benchmark, we can learn the following lessons and identify the following best practices:

- In general, must-carry remains a widely used public policy tool.
- Defining the networks on which must-carry obligations are imposed should be driven by “technology neutral” motivations: rather than the quality of the platform, it is the use of the platform (i.e. the amount of users) which should be privileged (see for example Belgium FR, Belgium NL, Iceland, Iceland and, to a certain extent due to very low threshold, Switzerland).
- These obligations should be reasonable and proportionate (see for example the limitations in terms of channels in Switzerland or in terms in capacity of the network in Iceland).
- Must-carry always concerns public service broadcasters.
- Must-carry often also concerns national, regional or local private broadcasters.
- Must-carry can also concern other kind of broadcasters, mainly foreign ones.
- When must-carry is extended to private broadcasters :
 - it should be motivated by public interest objectives, and these objectives should be clearly detailed (see for example Belgium FR, Belgium NL, Switzerland and Ireland – by contrast, see Iceland where nationality is the only criteria);
 - it should be predictable and transparent: the broadcasters should not be designated on an individual basis but on the basis of the category in which they fall, for example by fulfilling certain public interest objectives (see for example Belgium FR, Belgium NL, Switzerland and Ireland).
- Distribution costs are often partly or completely regulated.
- Regulation of distribution costs can take into consideration the quality of the broadcasters (see for example the protection of local broadcasters in Belgium NL).
- Regulation of distribution costs should take into consideration the amount of channels benefitting from must-carry (see for example Switzerland, where the large amount of channels – at least 16 – can lead to appropriate compensation).
- Regulation of distribution costs should take into consideration the quality of the networks (see for example the cost-based remuneration on terrestrial networks in Switzerland).
- Regulation of distribution cost should avoid the risk of having imposing a too heavy financial burden, since this burden might be transferred to the consumer by raising the price of the subscription.
- Must-offer appears to be used by more and more lawmakers throughout Europe.
- Must-offer does not necessarily apply to all the broadcasters benefitting from must-carry (see for example Belgium FR and Ireland).

As stated in the introduction, the development and the popularity of distribution platforms where the allocation of space for a given channel is no longer an issue have rendered the

concept of must-carry less sensitive or politically relevant. Specific contentious situations between distributors and broadcasters, however, have encouraged governments and regulators to make use of the concept of must-offer to better level the negotiating power and position of the stakeholders (it can be said, as a prospective conclusion too, that the concept of “must-find” is more likely to be part of forthcoming policy debates). Both concepts of must-carry and must-offer (as well as their combination) are still nonetheless important policy tools to deal with hypothetical and recurring disputes arising from, for instance:

- a new distributor is launched, but encounters negotiating problems with a popular or important broadcaster which uses its must-carry to levy an unreasonable distribution access fee (potentially secretly backed by an existing distributor who doesn't see the arrival of new competition keenly);
- a new distributor is launched and aims to commercialize a small package of channels with a low cost offer and is not interested in distributing national channels with limited audience or local channels;
- a distributor imposes an unreasonable distribution fee on a must-carry or must-offer channel.

Disputes between distributors and broadcasters are unfortunately recurrent and the concepts of must-carry or must-offer are frequently used by one side or the other (or both) to bolster the legitimacy of their claims. In such cases, the arbitration of the regulatory authority is frequently needed in order to find a fair and constructive resolution. It is thus essential that, however the regulatory framework is drawn in regards to must-carry and must-offer, legal provisions give regulatory authorities the legitimate, transparent, and objective tools to perform their adjudication role.

Jean-François Furnémont,

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