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## **Workshop On Must-Carry Obligations Summary Of The Discussion**

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SUMMARY OF THE DISCUSSION**

By  
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**INTRODUCTION**

On April 9, 2005, the Institute for Information Law of the University of Amsterdam (IViR) and the European Audiovisual Observatory held a joint workshop in Amsterdam on the topic of “must-carry” obligations (such as the obligation to carry particular programs on cable television networks). The aim of the workshop was to critically analyze current legislation relating to must-carry in Europe and the United States and to stimulate a discussion on what the future of this concept might be in the context of changing market and technological conditions. Three presentations were given during the workshop, each of which was followed by extensive round table discussions. The first presentation by Thomas Roukens focused on the European situation, with a detailed analysis of Article 31 of the Universal Service Directive, its impact and implications, and an overview of existing must-carry obligations in the various European Member States (particular attention was paid to the concerns of cable operators). The second presentation, by Rob Frieden, gave an account of current must-carry obligations in the United States as imposed on cable and satellite operators in both an analogue and digital context. Finally, the third speaker, Peggy Valcke, tackled the question of the future of must-carry, identifying a number of gaps in current must-carry regimes and putting forward a model for constructing must-carry obligations in the digital age. All three presentations are published here.

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This section of the report contains a summary of the main lines of thought that emerged from the round table discussions. A thematic, rather than chronological approach is followed.

A large part of the discussion was centered around the key question of what the actual objectives and justifications for must-carry obligations are today and whether there is in fact a need for such rules in the current audiovisual landscape. There was a significant division in the positions expressed, with some participants being highly critical of the existence of must-carry and others claiming the concept still had an important role to play.

## I NO JUSTIFICATION FOR MUST-CARRY?

Critics of must-carry looked at the issue from an economic standpoint arguing that must-carry rules are essentially measures that distort competition and are no longer justified in the digital environment. Indeed, according to these participants, if the current market were left to develop by itself without intervention, it would not be characterized by the elements of market failure, which must-carry rules purport to address. On the one hand, the increase in capacity brought about by digital technology makes it possible to grant access to networks to everyone that seeks it. On the other hand, it can be argued that public service broadcasting channels and in general, the channels currently benefiting from must-carry would be carried anyway on both traditional and new platforms, given their popularity with the audience and the need for attractive content of all network operators. The argument was also made that with the proliferation of new channels, such as thematic history and educational channels, the market is actually now providing the public interest content (both in terms of type and in terms of diversity of content), which was previously ensured through public service broadcasters and therefore granting must-carry to the latter is no longer a justifiable public policy objective. Taking this argument a step further, the view was expressed that must-carry rules are today in fact being used to protect established legacy broadcasters from the increasing competition brought about by new delivery systems and to extend their monopolistic position to new technology platforms. According to this view, must-carry rules are just a means of ensuring a privileged status to a strong lobby group (that of public service broadcasters), while putting new valuable competing channels, which could just as well provide the same content, in a disadvantageous position.

**II**  
**NON SECTOR SPECIFIC REGULATION**  
**SHOULD BE SUFFICIENT**

Along this line of thought, it was argued that there is actually no need for must-carry rules today because other regulatory tools are in place which could solve (to a large extent if not entirely) the issues in question. According to this view, both competition law and the general access regime provided for in the European regulatory framework for the electronic communications sector could go a long way in supporting pluralism and other general interest objectives. The idea is that the problem should be essentially dealt with through access regulation with the possibility of having some form of content regulation on top of that to decide particularly difficult cases, rather than having content regulation through must-carry deciding what are to a large extent access issues. With regard to this point of view, it was however noted that the role of access regulation cannot really be equated to that of must-carry regulation because the former only applies when an assessment of significant market power is made, while the latter is applicable irrespective of this assessment.

**III**  
**ARGUMENTS FOR MUST-CARRY REGULATION STILL VALID**

In contrast to the above criticisms of must-carry, many participants defended the existence of must-carry rules and argued that these were still necessary in today's market. It was felt that all could not be solved through competition law and that currently market forces alone would not ensure access to networks for everyone but that there would still be elements of market failure. Indeed, while the major public service broadcasters (and in the US the network affiliates) would probably still be carried by network operators regardless of must-carry, this would not be the case for smaller channels with a lower audience (e.g. local channels or some of the new services of public service broadcasters such as BBC3 and BBC4) which it could be argued play an important role in ensuring diversity of content and allowing a means of expression to various groups of society. Also, the concern was expressed that while public service broadcasters might be carried today on various platforms through the operation of normal market forces, this might no longer be the case in the future (inter alia in view of increasing platform fragmentation). In this perspective, certain participants felt that there was still a need for the policy maker to intervene in order to safeguard pluralism and freedom of expression, and ensure the provision of valuable content, which would otherwise not be made available to the consumer, through the imposition of must-carry regulation (albeit in a modernized form).

#### IV A RIGHT TO ACCESS

It was also suggested that rather than through traditional must-carry (i.e. the obligation on a network provider to broadcast a specific channel), these public interest objectives could be best safeguarded through another concept that is now in national legislation bordering the concept of must-carry, which is the concept of access rights. This was understood as the obligation on network providers to reserve a certain percentage of their capacity for access by independent programmers. The example of Italy was made, where under the national law relating to broadcasting authorizations to use scarce frequencies, access to frequencies for terrestrial television is granted under the condition that if an operator owns two or more broadcasting licenses it has to reserve 40% of its capacity to independent content providers (a good faith negotiation rule then applies). This ensures that minority groups are able to access the media, which is a fundamental aspect of a democratic society. In reaction to this view it was however noted that while under the European communications framework Member States are allowed to apply certain conditions to the use of scarce frequencies for terrestrial television, this does not apply to wireline networks (such as cable), which are in general the object of the must-carry discussion. Also, one participant fundamentally disagreed with the idea that there is a need for regulatory intervention in the digital environment to ensure access to networks for minorities because the new technology already allows this and if a particular subset of people is unable to obtain access to one platform, they can simply use another platform (some participants felt that this argument would however not be valid for as long as there existed significant differences in the degree of penetration of different platforms).

#### V AVAILABILITY OF CERTAIN CONTENT

Amid these arguments, some participants made the point that must-carry regulation and specifically in Europe Article 31 of the Universal Service Directive in fact has nothing to do with network access but it is concerned with ensuring that certain content is made universally available to everyone. The heart of the question is therefore whether government should have a role in guaranteeing that certain content considered by society to be of public interest reaches all viewers and is therefore also deeply linked to the role of public service broadcasting. Looking at the problem from this angle, opinions continued to diverge. At one end, the view was expressed that government should have nothing to do with determining what content is provided to viewers and that we should be withdrawing public service broadcasters rather than expanding their services and reach as they no longer have a role to play

in the digital age. According to this view public service broadcasters are just obsolete creatures fighting for institutional survival. At the other end, many participants recognized the continuing value of public service broadcasting and felt that this was still necessary today to fill existing gaps in the market. In their opinion, governments should indeed consider it their task to guarantee that certain content is provided through public service broadcasting and then to ensure that this is made universally available through must-carry regulation on the transmission level. There was however some agreement on the idea that it should not necessarily be public service broadcasters as institutions that should be brought into the digital age, but rather the concept of public service broadcasting as the idea of providing content which society agrees is of value and which the market would fail to provide (i.e. retain the services rather than the institutions). In this regard, it was suggested that States might in the future consider entrusting programming obligations in a wider, technology-neutral manner rather than on terrestrial mostly state owned channels and that this would then help break the link that currently exists in many European countries between must-carry and established legacy broadcasters (it was noted that this was currently under debate in some countries).

Aside from the central question of whether must-carry should exist at all, a part of the discussion was devoted to analyzing what the best way of structuring must-carry obligations would be and specifically which channels should benefit from must-carry and on which operators it should be imposed.

## VI THE US MODEL

On the question of who should benefit from must-carry, two distinctive models emerged from the presentations. On the one hand, there is the European approach, as expressed in Article 31 of the Universal Service Directive, whereby must-carry status is granted to specific channels on the grounds that the content of such channels is considered to further a number of public interest objectives (pluralism, cultural diversity, national language). On the other hand, there is the US model in which must-carry is granted to all local television broadcasters, irrespective of whom they are and the type of content they broadcast. Here must-carry is conceived as content-neutral regulation which is aimed at sustaining the economic viability of television broadcasters as a general category, as they are seen to play an important role in the promotion of the country's democratic debate (in the US must-carry is – among other things – structured-around obligations to reserve a certain percentage of channel capacity for local television signals). Opinions were divided as to the merits of these alternative systems. Some participants thought that the American model seemed to be very irrational and that it would make more sense to grant must-carry status to those channels,

which are actually considered to provide content relevant to society, in line with the European model. This argument was supported by the fact that in the American system, the primary beneficiaries of must-carry are actually the channels that contribute least to pluralism and education, such as local home-shopping channels, which is a rather paradoxical outcome (these are indeed the channels that would not be carried through normal market forces). The result is that such channels end up crowding out more compelling content from the networks. In this perspective the argument was also put forward that must-carry rules in the United States actually appear to be shaped by political considerations: US local broadcasters can exercise a significant influence on the electorate and they leverage that power to obtain a preferred status.

On the other hand, the view was expressed that the US system of reserving a certain network capacity for all local broadcasting channels and the so-called "carry one carry all" rule are not such irrational choices from the policymaker's point of view. Indeed, the problem with content-based must-carry rules is that one enters into a dimension in which the State has to determine what content is important to people and what isn't. However in a real democracy the State should not have the authority to make this decision. One can attempt to imagine criteria to rank channels on the basis of content (e.g. channels transmitting news might be more valuable than others), but this is a very delicate assessment which ultimately results in the State telling citizens what they should watch and listen to and the policymaker should avoid having to make this judgment. The American rule of reserving a certain capacity for local channels, as opposed to the classic European must-carry rule, is therefore more respectful of democracy. The ideal scenario would probably be to combine a good faith negotiation rule with a set of access rules (in terms of access pricing etc.), so as to ensure a reserved access to minority (in terms of audience) channels without imposing a particular model of what people should watch.

## VII TECHNOLOGY NEUTRAL APPROACH

Looking at the scope of must-carry, participants also considered the question of what networks should be covered by this obligation. It was noted that the original intention in Europe at the time of the elaboration of the new communications framework was to restrict the application of must-carry and have it apply as a legacy concept only to cable, but the concept of technology neutrality was subsequently brought into Article 31 of the Universal Services Directive, with the result that this provision now opens possibilities to actually extend the application of must-carry obligations to all networks (subject to the "significant number of end users" limitation). Some participants were of the opinion that it was dangerous to use the concept of technology-neutrality as had

been done in this case to extend legacy regulation without review and were against applying must-carry to new platforms. On the other hand, certain participants thought that to the extent that the aim of must-carry rules is to ensure that certain content is made universally available, then all electronic communications networks should be subject to the same type of must-carry obligations. Indeed, it was argued that the viewer would typically subscribe only to one platform (cable, satellite, digital terrestrial etc.) and therefore must-carry content should be available on all of these platforms. Along these lines it was suggested that it could be made a condition for all operators on the market for broadcasting transmission to carry a basic must-carry offering and it was thought that if this were a limited package operators of all transmission modes could build a viable business model incorporating this. Another participant believed that all distribution platforms which develop should to a certain extent include public service programs through must-carry so that even certain target groups, such as young people, who would not be immediately interested in such content would still have the opportunity to come across it and be exposed to topics which are important for their development (the risk being that if must-carry was not imposed on them it is probable that new platforms targeting specific groups would not carry such content).

Taking the former view, the U.S. has not adopted a technology neutral concept for all video providers. The U.S. applies the must-carry obligations to cable and Direct Broadcast Satellites (DBS) but not to developing video platforms (i.e. fiber optic systems, internet protocol television, etc.).<sup>1</sup> However, some of these developing video providers intend to honor the must carry system even though these providers are not obligated to comply.<sup>2</sup> At this time, it is unclear whether the must carry obligations will be extended under a technology neutral concept. [*MLP staff has added this paragraph to demonstrate the comparison to the U.S. must-carry approach to differing video platforms.*]

## VIII APPLICABILITY TO SERVICE PROVIDERS AND ASSOCIATED FACILITIES

Another point that was discussed relates to the exclusion of service providers from the scope of Article 31 of the Universal Service Directive and the fact that in a number of European countries must-carry obligations are applied to service providers as well as network providers. Some participants felt that this was a serious loophole in European must-carry law and that it could engender a

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<sup>1</sup> See 47 U.S.C. § 534; See also 47 U.S.C. § 338.

<sup>2</sup> Linda Haugsted, *Verizon Eyes Five More in '05*, MULTICHANNEL NEWS, September 26, 2005, at 5.



number of distortions. The view was also expressed that imposing must-carry on service providers is in fact nonsense. Indeed, it leads to the perverse situation whereby service providers, which do not supply transmission, have to pay the transmission costs of public service broadcasters. Connected to this point, participants also touched upon the question of whether must-carry should be applied to associated facilities (such as electronic program guides). In this regard, it was argued that must-carry should only be applied to transmission facilities and not to associated facilities (to which the access regime applies), on the understanding that whereas transmission capacity can in certain circumstances be a finite resource, associated facilities are not finite and therefore in principle everyone can have access to them without prejudice to anyone else. In reaction to this point of view, it was stressed that while associated facilities might be beyond the scope of must-carry rules, they represent nevertheless a very important problem, which should be tackled looking at the issue as a whole.

## IX MUST-OFFER OBLIGATION

Finally, the discussion also focused on the concept of must-offer for content providers (i.e. the obligation for broadcasters to make their channels available to network operators that wish to carry them) as the other side of the coin to must-carry. There was substantial agreement among the participants on the desirability of introducing must-offer obligations, given that in the present audiovisual landscape the problem would appear to be more that traditional and new network operators are seeking to secure the possibility of transmitting attractive content rather than content providers seeking distribution channels. This is proven by the fact that in certain countries network operators are actually asking to be submitted to must-carry obligations as they see this as a means of ensuring that they can have access to must-carry channels, which they consider to be essential for the success of their offer (the example of Canal in France begging to be submitted to must-carry in order to have access to France 2 and France 3 was made). Also, the adoption of must-offer rules would be desirable in light of recent attempts by operators of developing platforms to conclude exclusive distribution deals with public service broadcasters and established commercial channels (this problem presented itself for instance in Italy in the case of mobile networks). (In comparison, the U.S. 1992 Cable Act expressly prohibits exclusive distribution deals that prevent a distributor from obtaining programming from any vendor in which a cable operator has an attributable interest.<sup>3</sup>) In this perspective, certain participants supported the idea that must-

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<sup>3</sup> 47 U.S.C. § 548(c)(2)(c) (2006) [Note: MLP staff has added this sentence to demonstrate the U.S. approach to exclusive distribution deals with broadcasters and video providers.].

offer obligations should be introduced in parallel to must-carry obligations so as to mirror them (i.e. broadcasters benefiting from must-carry status should also have a must-offer obligation). Other participants, on the other hand, suggested that must-offer obligations could actually *substitute* must-carry rules and that this would be a better way of ensuring the promotion of established (particularly public service) broadcasters in the digital age.