

**INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA  
NOTICE 650 OF 2019**



Independent Communications Authority of South Africa  
350 Witch-Hazel Avenue, Eco Point Office Park  
Eco Park, Centurion

**REVIEW OF THE ICASA MUST CARRY REGULATIONS, 2008  
DISCUSSION DOCUMENT**

**INVITATION FOR WRITTEN REPRESENTATIONS**

In terms of Section 4B of the Independent Communications Authority of South Africa Act (Act No 13 of 2000), the Authority hereby conducts an Inquiry regarding the effectiveness of the Must Carry Regulations, 2008 ("the Regulations") and whether there is a need to amend them.


Interested persons are hereby invited to submit their written representations on the Discussion Document, which will also be made available on the Authority's website at <http://www.icasa.org.za> and in the Authority's Library at 350 Witch-Hazel Avenue, Eco Point Office Park, Eco Park, Centurion, (Ground Floor at Block B), between 09h00 and 16h00, Monday to Friday.

The representation must be submitted to the Authority by no later than 06 March 2020 by post, hand delivery or electronically (in Microsoft Word) and marked specifically for attention: Mamedupe Kgatshe. Delivery address: 350 Witch-Hazel Avenue, Eco Point Office Park, Eco Park, Centurion, (Ground Floor at Block B). Where possible, written representations should also be e-mailed to [mkgatshe@icasa.org.za](mailto:mkgatshe@icasa.org.za) and [MustCarryRegulationsCouncilCommittee@icasa.org.za](mailto:MustCarryRegulationsCouncilCommittee@icasa.org.za). Enquiries should be

directed to [mkgatshe@icasa.org.za](mailto:mkgatshe@icasa.org.za) or 012 568 3259; between 10h00 and 16h00, Monday to Friday.

Written representation(s) received by the Authority pursuant to this notice, will be made available for inspection by interested persons at the Authority's library and such copies will be obtainable upon payment of the prescribed fee.

At the request of any person who submits written representations pursuant to this notice, the Authority may determine that such representations or any portion thereof is to be treated as confidential in terms of section 4D of the ICASA Act. Where the request for confidentiality is refused, the person who made the request will be given an opportunity to withdraw such representations. Persons requesting confidentiality are urged to acquaint themselves with the Guidelines for Confidentiality Request published in Government Gazette No. 41839 (Notice No. 849) of 17 August 2018.



**DR KEABETSWE MODIMOENG**

**ACTING CHAIRPERSON**

**DATE:** 04 December 2019



## REVIEW OF THE ICASA MUST CARRY REGULATIONS, 2008

### DISCUSSION DOCUMENT

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## 1. INTRODUCTION AND BACKGROUND

The Independent Communications Authority of South Africa (hereinafter referred to as "ICASA" or "the Authority") derives its mandate to regulate the South African broadcasting sector from the Constitution of the Republic of South Africa, 1996<sup>1</sup> ("the Constitution"), the Independent Communications Authority of South Africa Act, 2002 (Act No. 13 of 2000)<sup>2</sup>, as amended ("the ICASA Act"), the Electronic Communications Act, 2005 (Act No. 36 of 2005)<sup>3</sup>, as amended ("the ECA") and the Broadcasting Act, 1999 (Act No. 4. of 1999)<sup>4</sup>, as amended ("the Broadcasting Act"). In line with the provisions of section 4B(1) (a) to (e) of the ICASA Act, the Authority is undertaking an inquiry regarding the review of the ICASA Must Carry Regulations, 2008<sup>5</sup> ("the Regulations").

On 25 September 2018, the Authority conducted a Regulatory Impact Assessment (RIA) to determine whether or not the Regulations have fulfilled the intended objectives. In March 2019, the Authority published a RIA *report* on the Regulations which concluded that:

- (a) The Authority cannot make a conclusive finding at this stage on whether the resultant implementation of the Regulations on costs carried by the Public Broadcasting Service (PBS) and Subscription Broadcasting Service (SBS) licensees warrant that the Regulations be amended. However, the figures provided by Multichoice on costs incurred (although one-sided) are indicative of a need to probe the matter further through an Inquiry.

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<sup>1</sup> See section 192 of the Constitution which states that national legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.

<sup>2</sup> See section 2 (a) of the ICASA Act which states that the object of the ICASA Act is to establish an independent authority which is to regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society, as required by section 192 of the Constitution.

<sup>3</sup> See section 2 of the ECA.

<sup>4</sup> See section 2 of the Broadcasting Act.

<sup>5</sup> ICASA, 2008, Must Carry Regulations published in Government Gazette no.31500 of 10 October 2008

- (b) The Inquiry will enable the Authority to reach a comprehensive and accurate conclusion on the effectiveness of the regulations and consequently whether the Regulations require an amendment.

The Authority believes that the inquiry will allow it to reach a comprehensive and accurate conclusion on the effectiveness of the Regulations and consequently, the extent of the amendment.

### **1.1 Policy and Legislative Framework Overview**

#### **The ECA:**

Section 60(3) of the ECA enjoins the Authority to "*... prescribe regulations regarding the extent to which subscription broadcast services must carry, subject to commercially negotiable terms, the television programmes provided by a public broadcast service licensee*".

#### **The Regulations:**

The primary objects of the Regulations are to:

- (a) Provide for terms and conditions under which the SBS licensees will carry the programmes of the PBS licensee;
- (b) Determine the transparent, equitable and reasonable terms and conditions under which the PBS licensee may offer its programmes to the SBS licensee;
- (c) Provide exemptions for certain SBS licensees from compliance with the regulations; and
- (d) Regulate all matters incidental to Must Carry.

## **The Broadcasting Digital Migration Policy of 2008:**

The Broadcasting Digital Migration Policy of 2008<sup>6</sup> states in paragraph 2.3.5 thereof that *“the “must carry” arrangements, which require broadcasting services to carry public broadcasting services, continue in the new digital environment, fulfilling the important aspect of providing public broadcasting services to all citizens.”*

### **1.2 Purpose**

The purpose of the Inquiry is to:

- (a) determine the extent to which SBS must carry the tv programmes of the PBS;
- (b) determine whether it is still practical for the PBS Licensee to offer its television programmes, at no cost, to SBS licensees;
- (c) determine whether it is still practical for the SBS licensee to carry television programmes of PBS at no cost;
- (d) determine whether the exemption, as contained in regulation 5 of the Regulations, must continue to apply; and
- (e) determine whether the cost of Must Carry must be left to the PBS and SBS to negotiate, and if so, what are the recommended dispute resolution mechanisms to avoid delays in implementing Must Carry.

### **1.3 Process**

The Authority started the process of reviewing the Regulations by conducting a RIA which was concluded in March 2019. Following the RIA, the Authority conducted desktop research to benchmark the Regulations vis-a-vis Regulations in other countries that have Must Carry obligations.

The Authority is intending to publish a Discussion Document to solicit inputs from stakeholders. The Discussion Document will provide information to the Authority on

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<sup>6</sup> Government gazette 31408 of 08 September 2008

the extent of the amendments necessary to the Regulations and subsequent to that, the Authority will publish the Findings document and possibly a Position paper with draft regulations on Must Carry Obligations in the 2020/21 financial year.

## **2. INTERNATIONAL BENCHMARKING**

The countries which the Authority benchmarked for this process include the European Union, The United Kingdom, Australia, the United States of America, India and Ireland. The broadcasting industry of these countries are considered to be developed and to have advanced broadcasting policies. The information from these countries provide guidance in terms of regulation of Must Carry, including Must carry in a digital broadcasting environment. Like the Authority, the broadcasting industry in the said countries have three (3) tiers, namely public, commercial and community broadcasting.

### **2.1 EUROPEAN UNION (EU)**

The work of the European Commission in 2015 provided an overview of different approaches to Must Carry across Europe. In Europe, most countries prescribe Must Carry rules to comply with Article 31 of the Universal Services Directive<sup>7</sup> ("US Directive"). Article 31 of the US Directive provides that Must Carry obligations should apply only to "networks that have a significant number of end-users using the service as their main means of accessing television broadcasts"<sup>8</sup>.

There are many reasons provided for the requirement for Must Carry obligations by each European country<sup>9</sup>. In Denmark, the purpose of the rules is to provide access to specific public service broadcasting content, such as the Danish parliamentary television channel and specific services for the visually and hearing-impaired population of Denmark<sup>10</sup>. In Finland, it is to transmit services that are in the public

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<sup>7</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 10.

<sup>8</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 10.

<sup>9</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 84.

<sup>10</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 101.

interest.<sup>11</sup> In Lithuania, the purpose of the Must Carry rules is to ensure the re-broadcasting of all unencoded national terrestrial television programmes of the Lithuanian public service broadcaster on all platforms regardless of the technology used<sup>12</sup>.

In Norway, the Must Carry rules are there to ensure the provision of programme services that are in the public interest<sup>13</sup>. In Poland they are there to ensure the transmission of public and specific commercial channels on all platforms, apart from DTT<sup>14</sup>. In the Republic of Serbia, Must Carry rules are based on the criteria of public interest and media pluralism<sup>15</sup>.

On the other hand, the reason for the Must Carry obligation in Estonia is to guarantee the distribution of particular types of services, such as public service television channels and free digital terrestrial television ("DTT") channels on cable, Internet Protocol television ("IPTV") and DTT networks.<sup>16</sup>

In Hungary, Article 73(1) states that the purpose of the Must Carry rules is "to preserve, protect and further develop Hungarian and European culture and the culture of nationalities, support and sustain the languages of nationalities, satisfy the information needs of citizens and facilitate their participation in democratic public affairs and preserve diversity of opinions"<sup>17</sup>. In Sweden, it is to provide programme services that offer impartiality and objectivity and to ensure a diversified range of programmes that must include news coverage<sup>18</sup>. Furthermore, it is to achieve broad freedom of expression and information to the greatest possible extent. In Germany, article 52b states that the overall purpose of the Must Carry rules is to safeguard the plurality of opinion and variety of offers.

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<sup>11</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 110.

<sup>12</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 145.

<sup>13</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 162.

<sup>14</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 165.

<sup>15</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 178.

<sup>16</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 103.

<sup>17</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 126.

<sup>18</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 182.



The purpose of Must Carry rules in Iceland is to guarantee the transmission of Icelandic channels on all platforms, except those classified as teleshopping channels<sup>19</sup>.

In Latvia, the purpose of the Must Carry rules is to ensure the re-transmission of public television broadcasting programmes and free-to-air commercial television programmes on cable platforms<sup>20</sup>. Malta requires this obligation to ensure that television broadcasting networks that are viewed by significant numbers of end-users as their main source of receiving television broadcast reserve part of their network capacity for the re-transmission of television channels qualifying as meeting general interest objectives<sup>21</sup>. While in the Netherlands the requirement is there to maintain a sufficiently varied media offer in standard television packages and to ensure a level playing field between broadcasters<sup>22</sup>.

<b>Country</b>	<b>Must Carry Obligations</b>	<b>Channels that are Must Carry</b>	<b>Costs/ payment</b>
<b>1. Bosnia and Herzegovina</b>	Yes - Art. 8 and 9 of Rule 56/2011 on Licences for the Distribution of Audio-visual Media Services and Radio Media Services <sup>23</sup> .	All platforms, except DTT <sup>24</sup> .	Silent on costs for Must Carry.

<sup>19</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 135.

<sup>20</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 150.

<sup>21</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 154.

<sup>22</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 159.

<sup>23</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 61.

<sup>24</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 61.

<b>Country</b>	<b>Must Carry Obligations</b>	<b>Channels that are Must Carry</b>	<b>Costs/ payment</b>
<b>2. Czech Republic</b>	Yes - Article 54(1) of Broadcasting Act of 2001 <sup>25</sup> .	Public service channels and local channels. The four multiplexes in operation are required to carry seven public channels <sup>26</sup> .	
<b>3. Denmark</b>	Yes - Art. 1-4 of the Executive Order on the distribution of television programmes in communal antenna systems <sup>27</sup> .	DTT, cable and IPTV platforms <sup>28</sup> . However, they do not apply to satellite platforms. Channels that are Must Carry are the parliamentary television channel, TV FRA Folketinget and services for the visually and hearing-impaired population <sup>29</sup> .	
<b>4. France</b>	Yes - The Law no. 86-1067 of 30 September 1986	Cable, satellite, ADSL and UPTS networks. Distributers Must	

<sup>25</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 79.

<sup>26</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 82.

<sup>27</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, pp. 85 - 86.

<sup>28</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 100.

<sup>29</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 101.

Country	Must Carry Obligations	Channels that are Must Carry	Costs/ payment
	on freedom of communication <sup>30</sup> .	Carry Arte and France Television that are transmitted by analogue terrestrial networks; TV5 channel; Reseau France Outre-Mer that are destined to the metropolitan public; local channels that so request; parliamentary channel and services for disabled people associated with the channels to be carried <sup>31</sup> .	
<b>5. Netherlands</b>	Yes. Art. 6.12 to 6.14d of the Media Act 2008 provide for Must Carry rules. <sup>32</sup>	All platforms. Each platform is obliged to include six national channels by the public service broadcasters of the	

<sup>30</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 113.

<sup>31</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 113 - 114.

<sup>32</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 157.

Country	Must Carry Obligations	Channels that are Must Carry	Costs/ payment
		Netherlands and the Flemish Community of Belgium, as well as the Dutch regional and local public broadcasters. <sup>33</sup>	
<b>6. Slovak Republic</b>	Yes- Section 17 of the Law 308/2000 on Broadcasting and Retransmission <sup>34</sup> .	Cable broadcasting. The types of services that are Must Carry include: <sup>35</sup> 1. the programme services of a public service broadcaster; 2. licensed broadcasters that can be receive free of charge; 3. the programme service of a broadcaster licensed for local digital broadcasting of a television programme	

<sup>33</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 159.

<sup>34</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, pp. 190.

<sup>35</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, pp. 190 - 191.

Country	Must Carry Obligations	Channels that are Must Carry	Costs/ payment
		<p>service, for which public capacity was reserved in the local multiplex available at the place of reception pursuant to specific legislation; and</p> <p>4. if such inclusion is not possible, the operator shall be obliged to ensure that the channels in a telecommunication s network or on telecommunication s facility include one channel reserved for local broadcasting free of charge available to the public in the basic programme package<sup>36</sup>.</p>	
<b>7. Spain</b>	Yes- The Audio-visual law, the Royal Decree	In terms of Art. 14, Must Carry rules apply to distributor	

<sup>36</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, pp. 190 - 191.

<b>Country</b>	<b>Must Carry Obligations</b>	<b>Channels that are Must Carry</b>	<b>Costs/ payment</b>
	920/2006 and Art. 11 of Law 42/1995 of December 22, on Cable <sup>37</sup> .	with more than 30 television channels in its service, at least 30% of the Spanish language channels should be from independent operators not owned by the distributor <sup>38</sup> .	
<b>8. Bulgaria</b>	Yes- Articles 37, 37a and 44 of the Law on Radio and Television <sup>39</sup> .	The channels should be Must Carry on DTT platforms if they: <ul style="list-style-type: none"> <li>1. have a licence for national coverage for television or radio;</li> <li>2. distribute their channels over the analogue terrestrial broadcasting system;</li> <li>3. provide services to at least 50% of the population; and</li> </ul>	Free/No cost

<sup>37</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 104.

<sup>38</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 106.

<sup>39</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 75.

Country	Must Carry Obligations	Channels that are Must Carry	Costs/ payment
		<p>4. unencoded form.<sup>40</sup></p> <ul style="list-style-type: none"> <li>• The multiplex operator (NURTS Digital EAD) is obliged to distribute channels that fulfil the criteria of section 37 and 37a.</li> <li>• First Digital EAD (multiplex operator) is obliged to distribute the public broadcasters (BNT1, BNT2, BNT HD).</li> <li>• Article 44 obliges the</li> </ul>	

<sup>40</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 75.

Country	Must Carry Obligations	Channels that are Must Carry	Costs/ payment
		<p>cable and satellite service providers to carry the programmes of the public service broadcasters (BNT and BNR)</p> <p>Free to air national coverage channels reaching at least 50% of the population over analogue terrestrial networks are must-carry only on DTT (not on cable and satellite)<sup>41</sup>.</p>	
<b>9. Lithuania</b>	Yes. Art. 33 of the Law on Provision of Information to the Public <sup>42</sup> .	All unencoded national terrestrial television programmes of the Lithuanian public service broadcaster LRT (e.g. LRT	

<sup>41</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 76.

<sup>42</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 144.



Country	Must Carry Obligations	Channels that are Must Carry	Costs/ payment
		televizija and LRT kultūra) <sup>43</sup> .	
<b>10. Romania</b>	Yes- Art. 82 of Audiovisual Law <sup>44</sup> .	Cable broadcasting. The law specifies public and private television channels as Must Carry channels. The regulator develops the list of Must Carry channels based on audience shares <sup>45</sup> .	
<b>11. Albania</b>	Yes- The Law no. 97/2013 as well as in the AMA's Decision no. 4, dated 26.03.2014 <sup>46</sup> .	Cable only for the carriage of public television and the two (2) main national free to air private channels <sup>47</sup> .	
<b>12. Finland</b>	Yes- Section 227 in Chapter 27 of the new Information Society Code <sup>48</sup> .	Cable, IPTV, and joint antenna networks within a real estate (DTT). Further, the rules	

<sup>43</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 145.

<sup>44</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 173.

<sup>45</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 174.

<sup>46</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 53.

<sup>47</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, pp. 53-54.

<sup>48</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 108.

Country	Must Carry Obligations	Channels that are Must Carry	Costs/ payment
		apply to broadcasting services licensed for public interest television operations; public service television and radio programmes, which includes all the channels of the Finnish Broadcasting Company YLE that are receivable in the municipality through antenna network <sup>49</sup> .	
<b>13. Iceland</b>	Yes- Article 44 of Section VII of the Icelandic Media Law No. 38/2011 <sup>50</sup> .	Channels under Icelandic jurisdiction with the exception of teleshopping channels <sup>51</sup> .	Must Carry cost may be determined by the National Regulator.
<b>14. Portugal</b>	Yes- Electronic Communications Act <sup>52</sup> .	Electronic communications networks used for	

<sup>49</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 110.

<sup>50</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 135.

<sup>51</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 136.

<sup>52</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 169.

Country	Must Carry Obligations	Channels that are Must Carry	Costs/ payment
		<p>the distribution of radio or television broadcasts where such networks are used by a significant number of end-users as the principal means of receiving radio and television broadcasts. The television services that qualify as Must Carry are: services in original Portuguese language of general contents, with general information contents, or with a scientific, education or cultural nature, taking into account its coverage scope and conditions for access<sup>53</sup>.</p>	

<sup>53</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 169.

Country	Must Carry Obligations	Channels that are Must Carry	Costs/ payment
<b>15. Austria</b>	Yes - Section 20(1) of the Audiovisual Media Services Act - AMD-G <sup>54</sup> .	Cable operators are obliged to transmit the ORF radio and television programmes (including ORF Sport + and ORFIII - Culture and Information) <sup>55</sup> .	1. Cable operators (with regard to multiplex platforms the principle applies that the distribution of the programmes of the ORF has to be done in exchange for a reasonable fee. 2. For satellite there is no corresponding rule with regard to costs <sup>56</sup> .
<b>16. Belgium</b>	Yes- Art. 81, 82, 83 and 87 of the AVMS Decree. Further, Art 185 of Media Act, Art. 186 and Art. 187 <sup>57</sup> .	Broadcasting services for French Community, Flemish Community and German-speaking Community. The Must Carry rules apply to cable networks (Art. 82 Of the Act), satellite (Art. 87 of the Act)	1. The Media Act is silent on costs incurred as a result of compulsory transmission of services for the French Community. 2. Section 1 2 ° in Art. 186 of Media Act states that for the Flemish Community, local

<sup>54</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 55.

<sup>55</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 57.

<sup>56</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 58.

<sup>57</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 63.

Country	Must Carry Obligations	Channels that are Must Carry	Costs/ payment
		and any electronic communications network with significant number of end-users as their principal means to receive radio and television broadcasts <sup>58</sup> .	broadcasters have to be transmitted free of charge. 3. The Act is silent on costs incurred as a result of compulsory transmission of services for the German-speaking Community. <sup>59</sup>
<b>17. Switzerland</b>	Yes- Articles 45 and 46 of Ordinance on Radio and Television Articles 59 and 60 of Swiss Federal Radio and Television Act (RTVA); Article 52 of Ordinance on Radio and Television (ORTV) <sup>60</sup> .	Wireless terrestrial broadcasting as well as broadcasting by wire. Further, Must Carry apply to the following services: 1. television programmes by national/regional-linguistic public service broadcaster SRG SSR, as defined in Art. 8 of the SRG licence: SRF 1, SRF 2, TSR	1. In terms of Art. 59, transmission by wire of access-entitled programmes must be free of charge 2. Further, the law states that in case of an unreasonable economic burden, access-entitled broadcasters have to pay appropriate compensation to the

<sup>58</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 64.

<sup>59</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 70.

<sup>60</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 77 - 78.

Country	Must Carry Obligations	Channels that are Must Carry	Costs/ payment
		<p>1, TSR 2, RSI LA 1, RSI LA 2 9 (throughout Switzerland) and SF Info (in the German-speaking part of Switzerland).</p> <p>2. foreign television programmes which contribute especially to public service objectives (Art. 59(2) RTVG).</p> <p>3. television programmes based on a licence to fulfil a public service mandate (e.g. local channels in the respective regions according to Art. 59(1b) RTVG (13 in total).</p> <p>4. other television programmes, which contribute to the</p>	<p>telecommunication s service provider.</p> <p>3. With regard to the carriage cost of access-entitled channels on terrestrial broadcasting Art. 55(2) of the RTVA mentions that "broadcasters pay the owner of a radio communication licence cost-based compensation for the broadcasting of access-entitled programme services". This is provided for in Art. 48<sup>62</sup>.</p>

<sup>62</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 78.

Country	Must Carry Obligations	Channels that are Must Carry	Costs/ payment
		fulfilment of public service goals 5. services which are coupled with access-entitled television programmes (such as services for the visually and hearing impaired or information for EPGs) <sup>61</sup>	
<b>18. Germany</b>	Yes - Articles 51(b), 52(1), 52(b) and 52(d) of the Interstate Broadcasting Treaty <sup>63</sup> .	The digital transmission of broadcasting to all forms of distribution by private platform providers that offer linear audiovisual media services via closed networks (e.g. cable and IPTV). The Must Carry rules only apply if the platform provider	Cable operators are paid for retransmission of content instead of paying for it <sup>65</sup> .

<sup>61</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 78.

<sup>63</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 82.

<sup>65</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 84.

Country	Must Carry Obligations	Channels that are Must Carry	Costs/ payment
		also operates the technical infrastructure <sup>64</sup> .	
<b>19. Estonia</b>	Yes- Articles 90 and 90 <sup>1</sup> Of the Electronic Communications Act <sup>66</sup> .	Cable, IPTV and DTT networks. <sup>67</sup> The television channels under must-carry rules are the public service television channels ETV and ETV2, and channels having licences for provision of free access television services: Tallinn municipal Tallinna TV (TTV) and private commercial channels Kanal2 and TV3 <sup>68</sup> .	In terms of the Electronic Communications Act, broadcasters offering FTA television services have the right to ask from cable operators a reasonable charge for re-transmitting their television programmes. However, there is no provision on how calculation of costs is done <sup>69</sup> .
<b>20. Hungary</b>	Yes. The Act CLXXXV of 2010 on Media Services	Cable television networks, satellite and terrestrial media service distribution	The distribution platforms are obliged to carry "a total of four linear audiovisual media

<sup>64</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 84.

<sup>66</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 101.

<sup>67</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 103.

<sup>68</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 103.

<sup>69</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 104.



Country	Must Carry Obligations	Channels that are Must Carry	Costs/ payment
	and Mass Media <sup>70</sup> .	networks, as well as transmission systems allowing for transmission of media services by use of Internet Protocol. Further, in terms of Art. 73 (3-4), the obligations extend to "providers and operators distributing media services on other transmission systems or networks, if this transmission system or network is the one which is widely used by subscribers and users as the main instrument for receiving radio and audiovisual media services" <sup>71</sup> .	services and three linear radio media services of the public media service provider free of charge, with the exception of media service distribution performed by means of broadcasting transmission <sup>72</sup> .

<sup>70</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 126.

<sup>71</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 126.

<sup>72</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 128.

Country	Must Carry Obligations	Channels that are Must Carry	Costs/ payment
<b>21. Italy</b>	Yes - The Decree Law no. 34 of 31 March 2011, as converted by Law no. 75 of 26 May 2011 as well as the AGCOM Resolution 353/11/CONS and the Decree Law no. 145 of 23 December 2013, as converted by Law no. 9 of 21 February 2014, as modified by Art. 1, comma 147, of Law no. 190 of 23 December 2014 <sup>73</sup> .	Digital terrestrial multiplex platforms. Digital terrestrial platforms are obliged to transport local channels as stipulated by Art. 27 of the AGCOM Resolution no. 353/11/CONS <sup>74</sup> .	In terms of Art. 27 AGCOM Resolution no. 353/11/CONS, with regard to the costs for transfers of transmission capacity the regulation specifies the range of costs (minimum of 0,010 Euros and maximum of 0,016 Euros per 1 M/bits per inhabitant) and stipulates that the price lists are to be made public on the website of AGCOM <sup>75</sup> .
<b>22. Lithuania</b>	Yes- Art. 33 of the Law on Provision of Information to the Public <sup>76</sup> .	All unencoded national terrestrial television programmes of the Lithuanian public service broadcaster	In terms of Art. 33(3) of the Law on Provision of Information to the Public, re-broadcasters and

<sup>73</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 138 - 140.

<sup>74</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 141.

<sup>75</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 141.

<sup>76</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 144.

Country	Must Carry Obligations	Channels that are Must Carry	Costs/ payment
		LRT (e.g. LRT televizija and LRT kultūra). <sup>77</sup>	the LRT shall not pay each other for must-carry television programmes <sup>78</sup> .
<b>23. Latvia</b>	Yes- Art. 19 of the Electronic Mass Media Law <sup>79</sup> .	Cable operators, public television broadcasting programmes (LTV1 and LTV7) and also apply to national commercial television programmes available free-to-air (e.g. Riga TV 24, OTV and Re: TV) <sup>80</sup>	The Electronic Mass Media Law states that for the re-transmission of Must Carry services neither broadcasters nor re-transmission operators may request a fee for Must Carry <sup>81</sup> .
<b>24. Malta</b>	Yes- Regulation 49 of the Electronic Communications Networks and Services (General)	Cable networks. The Broadcasting Authority identifies channels qualifying to meet general interest objectives. These channels are thus entitled for carriage on the	Regulation 49 of the Regulations state that where Must Carry obligations place an excessive or undue burden on the operator of a particular network,

<sup>77</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 145.

<sup>78</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 145.

<sup>79</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 149.

<sup>80</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 150.

<sup>81</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 150.

Country	Must Carry Obligations	Channels that are Must Carry	Costs/ payment
	Regulations, 2011. <sup>82</sup>	free-to-air DTT broadcast network managed by Public Broadcasting Services Limited (PBS) and for Must Carry status <sup>83</sup> .	the MCA will, where it deems appropriate, consider alternative measures for the General Interest TV (GI TV) channels to be seamlessly available to all end-users of that network provided that no undue burdens are placed on end-users. Further, when determining whether remuneration for the retransmission of the GI TV channels should be provided, the MCA will need to satisfy itself that any remuneration

<sup>82</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 153.

<sup>83</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 154.

Country	Must Carry Obligations	Channels that are Must Carry	Costs/ payment
			provided can be justified <sup>84</sup> .
<b>25. Norway</b>	Yes- Article 4.3 in Chapter 4 of the Norwegian Broadcasting Act, 1992 <sup>85</sup> .	Cable networks only. In Norway, both the state-funded public broadcaster NRK and the private commercial public service channel TV 2 have a must-carry status <sup>86</sup> .	The provisions stipulate that the retransmission of TV 2 shall be based on commercial terms <sup>87</sup> .
<b>26. Poland</b>	Yes- Article 43 of the Broadcasting Act of 29 December 1992 <sup>88</sup> .	All platforms, apart from DTT <sup>89</sup> .	The law stipulates that broadcasters under Must Carry rules cannot demand fees from platform operators for the retransmission of their services <sup>90</sup> .
<b>27. Republic of Serbia</b>	Yes- The Law on Electronic Media, the Law on Public Media Services	All platforms except DTT. The rules oblige operators to carry	Art. 15 of Law on Public Media Services states that the public media

<sup>84</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 154.

<sup>85</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 161.

<sup>86</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 162.

<sup>87</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 162.

<sup>88</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 164.

<sup>89</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 165.

<sup>90</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 167.

Country	Must Carry Obligations	Channels that are Must Carry	Costs/ payment
	and the Law on Electronic Communications <sup>91</sup> .	the services of the public service media, and allow the regulator to create a list of other services that should be Must Carry on the basis of the criteria of public interests and media pluralism <sup>92</sup> .	service broadcaster is obliged to pay fees to an operator for transmission of these services. The fee and other important issues are regulated by contract <sup>93</sup> .
<b>28. Sweden</b>	Yes- Section 1 of Chapter 9 of the Swedish Radio and Television Act <sup>94</sup> .	Cable and IPTV networks. The services that are Must Carry are public service Company Swedish Television and its four channels <sup>95</sup> .	The provider has the right to charge a reasonable service and maintenance fee for the network. However, audiences are protected from paying extra fees by section 1 of Swedish Radio and Television Act <sup>96</sup> .

<sup>91</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 177.

<sup>92</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 178.

<sup>93</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, pp. 178 - 179.

<sup>94</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 181.

<sup>95</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 182.

<sup>96</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 183.

Country	Must Carry Obligations	Channels that are Must Carry	Costs/ payment
29. Slovenia	Yes- The Mass Media Act. <sup>97</sup>	Operators (terrestrial networks, satellites or cable distribution). The channels that are Must Carry are listed in an Official Gazette of the Republic of Slovenia <sup>98</sup> .	Under cable/satellite platform and terrestrial broadcasting platform, television and radio channels with the status of special importance should be must carried free-of-charge. <sup>99</sup>  In the case of DTT, television and radio channels with the status of special importance are obliged to pay the proportional costs of depreciation and maintenance expenses <sup>100</sup> .

<sup>97</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 185.

<sup>98</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 186.

<sup>99</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 187.

<sup>100</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 189.

## **2.2 UNITED KINGDOM**

Unlike South Africa which has three (3) public broadcasting service channels, the United Kingdom (UK) has five (5) public broadcasting service channels, namely, BBC, Channel 3, Channel 4, Channel 5 and S4C. These public service channels have a similar mandate being to generate high quality programming across a diverse range of genres such as news, current affairs, drama, arts and regional programming. The UK government believes that sustaining the plurality of Public Service Broadcasting (PSB) providers who both complement and compete has been important in ensuring that quality and diversity of programming are maintained<sup>101</sup>.

The Office of Communications ("OFCOM"), determines conditions under which the Must Carry obligations are to be implemented as empowered by the UK's Communications Act of 2003 ("Communications Act").

### **Obligation to Carry Television programmes**

The conditions for Must Carry obligations in the UK are provided for in terms of section 64 as well as sections 272, to 275 of the Communications Act<sup>102</sup>, to regulate electronic communication networks namely, cable, satellite, terrestrial networks, IPTV etc. The electronic communication networks are obliged to carry PSB television channels.

In terms of section 64(2) of the Communications Act Must Carry rules should apply under the following conditions:

- when a network has a significant number of end-users that use its network as the primary source for receiving television programmes; and
- when services are included in the list of Must Carry services.

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<sup>101</sup>file:///F:/New%20folder%20(3)/Broacasting/Broacasting%20%20Policy%20%20Proposal/BBC%202006%206763.pdf

<sup>102</sup> Communications Act 2003, Chapter 21



The Communications Act has listed Must Carry services as:

- (a) any service of television programmes provided by the BBC so far as it is provided in digital form and is a service in relation to which OFCOM has functions;
- (b) Channel 3 services so far as provided in digital form;
- (c) Channel 4 so far as provided in digital form;
- (d) Channel 5 so far as provided in digital form;
- (e) S4C Digital; and
- (f) the digital public teletext service<sup>103</sup>.

However, even though there is a list of Must Carry services, the Secretary of State has the power to review the Must Carry list from time to time, and any requirements according to the terms on which services in that list must be broadcast.

In carrying out the review the Secretary of State must consult OFCOM and other parties that are likely to be affected by a modification to the Must Carry list. Following such a review, the Secretary of State may, by order, amend the Must Carry list<sup>104</sup>.

Before determining whether it is appropriate to amend the Must Carry list, the Secretary of State must consider the following:

- the public benefit in doing so;
- the extent to which a service would otherwise be made available even if not added to the list;
- the amount of spare network capacity of providers of electronic communications networks to whom the Must Carry obligations apply; and
- whether the burden of compliance is proportionate to the objective of securing that Must Carry services are made available to the public.

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<sup>103</sup> Communications Act 2003, section 64(3).

<sup>104</sup> Communications Act 2003, section 64

## **The Must Offer Obligation on the digital format**

On top of the obligation to carry, there is also an obligation to offer. Must offer obligations require relevant broadcasters to make their PSB channels available to every appropriate network and satellite services. The scope does not extend to PSBs' video-on-demand or portfolio services.<sup>105</sup> The Communications Act set out must-offer obligation for electronic communication networks, and satellite respectively, for digital format. In terms of section 64 of Communications Act<sup>106</sup> the must-offer obligations apply to every other licensed television service for the purposes of Must Carry obligations as obligated by Secretary of State<sup>107</sup>.

The following must offer obligation objectives were identified to ensure that<sup>108</sup>:

- channel or other services are provided in digital format and are broadcast and distributed on appropriate networks;
- the channel or other service providers are to ensure that agreements entered into comply with the following principles:
  - a) that the channel or other services, are broadcast and accessible to citizens in the UK; and
  - b) that broadcasting is in accordance with agreed terms and is accessible to intended audiences.

## **The Must Provide Obligation**

Section 274 of the Communication Act sets out obligations for must provide services to secure their reception in certain areas, and states, that the must provide services, are to be offered at a fee agreed between the parties. Section 274(2) set out the powers of OFCOM to impose conditions appropriate for securing reception of must provide service in the terms of the following:

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<sup>105</sup> UK Department of Culture, Media and Sports, 2015, The balance of payments between television platforms and public service broadcasters

<sup>106</sup> Communication Act 2003, section 272 and 273

<sup>107</sup> Communication Act 2003, section 272

<sup>108</sup> Communication Act 2003, section 272 and 273

- (a) the persons providing must provide services fail to enter into or maintain arrangements satisfying the requirements of this section; and
- (b) the person bound by the must provide conditions is required to act in accordance with arrangements imposed by OFCOM<sup>109</sup>.

The arrangements that are to be entered into, or may be imposed, are arrangements that secure:

- (a) that a facility for receiving each must-provide service, is made available to every member of the intended audience for that service who is unable, without the use of that facility, to receive it in an intelligible form and free of charge;
- (b) that the facility is one under which every such member of the intended audience for a must-provide service is entitled, free of charge, to receive in an intelligible form so much of a service broadcast from a satellite as includes that must-provide service;
- (c) that the cost of making that facility available is shared, in appropriate proportions, by all the persons providing must-provide services;
- (d) that procedures are established and maintained for dealing with complaints from persons claiming to be entitled, in accordance with the arrangements, to receive a service free of charge, and for resolving disputes about the existence or extent of such an entitlement; and
- (e) that the availability of those procedures is adequately publicised in accordance with guidance given from time to time by OFCOM.

### **Must Carry for digital terrestrial broadcasting**

Must Carry obligations are the same in digital environment as it is in an analogue environment. According to section 64(2)(b) of the Communications Act, Must Carry conditions should be limited to networks by means of which public electronic communications services are used by a significant number of end-users as their principal means of receiving television programme.

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<sup>109</sup> Communication Act 2003, Section 274

OFCOM gave directive to two terrestrial transmission providers namely National Transcommunications Limited (NTL) and Crown Castle to provide transmission of the Must Transmission Services (MTS), as they provide PBS and are considered to be appropriate networks because they have significant numbers of end-users<sup>110</sup>. MTS refers to the broadcast or transmission of the Must Carry Services by NTL or Crown Castle through using equipment installed and operated by them for that purpose<sup>111</sup>. Moreover, the NTL and Crown Castle are required to provide MTS on fair and reasonable terms, conditions and charges. In terms of fair and reasonable terms, conditions and charges, OFCOM follows Article 31(2) of the Universal Service Directive which acknowledges that Member States should be able to determine appropriate payment, in respect of Must Carry obligations<sup>112</sup>.

OFCOM is of the view that the cost of providing MTS is substantial, therefore, for the purpose of investment in infrastructure, other operational costs should be taken into account in order to encourage innovation<sup>113</sup>, as such, it is important for transmission service providers to charge for MTS that they provide. OFCOM is of the view that this would allow a reasonable opportunity to return of investments. OFCOM does not however determine the charges for MTS, but allows these to be determined in commercial agreements.

### **2.3 UNITED STATES OF AMERICA (USA)**

The Federal Communications Commission (FCC) is the USA's communications regulator established in terms of the Communications Act of 1934.<sup>114</sup>

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<sup>110</sup> Provision of Managed Transmission Services to Public Service Broadcasters **Proposal to give a Direction setting must-carry obligations on the terrestrial transmission network February 2005, page 2**

<sup>111</sup> Ibid, **page 3**

<sup>112</sup> Universal Services Directive <http://eur-lex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX:32002L0022&from=EN>

<sup>113</sup> Provision of Managed Transmission Services to Public Service Broadcasters **Proposal to give a Direction setting must-carry obligations on the terrestrial transmission network February 2005, page 8**

<sup>114</sup> Communications Act of 1934, section 1.

The television market in the USA consists of public, commercial and community broadcasting transmitted through various platforms. The PBS is an American public broadcaster established in terms of the Public Broadcasting Act of 1967.<sup>115</sup> There are four traditional commercial television service networks, namely; American Broadcasting Company (ABC), Columbia Broadcasting System (CBS), National Broadcasting Company (NBC) and FOX.<sup>116</sup>

In terms of section 611 of the Communications Act, local franchising authorities may require cable operators to set aside channels for public, educational, or governmental use.<sup>117</sup> Community television services that are available in the USA are provided through the cable television system.<sup>118</sup> They comprise of Public-access television, Educational-access, Government-access and Leased access (pay per view) television.<sup>119</sup>

In the USA's television market, the pay or subscription television market is dominated by cable and satellite television service providers.<sup>120</sup>

### **Must Carry Obligations**

Must Carry obligations in the USA were introduced in 1965 to require cable systems to carry local broadcast television stations.<sup>121</sup> Cable television operators bear a statutory obligation to reserve up to one third of their channel capacity for the compulsory carriage of significantly viewed local, terrestrial broadcast television

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<sup>115</sup> Public Broadcasting Act of 1967, section 396(b).

<sup>116</sup> Hélène Palmeri, « U.S. public television in the digital era: from niche to "Greek marketplace"?, *Transatlantica* [En ligne], 2010, mis en ligne le 13 avril 2011, consulté le 05 mai 2019. URL : <http://journals.openedition.org/transatlantica/5193>, p 8.

<sup>117</sup> Communications Act of 1934, section 611.

<sup>118</sup> Communications Act of 1934, section 611(b).

<sup>119</sup> Janes, BT. History and Structure of Public Access Television, *Journal of Film and Video* Vol. 39, No. 3, Community Access Cable Television (Summer 1987), p 14.

<sup>120</sup> <https://www.statista.com/statistics/251793/pay-tv-providers-with-the-largest-number-of-subscribers-in-the-us>, retrieved on 20 August 2019.

<sup>121</sup> <https://mtsu.edu/first-amendment/article/1000/must-carry-rules>, retrieved on 13 August 2019.

stations.<sup>122</sup> In the mid-1980s, as cable networks increased, cable operators found Must Carry rules to be increasingly burdensome because the operators were being forced to carry local broadcast stations in preference to the more popular and lucrative cable network channels.<sup>123</sup> This led cable operators to approach court for relief.

In the *Quincy Cable TV Inc v FCC*<sup>124</sup>, the court had to consider the Must Carry provision that required cable television operators, upon request and without compensation, to transmit to their subscribers every over-the-air television broadcast signal that is “significantly used in the community” or other considered local broadcasters under Commission’s rules. Furthermore, the Act required a cable system to carry all commercial broadcasters within a 35-mile radius of the communities served, in addition to providing the same service to other broadcasters in the same market and even others in various yet competing markets. Thus, cable broadcasting was to grow within the spirit that is consistent with the public interests that would preserve local content. The Circuit Court of Appeals for the District of Columbia found Must Carry rules to be impermissible content-based regulations in violation of the First Amendment to the United States Constitution.<sup>125</sup>

The Cable Television Consumer Protection and Competition Act of 1992 (“Cable Act”), enacted by Congress after extensive hearings and over a presidential veto, re-established the Must Carry rules for cable operators.<sup>126</sup> In 1993 the new Must Carry requirements were immediately challenged in *Turner Broadcasting System, Inc. v Federal Communications Commission*<sup>127</sup>. Sections 4 and 5 of the Cable Act required cable systems to allocate a percentage of their channels to local public broadcast stations for Must Carry.<sup>128</sup> The rules limited the channels available for exclusive

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<sup>122</sup> Closs W & Nikoltchev S “To Have or Not to Have Must-Carry Rules”, the European Audiovisual Observatory, p 21.

<sup>123</sup> <https://www.mtsu.edu/first-amendment/article/1000/must-carry-rules>, retrieved on 13 August 2019.

<sup>124</sup> *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C.Cir. 1985).

<sup>125</sup> *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C.Cir. 1985).

<sup>126</sup> <https://www.mtsu.edu/first-amendment/article/1000/must-carry-rules>, retrieved on 13 August 2019.

<sup>127</sup> *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622 (1994).

<sup>128</sup> Cable Television Consumer Protection and Competition Act of 1992.

control by cable programmers and increased competition for the remaining channels.<sup>129</sup>

The FCC regulates cable operators ancillary to broadcasting.<sup>130</sup> As a result, cable operators face significant rules designed to preserve over-the-air television or terrestrial television, including providing access and channel capacity to carry the signals of local stations.<sup>131</sup>

The Cable Act, specifically, section 4 provides for Must Carry rules and requires cable operators to carry local broadcasting stations.<sup>132</sup> In terms of section 4(a) of the Cable Act, each cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations and qualified low power stations as provided by this section.<sup>133</sup> Carriage of additional broadcast television signals on such system shall be at the discretion of such operator.<sup>134</sup>

## **2.4 AUSTRALIA**

The Australian Communications and Media Authority Act 2005 ("ACMA Act") established the Australian Communications and Media Authority (ACMA) for the purposes of regulating the broadcasting, radio communications and telecommunications sectors according to the provisions of relevant legislation. ACMA's mandate is to deliver a communications and media environment that balances the needs of the industry and the Australian community with regulation, education and advice.<sup>135</sup>

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<sup>129</sup> <sup>129</sup> <https://www.oyez.org/cases/1993/93-44>, retrieved on 13 August 2019.

<sup>130</sup> <https://www.mtsu.edu/first-amendment/article/1000/must-carry-rules>, retrieved on 13 August 2019.

<sup>131</sup> Cornell Journal of Law and Public Policy, volume 15 Issue 1 Fall 2005, Article 2, Digital Must Carry and the Case for Public Television, p 74.

<sup>132</sup> Cable Television Consumer Protection and Competition Act of 1992.

<sup>133</sup> Cable Television Consumer Protection and Competition Act of 1992.

<sup>134</sup> Cornell Journal of Law and Public Policy, volume 15 Issue 1 Fall 2005, Article 2, Digital Must Carry and the Case for Public Television, p 82.

<sup>135</sup> <https://www.acma.gov.au/theACMA/About/Corporate/Responsibilities/regulation-responsibilities-acma>, retrieved on 3 May 2019.



The Broadcasting Services Act No. 110 of 1992, as amended ("BSA") sets out the regulatory environment for the broadcasting industry in Australia<sup>136</sup>. Further, the Australian Broadcasting Corporation Act ("ABC Act") of 1983 provides for the establishment and operation of the Australian Broadcasting Corporation ("ABC").<sup>137</sup>

Australia has two subscription television services excluding Telstra which provides Netflix services. Galaxy is Australia's first subscription television service broadcaster<sup>138</sup>, there is also another subscription television service broadcaster being Foxtel. Foxtel acquired Galaxy customer subscriptions when Galaxy ceased operations.<sup>139</sup> As of 2012, there were only 28% of Australian households subscribed to a pay television service, with Foxtel dominating most of the market. The second pay television provider in Australia is Fetch<sup>140</sup>. Australia has two national broadcasters, that is ABC and Special Broadcasting Service ("SBS").<sup>141</sup>

According to the ABC Charter, it is required to provide informative, entertaining and educational services that reflect the breadth of the Australian nation. SBS is founded on the belief that all Australians, regardless of geography, age, cultural background or language skills should have access to high quality, independent, culturally-relevant Australian media<sup>142</sup>. SBS operates under the Special Broadcasting Service Act and operates six free-to-air television channels, eight radio stations and World Movies, a subscription television channel. Although it provides a subscription television channel, SBS is considered to be a free-to-air public broadcaster<sup>143</sup>.

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<sup>136</sup>[https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1617/Quick\\_Guides/MediaCommsResources](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/MediaCommsResources), retrieved on 2 May 2019.

<sup>137</sup><https://www.acma.gov.au/theACMA/About/Corporate/Responsibilities/regulation-responsibilities-acma>, retrieved on 3 May 2019.

<sup>138</sup> <https://www.finder.com.au/internet-tv/pay-tv>, retrieved on 7 May 2019.

<sup>139</sup> <https://www.finder.com.au/internet-tv/pay-tv>, retrieved on 7 May 2019.

<sup>140</sup><https://www.acma.gov.au/theACMA/About/Corporate/Responsibilities/regulation-responsibilities-acma>, retrieved on 3 May 2019.

<sup>141</sup>[https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1617/Quick\\_Guides/MediaCommsResources](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/MediaCommsResources), retrieved on 2 May 2019.

<sup>142</sup>[https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1617/Quick\\_Guides/MediaCommsResources](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/MediaCommsResources), retrieved on 2 May 2019.

<sup>143</sup> <https://www.sbs.com.au/aboutus/our-story>, retrieved on 6 May 2019.



## Must carry obligations

The Australian Law Reform Commission ("ALRC") undertakes research and provides recommendations to reform the law on topics selected by the Attorney-General of Australia<sup>144</sup>. The ALRC has suggested that a US-style 'Must Carry' regime should be implemented for Australia. Under Australia's Must Carry regime, free-to-air broadcasters have the option of either requiring that they be carried on cable or on satellite platform, or requiring that the free to air broadcaster be remunerated where the satellite platform chooses to re-transmit the signal.<sup>145</sup>

The purpose of a Must Carry regime is to provide a framework for commercial negotiations between free to air broadcasters and subscription television companies about payments for broadcasts retransmitted by the latter. A Must Carry regime would also ensure that, in future, free-to-air broadcasters are not forced to pay for carriage on subscription platforms (particularly if IPTV becomes a primary platform with the advent of Australia National Broadband Network) and prevent 'cherry-picking' of channels where subscription television only retransmits some of the free-to-air broadcaster's channels<sup>146</sup>.

During the Must Carry inquiry conducted in Australia, a number of stakeholders addressed the issue of Must Carry. Free-to-air television broadcasters were in favour of retransmission of free-to-air television broadcasts permitted with the consent of, and in accordance with commercial terms agreed with the broadcaster or with "Must Carry" obligations. The other submissions were in disagreement with the proposed Must Carry obligations especially the subscription television broadcasters.

The ALRC concluded that the Australian Government should consider a repeal of the retransmission scheme for free-to-air broadcasts. However, the ALRC makes no

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<sup>144</sup> <https://www.alrc.gov.au/about>, retrieved on 2 May 2019.

<sup>145</sup> Copyright and the Digital Economy (ALRC report 122).

<sup>146</sup> Copyright and the Digital Economy (ALRC report 122).

recommendation on whether reform should also involve the imposition of Must Carry obligations on subscription television service providers.<sup>147</sup>

Must Carry provisions would operate to impose obligations to communicate copyright materials (broadcasts), at the behest of the copyright holder. This issue does not directly concern the operation of copyright exceptions. Further, the policy rationales for Must Carry regimes are based primarily on communications policy and are not issues that can, or should, be driven by reform of copyright laws.<sup>148</sup>

## 2.5 IRELAND

The main piece of legislation for the media sector in Ireland is the Broadcasting Act, No 18 of 2009. The Broadcasting Act outlines the Must Carry rules and provides the framework for the establishment of digital terrestrial broadcasting in Ireland<sup>149</sup>.

The current Irish television landscape is a mix of national, regional and local services which can be public, commercial or community in nature, offering differing and varied content<sup>150</sup>. The Irish state or public television service broadcaster is Raidió Teilifís Éireann (RTÉ) TV<sup>151</sup>. The Irish pay television services include EIR Sport, Virgin Media and Virginia Media Sports<sup>152</sup>. However, many other subscription television services from outside Ireland, such as Sky and Vodafone are available for interested viewers<sup>153</sup>.

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<sup>147</sup> Copyright and the Digital Economy (ALRC report 122).

<sup>149</sup> European Audiovisual Observatory for the European Commission – DG COMM, p 130.

<sup>150</sup> <https://www.bai.ie/en/broadcasting/licensing-2/#al-block-4>, retrieved on 6 May 2019.

<sup>151</sup> <https://www.bai.ie/en/broadcasting/licensing-2/#al-block-4>, retrieved on 6 May 2019.

<sup>152</sup> <https://www.bai.ie/en/broadcasters>, retrieved on 7 May 2019.

<sup>153</sup> <https://switcher.ie/broadband/compare/digital-tv>, retrieved on 7 May 2019.

## Must Carry Obligations

Section 77 of the Broadcasting Act addresses the issue of the Must Carry rules.<sup>154</sup> The Must Carry rules apply to “appropriate networks” and these are defined as follows:

*“an electronic communications network provided by a person (“appropriate network provider”) which is used for the distribution or transmission of broadcasting services to the public”.*

An appropriate network provider must be “used by a significant number of end-users as their principal means of receiving transmissions of programme material” to qualify for Must Carry. In the case of digital cable, there is a “Must Carry” obligation for community television services. The channels that are Must Carry are listed under sections 77 (3) and 77(4) of the Broadcasting Act.

In terms of section 77(3) of the Broadcasting Act, in the case where the appropriate network is a digital system, the appropriate network provider shall ensure the re-transmission of the Houses of the Oireachtas Channel and the Irish Film Channel. Section 77(4) provides that an appropriate network provider shall ensure the re-transmission of each free-to-air television service provided for the time being by RTE’, TG4 and the free-to-air service provided under Section 70 of the Broadcasting Act by the television service programme contractor which that body requests the appropriate network provider to re-transmit. In total this includes the Houses of the Oireachtas Channel (Parliamentary channel) and the Irish Film Channel (not yet established) and the free-to-air services of public service broadcaster, i.e. RTÉ; TG4<sup>155</sup>.

In addition, the Must Carry obligations has other access rules such as Must Offer Rules. The Must Offer services are listed under Section 77 (11-12) of the Broadcasting Act to include TG4, RTÉ 1, RTÉ 2, TV3/ 3e. In terms of section 77(11), without

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<sup>154</sup> Broadcasting Act No. 18 of 2009.

<sup>155</sup> Ibid, Sections 77(3) and (4).

prejudice to the requirements imposed under section 77(4), RTE, TG4 and the television service programme contractor shall ensure that their Must Offer services are always offered for re-transmission (subject to agreement that is fair, reasonable and has non-discriminatory terms of use) by means of any appropriate network that is available for reception in an intelligible form by members of the public in the whole of, or in part of the State<sup>156</sup>.

## **2.6 INDIA**

The Public Broadcasting Corporation of India called Prasar Bharti was established under the Prasar Bharti Act, 1990. The main obligation of the Public Broadcasting Corporation of India<sup>157</sup> is to organize and conduct public broadcasting services to inform, educate, and entertain the public and to ensure a balanced development of broadcasting of radio and television<sup>158</sup>.

### **Obligation to Carry Television programmes**

To enforce Must Carry obligations in India, section 8 of Cable Television Networks (Regulation) Act, 1995 ("Cable Act") requires that specific channels be transmitted. Therefore, the Central Government in India, has a mandate to specify by notification in the government gazette the names of Doordarshan channels or the channels operated by or on behalf of Parliament, to be mandatorily carried by the cable operators on their cable services. Moreover, these channels are re-transmitted without any deletion or alteration of any programme transmitted on such channels.

The prime band is limited to the carriage of two Doordarshan terrestrial channels and one regional language channel of the state in which the network of the cable operator is located<sup>159</sup>.

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<sup>156</sup> Ibid.

<sup>157</sup> The Prasar Bharati Act, 1990, Section 12

<sup>158</sup> Prasar Bharati (Broadcasting Corporation of India) Act, 1990 – An overview

<sup>159</sup> Must carry obligations in India, section 8 of Cable Television Networks (Regulation) Act, 1995, page 5

Unlike other jurisdictions, the multi system operator ("MSO") enters into a written interconnection agreement with the local cable operator for providing signals of television channels to the local cable operator, in line with the model of interconnection agreement.

In India the Central Government may issue a government directive in the public interest to the Telecom Regulatory Authority of India ("TRAI") to specify, through notice in the government gazette, that one or more free-to-air channels must be included in the package of channels forming basic service tiers<sup>160</sup>. Moreover, any one or more of such channels may be specified in the notice in terms of genre for providing a programme mix of entertainment, information, education and other programmes.

There is a fixed tariff for the basic service tier which is offered by the cable operators to consumers, whereby consumers have the option to subscribe to any such tier, provided that the cable operator shall also offer the channels in the basic service tier on an *a la carte* basis to the subscriber at a specified tariff.

The Central Government or the TRAI may in the notification specify the following:

- (a) the number of free to air channels to be included in the package of channels; and
- (b) basic service tiers for the purposes of section 1(1) and different numbers may be specified for different States, cities, towns or areas.<sup>161</sup>

### **The Obligation to offer Television programmes**

According to regulation 3(14) of the Telecommunication, Broadcasting and Cable Services Interconnection regulations<sup>162</sup>, "every multi system operator or their authorized agent shall provide the signals of television Channels to a local cable

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<sup>160</sup> section 36, section 11, of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997),

<sup>161</sup> Section 36, section 11, of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997),

<sup>162</sup> Digital Addressable Cable Television Systems) Regulations, 2012 Page 2 of 85 (9 of 2012

*operator in accordance with its reference interconnect offer within sixty days from the date of receipt of such request. In case the request for providing signals of television channels is not agreed to, the reasons for such refusal to provide signals shall be conveyed to the local cable operator or to the person making a request within sixty days from the date of request<sup>163</sup>.*

The MSO shall make available signals of television channels to the local cable operator, on non-exclusive basis, to re-transmit the same to the subscribers in the territory, in terms of the agreement and as per prevailing norms, policies, the applicable laws and rules, regulations, directions and orders of the concerned authorities<sup>164</sup>.

### **Transmission of television programmes**

Regulation 13B, states that every MSO shall, within a period of thirty (30) days from the date of receipt of a request from the local cable operator, to provide the signals of television channels, enter into an interconnection agreement in accordance with the terms and conditions of the model interconnection agreement or standard interconnection agreement<sup>165</sup>.

Regulation 5.2 states that the local cable operator shall carry signals of TV channels received from the MSO, on non-exclusive basis, for distribution to the subscribers in the territory<sup>166</sup>. It is compulsory for parties to transmit, re-transmit or otherwise carry any channel, content or programme only in encrypted mode through a digital

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<sup>163</sup> The Telecommunication (Broadcasting and Cable Services) Interconnection (Digital Addressable Cable Television Systems) (Seventh Amendment) Regulations, 2016 (No. 3 Of 2016)

<sup>164</sup> Telecommunication (Broadcasting and Cable Services) Interconnection (Digital Addressable Cable Television Systems) Regulations, 2012 Page 2 of 85 (9 of 2012)

<sup>165</sup> Telecommunication (Broadcasting and Cable Services) Interconnection (Digital Addressable Cable Television Systems) Regulations, 2012 Page 2 of 85 (9 of 2012)

<sup>166</sup> The Telecommunication (Broadcasting and Cable Services) Interconnection (Digital Addressable Cable Television Systems) (Seventh Amendment) Regulations, 2016 (No. 3 Of 2016)

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addressable system strictly in terms of and in accordance with the applicable laws and regulations<sup>167</sup>.

### **3. KEY LESSONS FOR MUST CARRY REGULATION IN SOUTH AFRICA**

#### **3.1. Legislative Context of Must Carry**

Section 60(3) of the ECA provides that:

*"The Authority must prescribe regulations regarding the extent to which subscription broadcast services must carry, subject to commercially negotiable terms, the television programmes provided by a public broadcast service licensee"*.

As per the ECA, section 60(3), the Authority impose the obligation to carry the television programmes of the Public Service Broadcasting Licensee on the Subscription Broadcasting Service licensees. The Subscription Broadcasting Service Licensees must carry the channels of the Public Service Broadcasting Licensee designated as must carry channels as part of their service offering.

The benchmarking conducted indicates that must carry obligations in most countries, specifically, in Europe are prescribed to comply with Article 31 of the Universal Services Directive<sup>168</sup> ("US Directive"). Article 31 of the US Directive provides that Must Carry obligations should apply only to "networks that have a significant number of end-users using the service as their main means of accessing television broadcasts"<sup>169</sup>.

##### **3.1.1. Television programmes to be carried**

During the regulation making process that led to the 2008 Regulations, the Authority assessed the television programmes provided by a public broadcast service licensee

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<sup>167</sup> Telecom Regulatory Authority of India, Consultation on Draft Tele - Communication (Broadcasting and Cable Services) Inter Connection (Addressable Systems) Regulations, 2016, p 116-119

<sup>168</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 10.

<sup>169</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 10.

that qualify for carriage. The Authority indicated that the definition of “public broadcasting service” in the Broadcasting Act mirrors that contained in the ECA and specifically states that the “public broadcasting service” includes the commercially operated service of the public broadcaster, arguably casting the net wider than it is in terms of the ECA.<sup>170</sup> As a result, all the television programmes comprising a channel and broadcast by a Public Broadcast Service licensee as part of its broadcasting service are subject to Must Carry obligations.<sup>171</sup>

All free-to-air commercial broadcasting service licensees will have to negotiate their individual arrangements for access and carriage in a commercial agreement to be reached with the respective Subscription Broadcasting Service Licensees until such time that there is a different dispensation. The legislation only recognises the television programmes provided by a public broadcast service licensee for carriage.

In terms of the benchmarking conducted, the must carry obligations in other countries do not compel subscription television services to carry public broadcasting service. Rather it compels networks that have a significant number of end-users using the service as their main means of accessing television broadcasts. The intention is to provide wider access to programmes of public interest.

### **3.1.2. Obligation to offer programmes**

The Authority deemed it necessary to pronounce on the obligation to offer television programmes to make for a smooth process for the carriage of the television programmes of the Public Broadcasting Service. The Authority therefore mandated the Public Service Broadcasting Licensee to offer its television programmes to a Subscription Broadcasting Service Licensee upon a request from the Subscription Broadcasting Service Licensee. The Public Service Broadcasting Licensee must offer

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<sup>170</sup> ICASA Must carry Obligations: Position paper and Draft Regulations, published in Government gazette 31081 of 22 May 2008, page 30-31

<sup>171</sup> ICASA Regulations: Extent to which subscription broadcasting services must carry the television programmes provided by the Public Broadcast Service Licensee, Government Gazette 31500, published on 10 October 2008, page 5

its programmes to a Subscription Broadcasting Service Licensee within three (3) months from the date of the request submitted by an Subscription Broadcasting Service Licensee. The Public Service Broadcasting Licensee must deliver its signal to the Subscription Broadcasting Service Licensee in an unencoded and compatible format.<sup>172</sup>

In Ireland, RTE, TG4 and the television service programme contractor shall ensure that their Must Offer services are always offered for re-transmission (subject to agreement that is fair, reasonable and has non-discriminatory terms of use) by means of any appropriate network that is available for reception in an intelligible form by members of the public in the whole of, or in part of the State<sup>173</sup>.

### **3.1.3. Obligation to carry programmes**

In terms of the current Must Carry Regulation, a Subscription Broadcasting Service Licensee must submit a request to carry the television channels of the Public Service Broadcasting licensee within six (6) months of the coming into effect of the Regulations or within six (6) months from the date of issue of the Subscription Broadcasting Service Licence. Retransmission of must carry channels must commence within three (3) months of the receipt of the must carry channels.<sup>174</sup>

The obligation on the Subscription Broadcasting Service Licensee to carry television programmes of the Public Service Broadcasting Licensee shall not be applicable to Subscription Broadcasting Service Licensees whose service offering has twenty-nine (29) channels or less. A Subscription Broadcasting Service Licensee must ensure that every twentieth (20th) channel added to its bouquet over the minimum thirty (30) is a must carry channel (being the 30th, 50th, 70th, 90th channels and so forth).<sup>175</sup>

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<sup>172</sup> Ibid, page 7

<sup>173</sup> Broadcasting Act No. 18 of 2009, Section 77(4).

<sup>174</sup> ICASA Regulations: Extent to which subscription broadcasting services must carry the television programmes provided by the Public Broadcast Service Licensee, Government Gazette 31500, published on 10 October 2008, page 5

<sup>175</sup> Ibid, page 6

The countries benchmarked do not go into detail in respect of the above. In most countries, specifically, in Europe the must carry obligations are prescribed to comply with Article 31 of the US Directive. Article 31 of the US Directive provides that Must Carry obligations should apply only to “networks that have a significant number of end-users using the service as their main means of accessing television broadcasts”.<sup>176</sup>

#### **3.1.4. Transmission of programmes and costs of Must Carry**

The Authority decided that the Public Service Broadcasting Licensee must bear the costs of transmission of the broadcast signal to the Subscription Broadcasting Service Licensee. The Subscription Broadcasting Service Licensees are required to transmit simultaneously and without any alteration, the entire television programmes of the Public Service Broadcasting Licensee.<sup>177</sup>

The wording requiring that the Subscription Broadcasting Service Licensees are required to carry the programmes of a Public Service Broadcasting Licensee at no cost is, at face value, in direct contradiction to section 60(3) of the ECA that requires ICASA to “prescribe regulations regarding the extent to which subscription broadcast services must carry, subject to commercially negotiable terms ...”. Thus, the SABC has identified this apparent inconsistency as rendering regulation 6(1) to be ultra vires.<sup>178</sup>

The apparent inconsistency between section 60(3) and regulation 6(1) of the Regulations is however given context in the Position Paper<sup>179</sup> published prior to the

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<sup>176</sup> Council of Europe, “Access to TV platforms: must-carry rules, and access to free-DTT, p. 10.

<sup>177</sup> ICASA Regulations: Extent to which subscription broadcasting services must carry the television programmes provided by the Public Broadcast Service Licensee, Government Gazette 31500, published on 10 October 2008, page 7

<sup>178</sup> ICASA Regulatory Impact Assessment Report on the Must Carry Regulations, published on the ICASA website in March 2019, page 6

<sup>179</sup> ICASA Must carry Obligations: Position paper and Draft Regulations, published in Government gazette 31081 of 22 May 2008

promulgation of the Regulations and the submissions by stakeholders made thereto. The Position Paper shows that stakeholders, such as Multichoice, had foreseen the need for Public Service Broadcasting and Subscription Broadcasting Service to agree on each other's remuneration and a cost structure that is transparent, non-discriminatory and fair. This included a proposition that the Public Service Broadcasting Licensee must offer its channels to all broadcasters. However, the SABC disputed the must-offer aspect, as it is not an obligation in terms of legislation.<sup>180</sup>

Further, in relation to the discussion of the contractual terms, stakeholders highlighted that section 60(3) of the ECA did not grant the Authority powers to ascertain the commercial terms of Must Carry contracts between the Public Service Broadcasting Licensee and Subscription Broadcasting Service Licensees.<sup>181</sup>

To arrive at a position that catered for all parties, the Authority resolved in the Position Paper to ensure that there would be no discrimination amongst Subscription Broadcasting Service Licensees, the Authority would exempt both the Public Service Broadcasting and Subscription Broadcasting Service Licensees from paying a fee to the other or receiving financial compensation for must-carry or offer obligations. In terms regulation 4 of the Regulations, all Subscription Broadcasting Service Licensees must carry the Public Service Broadcasting Licensee television programmes as part of their service offerings and are further required to submit a request to the Public Service Broadcasting Licensee to carry such programmes.<sup>182</sup>

Furthermore, regulation 6 requires the Public Service Broadcasting Licensee to offer its television programmes, upon request from an Subscription Broadcasting Service Licensee, free of charge and deliver the signal to the Subscription Broadcasting Service Licensee at its own cost. The Subscription Broadcasting Service Licensees would however incur the cost of broadcasting the must carry channels. Any other cost in excess, which is not related to the delivery of the signal or carriage of

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<sup>180</sup> ICASA Regulatory Impact Assessment report on the Must Carry regulations, published on the ICASA website in March 2019, pages 6-7

<sup>181</sup> Ibid, page 7

<sup>182</sup> Ibid, page 7

channels, would be based on commercial negotiations between the broadcasters. It is therefore on this premise that the different wording of “at no cost” in the Regulations came about.<sup>183</sup>

The Public Broadcast Service Licensees should offer their designated television programmes free of charge, and, should deliver the signal to the Subscription Broadcasting Service Licensees at its own cost in an acceptable quality. The Subscription Broadcasting Service Licensees will incur the costs of broadcasting the television programmes for must carry obligations. Any other cost over and above that (i.e. not related to the delivery of the signal or the carriage of the channels) will be based on commercial negotiations between the broadcasters themselves.

The Authority could not, through the RIA, make a conclusive finding on whether the resultant implementation of the Regulations on costs carried by the Public Broadcasting Service Licensee and Subscription Broadcasting Services Licensees warrant that the Regulations be amended.<sup>184</sup>

Nonetheless, with regards to universal access, the Regulations have been effective and have ensured that Public Broadcasting Service Licensee’s channels are universally accessible. The Regulations have enabled the public, who ordinarily would not have access to Public Broadcasting Service television programmes due to coverage deficiencies, to access Public Broadcasting Service television programmes.<sup>185</sup>

The benchmarking conducted indicates that some regulators prescribe fees for must carry obligations. In Italy, for example, Article 27 AGCOM Resolution no. 353/11/CONS, with regard to the costs for transfers of transmission capacity the regulation specifies the range of costs (minimum of 0,010 Euros and maximum of

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<sup>183</sup> Ibid, page 7

<sup>184</sup> Ibid, page 22

<sup>185</sup> Ibid, page 21

0,016 Euros per 1 M/bits per inhabitant) and stipulates that the price lists are to be made public on the website of AGCOM.<sup>186</sup>

In Bosnia and Herzegovina, Czech Republic, Denmark, France, Netherlands, Slovak Republic and Spain, the must carry obligations are silent on costs. On the other hand, in countries such as Bulgaria, Lithuania, Romania, Albania, Finland, Iceland, Portugal, Austria, Belgium and Switzerland the must carry obligations state that the retransmission must be at no cost.

Germany cable operators are paid for retransmission of content instead of paying for it. In Estonia, the Electronic Communications Act states that broadcasters offering FTA television services have the right to ask from cable operators a reasonable charge for re-transmitting their television programmes. However, there is no provision on how calculation of costs is done<sup>187</sup>. In Hungary, the distribution platforms are obliged to carry "a total of four linear audio-visual media services and three linear radio media services of the public media service provider free of charge, with the exception of media service distribution performed by means of broadcasting transmission."<sup>188</sup>

In Lithuania, Article 33(3) of the Law on Provision of Information to the Public states that re-broadcasters and the LRT shall not pay each other for must-carry television programmes<sup>189</sup>. In Latvia, The Electronic Mass Media Law states that for the re-transmission of Must Carry services neither broadcasters nor re-transmission operators may request a fee for Must Carry<sup>190</sup>.

In Malta, Regulation 49 of the Regulations states that where Must Carry obligations place an excessive or undue burden on the operator of a particular network, the MCA will, where it deems appropriate, consider alternative measures for the General

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<sup>186</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 141.

<sup>187</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 104.

<sup>188</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 128.

<sup>189</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 145.

<sup>190</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 150.



Interest TV (GI TV) channels to be seamlessly available to all end-users of that network provided that no undue burdens are placed on end-users.

Further, when determining whether remuneration for the retransmission of the GI TV channels should be provided, the MCA will need to satisfy itself that any remuneration provided can be justified.<sup>191</sup>

In Norway, the provisions stipulate that the retransmission of TV 2 shall be based on commercial terms<sup>192</sup>. This is similar to section 60(3) of the ECA. In Poland, the law stipulates that broadcasters under Must Carry rules cannot demand fees from platform operators for the re-transmission of their services.<sup>193</sup> In the Republic of Serbia, Art. 15 of Law on Public Media Services states that the public media service broadcaster is obliged to pay fees to an operator for transmission of these services. The fee and other important issues are regulated by contract.<sup>194</sup>

In Sweden, the provider has the right to charge a reasonable service and maintenance fee for the network. However, audiences are protected from paying extra fees by section 1 of Swedish Radio and Television Act.<sup>195</sup> In Slovenia, under cable/satellite platform and terrestrial broadcasting platform, television and radio channels with the status of special importance should be must carried free-of-charge.<sup>196</sup> In the case of DTT, television and radio channels with the status of special importance are obliged to pay the proportional costs of depreciation and maintenance expenses.<sup>197</sup>

In the UK, the NTL and Crown Castle are required to provide MTS on fair and reasonable terms, conditions and charges. In terms of fair and reasonable terms, conditions and charges, OFCOM follows Article 31(2) of the Universal Service Directive which acknowledges that Member States should be able to determine

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<sup>191</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 154.

<sup>192</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 162.

<sup>193</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 167.

<sup>194</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, pp. 178 - 179.

<sup>195</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 183.

<sup>196</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 187.

<sup>197</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 189.



appropriate payment, in respect of Must Carry obligations.<sup>198</sup> OFCOM is of the view that the cost of providing MTS is substantial, therefore, for the purpose of investment in infrastructure, other operational costs should be taken into account in order to encourage innovation<sup>199</sup>, as such, it is important for transmission service providers to charge for MTS that they provide. OFCOM is of the view that this would allow a reasonable opportunity to return of investments. OFCOM does not however determine the charges for MTS, but allows these to be determined in commercial agreements.

### 3.1.5. Filing of terms and conditions

On issues of the contracts for the smooth implementation of must carry, the Authority is convinced that there should be two forms of contracts being the one for commercial negotiations between the stakeholders, and the terms of carriage that is guided by the prescribed regulations.<sup>200</sup>

The Authority decided that the Subscription Broadcasting Service Licensee must submit to the Authority a copy of the Must Carry agreements within thirty (30) days of such signed<sup>201</sup>. The Authority will not scrutinize the commercial nature of the agreements as that is left to the parties to negotiate.

In Norway, the provisions stipulate that the retransmission of TV 2 shall be based on commercial terms.<sup>202</sup>

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<sup>198</sup> Universal Services Directive <http://eur-lex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX:32002L0022&from=EN>

<sup>199</sup> Provision of Managed Transmission Services to Public Service Broadcasters **Proposal to give a Direction setting must-carry obligations on the terrestrial transmission network February 2005, page 8**

<sup>200</sup> ICASA Must carry Obligations: Position paper and Draft Regulations, published in Government gazette 31081 of 22 May 2008 page 32

<sup>201</sup> ICASA Regulations: Extent to which subscription broadcasting services must carry the television programmes provided by the Public Broadcast Service Licensee, Government Gazette 31500, published on 10 October 2008, page 8

<sup>202</sup> Council of Europe, "Access to TV platforms: must-carry rules, and access to free-DTT, p. 162.

### 3.1.6. Exemption from compliance with the regulations

The Authority considered the size of the Subscription Broadcasting Service Licensee concerned in providing exemption from compliance with the Must Carry regulations. This ensures that the financial viability of the Subscription Broadcaster will not be compromised as broadcasters are encumbered in relation to the size of their operations and the obligation is discharged equitably and fairly as amongst broadcasters.<sup>203</sup>

The obligation on the Subscription Broadcasting Service Licensee to carry television programmes of the Public Service Broadcasting Licensee is not applicable to Subscription Broadcasting Service Licensees whose service offering has twenty-nine (29) channels or less. A Subscription Broadcasting Service licensee must submit a notice requesting exemption for approval by the Authority.<sup>204</sup>

As stated above, in most countries, specifically, in Europe the must carry obligations are prescribed to comply with Article 31 of the Universal Services Directive. There are no provisions with regards to exemptions.

### 3.1.7. Monitoring compliance with the regulations

The Authority mandate the licensees to submit a compliance report annually no later than the end of June to demonstrate compliance with the Regulations.<sup>205</sup>

The benchmarking indicates that most countries encourages compliance with the relevant legislation and the Must Carry obligations.

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<sup>203</sup> ICASA Must carry Obligations: Position paper and Draft Regulations, published in Government gazette 31081 of 22 May 2008 page 34

<sup>204</sup> ICASA Regulations: Extent to which subscription broadcasting services must carry the television programmes provided by the Public Broadcast Service Licensee, Government Gazette 31500, published on 10 October 2008, page 6-7

<sup>205</sup> Ibid, page 8

### 3.2. Key Considerations for Must Carry Regulation in South Africa

Principles that can be drawn from the above research on the application of the Must Carry obligations are as follows:

- that even in a digital environment, channels or other services are provided in digital format, and are broadcast and distributed on appropriate networks; and
- Must Carry obligations are imposed to:
  - meet public interest objectives;
  - safeguard the plurality of opinion and to provide a variety of offers to the public;
  - provide access to specific public service broadcasting content such as public service television channels and free digital terrestrial television channels and specific services for the visually and hearing-impaired population to;
  - facilitate public participation in democratic public affairs;
  - preserve, protect and further develop a country's culture, and to support and sustain the languages of that nation;
  - achieve broad freedom of expression and information to the greatest possible extent;
  - satisfy the information needs of citizens and facilitate their participation in democratic public affairs and preserve diversity of opinions; and
  - provide a service to the extent to which it would otherwise have been made available even if not added.

## 4. CONCLUSION

The research undertaken shows that the Must Carry obligations in most of the countries studied aim at ensuring public access to particular content or programme services. In several countries, the free-to-air commercial broadcasters may also be included as Must Carry and not only public broadcasting services, as is the case in South Africa. Furthermore, a range of other types of channels including local, community, regional channels may also be designated Must Carry. The issue of cost

to Must Carry remains contentious as a result of the obligations placed on affected broadcasters. And hence in other countries there were legal battles and court cases that ensue over these obligations.

The key issues addressed above have been central to the broadcasting service licensees responsible for Must Carry Regulations. In the current review the Authority expects stakeholders to assess these mechanisms that have been used by the Authority and to suggest the way forward in terms of the regulation of Must Carry.

## **5. QUESTIONS**

The purpose of these questions is to solicit input from stakeholders, if any, on the imposition of the Must Carry obligations.

1. What in your view is the purpose of Must Carry in South Africa? Please substantiate.
2. What are the advantages and disadvantages of the current Must Carry Regulations to both PBS and SBS licensees?
3. Should the Authority monitor compliance with the requirement of section 60(3) on an annual basis? If yes, how should such monitoring be done in an effective manner?
4. What role, if any, should the Authority play in the negotiation of contracts for must carry?
5. Should the Authority provide a framework for commercial agreements? Please substantiate your answer. What should be the content of such a framework?
6. If the Authority should not play a role in the negotiation of contracts, what are the proposed dispute resolution mechanisms and by when should the agreement be concluded subsequent to receiving a must-offer or must-carry request.
7. What are the compliance burdens associated with Must Carry regulations if any? How can these burdens best be addressed?
8. What changes, if any, should there be in the digital environment with regard to Must Carry regulations?

9. Should the Authority continue exempting some subscription broadcasting service licensees based on the number of channels they provide? Should there be other forms of exemptions, and why?
10. What are the actual costs incurred associated with meeting the Must Carry obligations by the PBS and SBS licensees? To support assertions, kindly provide a detailed breakdown of costs for the previous 3 financial years. In your response kindly ensure the following are answered:
  - a. What are the cost drivers and associated costs for Must Carry?
  - b. What are the costs (breakdown required) to the PBS licensee for offering must carry channels?
  - c. What are the costs (breakdown required) to the SBS licensees of carrying the channels?
11. How should the costs for Must Carry be apportioned between the PBS and SBS licensees, if at all?
12. What are the costs associated with meeting the Must Carry obligations on an analogue platform versus over a digital platform?
13. Do you think Must Carry obligations should apply during the dual illumination period? What will be the impact of Must Carry during dual illumination?
14. Should the requirement be that all programmes provided by the PBS licensee channels be carried, or should there be room to elect programmes for carriage? If you advocate for the right to elect programmes to carry, what criteria should be used for such a choice?
15. What are the benefits of offering channels for Must Carry?
16. What are the benefits of carrying the public broadcasting channels?

17. Are there any other issues that the Authority will have to consider regarding the amendment of regulations on Must Carry?