

Cable Operators

Governments all over the world have generally imposed a 'must-carry' regulation on cable operators obliging them to carry on their system locally-licensed television stations. It was the United States that first implemented a 'must-carry' scheme. This principle is also recognized in the laws of the member states of the European Union. Its main aim is to enable television viewers to have access to public service broadcasters as well as private ones, and to maintain a pluralistic and cultural range of programmes.

On its part the EU has attempted to regulate and restrict national legislation which gives force to this principle in a bid to allow freedom of competition in the communications field. The EU has recognized that these 'must-carry' obligations impose a burden on network operators to the extent of hindering their competitive position in the market place. In addition they are obliged to pay copyright retransmission fees, sometimes even without any appropriate remuneration.

Given the negative impact of too restrictive 'must-carry' rules, the EU Universal Service Directive of 2002 requires 'must-carry' obligations to be proportionate and reasonable so that they cause minimal or no hindrance to the functioning of the market. Furthermore, the Directive makes it a rule that the network operator be remunerated appropriately.

This issue was the subject of a recent ruling of the European Court of Justice (ECJ) which was a preliminary reference made by the Belgian court. The matter in dispute concerned the obligation imposed on cable operators under Belgian law to broadcast television programmes transmitted by certain private broadcasters designated by the authorities of the Belgian state.

Several cable network providers sought to revoke this Belgian piece of legislation, arguing that the 'must-carry' scheme granted private broadcasters a special right liable to distort competition between broadcasters. Moreover they argued that the law created an unjustified restriction on their freedom to provide services. The Belgian court stayed proceedings in order to refer certain matters of EU significance to the ECJ.

The ECJ in its decision referred to its previous case-law, which established that the mere creation of a dominant position through the grant of special or exclusive rights is not in itself incompatible with the EU Treaty but would be if the undertaking in question is led to abuse its dominant position through the exercise of these special or exclusive rights. The ECJ however held that for such a decision to be made, the factual and legislative context has to be examined. The Court refrained from giving a decision in this respect given the lack of information submitted for its consideration on the matter.

As regards the second defence brought by the network operators, the ECJ ruled that the transmission of television signals, including transmission by cable television, constitutes a supply of services. In order for legislation to constitute an obstacle to the provision of services between Member States, it is not necessary to show that all undertakings in a particular member state are advantaged in comparison with foreign undertakings, but it is sufficient that that legislation should benefit certain undertakings established on the territory of a particular member state. The Court held that the Belgian law constituted a restriction on the provision of services.

The ECJ however held that a restrictive law is permissible when it pursues an aim in the general interest, such as the cultural policy of the state. It was for the national court to determine whether the Belgian law sought to safeguard the cultural policy of Belgium and whether such law was proportionate in relation to that objective.

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