**European Court of Justice, 13 December 2007, UPC cs v Belgium State**

**FREE MOVEMENT**

**Must-carry obligation**

- **Must-carry obligation acceptable when pursues an aim in the general interest, is not disproportionate, and must be subject to a transparent procedure based on objective non-discriminatory criteria known in advance.**

Article 49 EC is to be interpreted as meaning that it does not preclude legislation of a Member State, such as the legislation at issue in the main proceedings, which requires, by virtue of a must-carry obligation, cable operators providing services on the relevant territory of that State to broadcast television programmes transmitted by private broadcasters falling under the public powers of that State and designated by the latter, where such legislation:

– pursues an aim in the general interest, such as the retention, pursuant to the cultural policy of that Member State, of the pluralist character of the television programmes available in that territory, and

– is not disproportionate in relation to that objective, which means that the manner in which it is applied must be subject to a transparent procedure based on objective non-discriminatory criteria known in advance.

It is for the national court to determine whether those conditions are satisfied.

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**European Court of Justice, 13 December 2007**

(A. Rosas, U. Lõhmus, J.N. Cunha Rodrigues, A. Ó Caoimh and A. Arabadjiev)

JUDGMENT OF THE COURT (Third Chamber)

13 December 2007 (*)

*(Article 49 EC – Freedom to provide services – National legislation requiring cable operators to broadcast programmes transmitted by certain private broadcasters ('must carry') – Restriction – Overriding reason relating to the general interest – Maintenance of pluralism in a bilingual region)*

In Case C-250/06,

REFERENCE for a preliminary ruling under Article 234 EC by the Conseil d'État (Belgium), made by decision of 17 May 2006, received at the Court on 6 June 2006, in the proceedings

United Pan-Europe Communications Belgium SA,
Coditel Brabant SPRL,
Société Intercommunale pour la Diffusion de la Télévision (Brutélé),
Wolu TV ASBL
v
État belge,
intervening parties:
BeTV SA,
Tvi SA,
Télé Bruxelles ASBL,
Belgian Business Television SA,
Media ad Infinitum SA,
TV5-Monde,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, U. Lõhmus, J.N. Cunha Rodrigues, A. Ó Caoimh (Rapporteur) and A. Arabadjiev, Judges,

Advocate General: M. Poiares Maduro,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 18 April 2007,

after considering the observations submitted on behalf of:

– United Pan-Europe Communications Belgium SA, Coditel Brabant SPRL and Wolu TV ASBL, by F. de Visscher and E. Cornu, avocats,

– Belgian Business Television SA, by F. Van Elsen, avocat,

– TV5-Monde and Media ad Infinitum SA, by A. Berenboom and A. Joachimowicz, avocats,

– Télé Bruxelles ASBL, by C. Doutrelepont and V. Chapoulaud, avocats,

– the Belgian Government, by A. Hubert, acting as Agent, and by A. Berenboom and A. Joachimowicz, avocats,

– the Austrian Government, by C. Pesendorfer, acting as Agent,

– the Portuguese Government, by L. Fernandes and J. Marques Lopes, acting as Agents,

– the United Kingdom Government, by T. Harris, acting as Agent, and by G. Peretz, Barrister,

– the Commission of the European Communities, by F. Arbault and M. Shotter, acting as Agents,

after hearing the **Opinion of the Advocate General at the sitting on 25 October 2007**

gives the following

**Judgment**

1 This reference for a preliminary ruling relates to the interpretation of Articles 49 EC and 86 EC, the latter being read in conjunction in particular with Article 82 EC.

2 The reference has been made in the course of proceedings brought by United Pan-Europe Communications Belgium SA ('UPC'), Coditel Brabant SPRL, Société Intercommunale pour la Diffusion de la Télévision (Brutélé) and Wolu TV ASBL against État belge relating to the obligation imposed on them by the latter to broadcast, in the bilingual region of Brussels-Capital, television programmes transmitted by certain private broadcasters designated by the authorities of that State.

**National legislation**

3 Article 13 of the Law of 30 March 1995 concerning the distribution networks for broadcasting and the exercise of broadcasting activities in the bilingual region of Brussels-Capital (Moniteur belge of 22 February 1996, p. 3797) ('the Law of 1995') states:

'Cable operators who have a permit to operate a distribution network for broadcasts in the bilingual region of Brussels-Capital must transmit simultaneously and in their entirety the following television programmes:
– television programmes broadcast by the public service broadcasters falling under the powers of the French Community and those falling under the powers of the Flemish Community;
– television programmes broadcast by any other broadcasters of the French or Flemish Communities, as designated by the competent minister.'

4 That legislative provision was implemented by Ministerial Order of 17 January 2001 concerning the designation of the broadcasters referred to in the second indent of Article 13 of the Law of 30 March 1995 concerning the distribution networks for broadcasting and the exercise of broadcasting activities in the bilingual region of Brussels-Capital (Moniteur belge of 2 February 2001, p. 2781) ('the Order of 17 January 2001'), which is worded as follows:

'…
Whereas the must-carry regime is part of an audiovisual policy designed to enable television viewers to have access to both public service broadcasters and private broadcasters which assume public service obligations;
Whereas the aim of the must-carry regime is to safeguard the pluralistic and cultural range of programmes available on television distribution networks and to ensure that all television viewers have access to that pluralism;
Whereas this regime is unquestionably justified in the public interest;
Whereas the choice of private stations enjoying must-carry status has been made in the interest of harmonising the audiovisual landscape in Belgium;
Whereas the French Community and the Flemish Community have been consulted;
Whereas must-carry status should be granted to designated broadcasting organisations in return for significant obligations being imposed and to which they have agreed;
Whereas certain designated broadcasting organisations are entrusted with a public service task;
Whereas must-carry status must be conferred on asbl Télé Bruxelles ['Télé Bruxelles'] and vzw TV Brussel with a view to promoting the development of local television, broadcasting local news aimed at the local public;
Whereas the consequence of withdrawing must-carry status would be to jeopardise the very existence of those television broadcasting organisations which could not bear the high costs of distribution,
It is hereby ordered:
Article 1
A distributor which is authorised to operate a television distribution network in the bilingual region of Brussels-Capital is required to transmit, simultaneously and in their entirety, the television programmes of the following broadcasters:
1. Vlaamse Media Maatschappij n.v.
2. TV Brussel v.z.w.
3. Belgian business television n.v.
4. Media ad infinitum n.v.
5. TVi s.a.
6. [Télé Bruxelles]
7. Canal+ Belgique s.a. [since renamed BeTV SA]
8. Satellimages s.a.[since renamed TV5-Monde SA ('TV5-Monde')]
…'

5 The Ministerial Order of 24 January 2002 amending the Ministerial Order of 17 January 2001 designating the broadcasters referred to in the second indent of Article 13 of the Law of 30 March 1995 concerning the distribution networks for broadcasting and the exercise of broadcasting activities in the bilingual region of Brussels-Capital (Moniteur belge of 16 February 2002, p. 6066) ('the Order of 24 January 2002') added the following to Article 1 of the Order of 17 January 2001:
'9. Event TV Vlaanderen n.v.
10. YTV s.a.'

**The main proceedings and the questions referred for a preliminary ruling**

6 The applicants in the main proceedings broadcast, through their cable networks, the programmes of a number of broadcasters, particularly in the bilingual region of Brussels-Capital. The order for reference states that, through that medium, forty or so channels are available in analogue mode.

7 On 2 April 2001, those cable operators each separately brought an action before the Conseil d'État seeking the annulment of the Order of 17 January 2001. Subsequently, on 17 April 2002, they brought a joint application before the same court for the annulment of the Order of 24 January 2002.

8 By judgment of 17 May 2006, the Conseil d'État, which had joined those separate applications, dismissed the actions brought by Société Intercommunale pour la Diffusion de Télévision (Brutélé) as inadmissible on purely formal grounds. As regards the actions brought by the other three cable operators, the national court rejected the majority of their claims. However, it annulled the Order of 17 January 2001 in so far as it provided for the grant of must-carry status to TV5-Monde, on the ground that the latter, which is a company incorporated under French law established in France, appeared to be an international Francophone channel which, although an institution falling under the powers of the French Community holds a limited number of shares in it, was too remotely connected with that Community for it to be treated as 'falling under the powers of' that Community for the purposes of Article 13 of the Law of 1995, and, moreover, that there was nothing to indicate that TV5-Monde had undertaken commitments in regard to that Community in return for the benefit of the must-carry obligation.

9 As to the remainder, the Conseil d'État has determined that the proceedings before it require the interpretation of Community law.

10 Firstly, the cable operators in question argue that the contested measures grant private broadcasters with must-carry status a special right which, in breach of Ar-

ticles 3(1)(g) EC and 10 EC, as well as Articles 82 EC and 86 EC, is liable to distort competition between broadcasters and to disadvantage broadcasters established in Member States other than the Kingdom of Belgium, while BeTV SA occupies a dominant position in French-speaking Belgium on the market for pay-TV. The national court considers in that regard that the concept of 'special right' within the meaning of Article 86 EC has not been defined by the Court.

11 Secondly, those cable operators argue that the contested measures constitute an unjustified restriction, in breach of Articles 3(1)(g) EC, 49 EC and 86 EC, on freedom to provide services by restricting the number of channels available and making them more costly, while the private broadcasters having must-carry status benefit from the obligation to broadcast imposed on the cable operators when negotiating access prices with them. In that regard, the national court observes that although it is not true to say that the infrastructure used by the cable operators in question is saturated, it is, however, likely that the effect of the contested measures is to place foreign broadcasters which wish to have their programmes distributed by cable in the bilingual region of Brussels-Capital in a less favourable negotiating position than private broadcasters enjoying must-carry status.

12 In those circumstances, the Conseil d'Ėtat (Council of State) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must the obligation imposed on undertakings which distribute television programmes by cable to [broadcast] certain pre-determined programmes be interpreted as conferring on the programmes' authors a "special right" within the meaning of Article 86 [EC]?

(2) If the first question is to be answered in the affirmative, must the rules referred to at the end of Article 86(1) [EC] (namely "the rules contained in this Treaty, in particular ... those rules provided for in Articles 12 [EC] and Articles 81 [EC] to 89 [EC]") be interpreted as not permitting Member States to require undertakings which distribute television programmes by cable to [broadcast] certain television programmes transmitted by private broadcasting organisations, but "falling under" (within the meaning of [the Law of 1995]) specified public powers of that State, with the result that the number of programmes coming from other Member States or non-members of the European Union and of organisations not falling under those public powers is reduced by the number of programmes covered by the "must-carry" obligation?

3. Must Article 49 [EC] be interpreted as meaning that a prohibited restriction of the freedom to provide services exists from the time a measure taken by a Member State, in the present case the obligation to retransmit television programmes over cable distribution networks, is liable to impede directly or indirectly, actually or potentially, the provision of services from another Member State to recipients of those services in the first Member State, which will be the case where, on account of that measure, the service provider finds itself in an unfavourable position when negotiating for access to those networks?

4. Must Article 49 [EC] be interpreted as meaning that a prohibited restriction of the freedom to provide services exists because a measure taken by a Member State, in the present case the obligation to retransmit television programmes over cable distribution networks, is granted only to undertakings established in that Member State in the majority of cases, owing to the place of establishment of those benefiting from the measure or the fact that they have some other link to that Member State – while there is no justification for such a restriction based on overriding reasons relating to the general interest in compliance with the principle of proportionality?'

**The questions referred for a preliminary ruling**

**The admissibility of the first two questions, relating to Article 86(1) EC**

13 By its first two questions, the national court asks, in essence, whether Article 86 EC is to be interpreted as meaning that it precludes legislation of a Member State, such as the legislation at issue in the main proceedings, which provides that private broadcasters falling under the public powers of that State and which those powers have designated, have the right, by virtue of a must-carry obligation, to have their television programmes broadcast in their entirety by the cable operators which provide services in the relevant part of that State.

14 In that regard, it should be noted that Article 86(1) EC provides that, in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States are neither to enact nor maintain in force any measure contrary to the rules contained in the EC Treaty, in particular to those rules provided for in Article 12 EC and Articles 81 EC to 89 EC.

15 It is clear from the wording of Article 86(1) EC that it has no independent effect, in the sense that it must be read in conjunction with the other relevant rules of the Treaty (Case C-295/05 Asemfo [2007] ECR I-2999, paragraph 40).

16 The order for reference shows that the relevant provision envisaged by the Conseil d'État is Article 82 EC, according to which any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it is prohibited.

17 According to well-established case-law of the Court, the mere creation of a dominant position through the grant of special or exclusive rights within the meaning of Article 86(1) EC is not in itself incompatible with Article 82 EC. A Member State will be in breach of the prohibitions laid down by those two provisions only if the undertaking in question, merely by exercising the special or exclusive rights conferred upon it, is led to abuse its dominant position or where such rights are liable to create a situation in which that undertaking is led to commit such abuses (Case C-209/98 Sydhavnens Sten & Grus [2000] ECR I-3743, paragraph 66; Case C-475/99 Ambulanz Glöckner [2001] ECR I-8089, paragraph 39); and Case C-451/03 Servizi Au-

siliari Dottori Commercialisti [2006] ECR I-2941, paragraph 23).

18 The question accordingly arises in the main proceedings whether the legislation at issue in those proceedings, namely the Law of 1995 and the Orders of 17 January 2001 and of 24 January 2002, had the effect not only of granting the private broadcasters designated under them special or exclusive rights within the meaning of Article 86(1) EC, but also led to the abuse of a dominant position within the meaning of Article 82 EC.

19 Nevertheless, if the Court is to be in a position to give helpful answers to the questions referred to it, it is necessary for the national court to define the factual and legislative context of the questions it asks or, at the very least, to explain the factual circumstances on which those questions are based (see, to that effect, order in Case C-190/02 Viacom [2002] ECR I-8287, paragraph 15 and the case-law cited, and Case C-134/03 Viacom Outdoor [2005] ECR I-1167, paragraph 22).

20 In that regard, according to the Court's case-law, the need for precision with regard to the factual and legislative context applies in particular in the area of competition, which is characterised by complex factual and legal situations (see Case C-176/96 Lehtonen and Castors Braine [2000] ECR I-2681, paragraph 22; Viacom Outdoor, paragraph 23; and Case C-238/05 Asnef-Equifax and Administración del Estado [2006] ECR I-11125, paragraph 23).

21 In the present case, irrespective of the question whether special or exclusive rights were conferred on the private broadcasters referred to in the Orders of 17 January 2001 and 24 January 2002, neither the order for reference, nor the written observations, nor, indeed, the oral submissions made at the hearing provide the Court with the factual and legal information necessary for it to determine whether the conditions relating to the existence of a dominant position or of abusive conduct for the purposes of Article 82 EC are satisfied. In particular, the national court has not indicated on what relevant market and in what way the private broadcasters in question hold an individual or collective dominant position.

22 In those circumstances, as Belgian Business Television SA, Media ad infinitum SA, TV5-Monde, the Belgian Government and the Commission of the European Communities contend, the Court is unable to provide a useful answer to the first two questions.

23 It follows that the first two questions put by the national court must be declared inadmissible.

The third and fourth questions, relating to Article 49 EC

24 By these questions, which should be considered together, the national court asks, in essence, whether Article 49 EC is to be interpreted as precluding national legislation of a Member State, such as the legislation at issue in the main proceedings, which requires, by virtue of a must-carry obligation, cable operators providing services on the relevant territory of that State to broadcast television programmes transmitted by the private broadcasters falling under the public powers of that State and designated by them.

25 As a preliminary point, it should be noted that, contrary to what a number of interested parties have submitted in their written observations, that question cannot be examined in the light of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (OJ 2002 L 108, p. 51), Article 31 of which authorises the Member States, subject to certain conditions, to impose a must-carry obligation, inter alia as regards the transmission of television programmes.

26 As is clear from the order for reference, that directive, which is not the subject of any questions put by the Conseil d'État, has no bearing on the resolution of the main proceedings since, as UPC also pointed out at the hearing, it was not in force on the date of the adoption of the Orders of 17 January 2001 and of 24 January 2002, the validity which that court is required to review in those proceedings.

27 It follows that the third and fourth questions fall to be examined only in the light of Article 49 EC.

28 According to the well-established case-law of the Court, the transmission of television signals, including the transmission of such signals by cable television, constitutes, as such, a supply of services for the purposes of Article 49 EC (see, to that effect, Case 155/73 Sacchi [1974] ECR 409, paragraph 6; Case 52/79 Debauve and Others [1980] ECR 833, paragraph 8; Case C-23/93 TV10 [1994] ECR I-4795, paragraph 13; and Case C-17/00 De Coster [2001] ECR I-9445, paragraph 28).

29 As regards the question whether national legislation, such as the legislation at issue in the main proceedings, gives rise to a restriction which is prohibited by Article 49 EC, it should be pointed out that, again according to well-established case-law of the Court, the freedom to provide services requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where it lawfully provides similar services (see, inter alia, De Coster, paragraph 29; Joined Cases C-544/03 and C-545/03 Mobistar and Belgacom Mobile [2005] ECR I-7723, paragraph 29; Joined Cases C-94/04 and C-202/04 Cipolla and Others [2006] ECR I-11421, paragraph 56; and Case C-208/05 ITC [2007] ECR I-181, paragraph 55).

30 Furthermore, the Court has already held that Article 49 EC precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State (De Coster, paragraph 30; Mobistar and Belgacom Mo-

bile, paragraph 30; Cipolla and Others, paragraph 57; and Case C-76/05 Schwarz and Gootjes-Schwarz [2007] ECR I-0000, paragraph 67).

31 In pursuance of those rules, the right to the freedom to provide services may be relied on by an undertaking against the Member State in which it is established where the services are provided to recipients established in another Member State and, more generally, whenever a provider of services offers services in a Member State other than the one in which he is established (see, inter alia, Case C-381/93 Commission v France [1994] ECR I-5145, paragraph 14, and ITC, paragraph 56).

32 In the present case, it must be held that, as UPC rightly submits, by reason alone of the fact that they do not have must-carry status in the bilingual region of Brussels-Capital under the national legislation at issue in the main proceedings, broadcasters established in Member States other than the Kingdom of Belgium, since they do not, unlike the broadcasters which do have that status, possess an unconditional guarantee that they will be able to access the network held by the cable operators in that region, are required to negotiate conditions for such access with the latter, in competition, for that purpose, with the other broadcasters established in the Kingdom of Belgium or in other Member States which also lack that status. The fact, advanced by Télé Bruxelles and the Belgian Government at the hearing, that no broadcaster established in another Member State has applied for must-carry status is irrelevant in that regard.

33 The national legislation at issue in the main proceedings thus directly determines the conditions for access to the market for services in the bilingual region of Brussels-Capital, by imposing on the providers of services established in Member States other than the Kingdom of Belgium which are not designated under that legislation a burden which is not imposed on the providers of services designated by it. Such legislation is accordingly liable to hinder the provision of services between Member States (see, to that effect, Case C-384/93 Alpine Investments [1995] ECR I-1141, paragraph 38, and De Coster, paragraph 33).

34 It is not clear from the documents before the Court whether Article 13 of the Law of 1995 requires broadcasters to be established in Belgium in order to obtain must-carry status. Nevertheless, even if that provision were to be construed as not expressly reserving that status to broadcasters established in Belgium, since it represents, as the Belgian Government has itself stated, an instrument of cultural policy, the essential purpose of which is to guarantee Belgian citizens access to local and national news and to their own culture, it is more likely to be granted to broadcasters established in Belgium than in Member States other than Belgium.

35 By the order for reference, the Conseil d'État has, moreover, set aside the grant of must-carry status to the only broadcaster established in a Member State other than Belgium, on the ground that that body could not be considered as 'falling under the powers of' the French Community for the purposes of Article 13 of the Law of 1995. Thus, it is not in dispute that following that decision the broadcasters having that status by virtue of the Orders of 17 January 2001 and of 24 January 2002 were henceforth all established in Belgium. Moreover, at the hearing, the Belgian Government itself stated that the fact that one of the private broadcasters possessing that status recently decided to transfer its head office to another Member State is a factor which would be taken into account in determining the need to maintain that status, even if the content of the programmes broadcast by that organisation has not changed.

36 It follows that the national legislation at issue in the main proceedings therefore has the effect of making the provision of services between Member States more difficult than the provision of services purely within the Member State concerned.

37 Contrary to what the Belgian Government has argued, both in its written pleadings and at the hearing, it is irrelevant in that regard that the restrictive effects of that legislation also extend to private broadcasters established in Belgium which do not possess must-carry status in the bilingual region of Brussels-Capital. In order for legislation to constitute an obstacle to the provision of services between Member States, it is not necessary for all undertakings in a Member State to be advantaged in comparison with foreign undertakings. It is sufficient that that legislation should benefit certain undertakings established on the national territory (see, to that effect, Case C-353/89 Commission v Netherlands [1991] ECR I-4069, paragraph 25).

38 In those circumstances, it must be held that the national legislation at issue in the main proceedings constitutes a restriction on freedom to provide services within the meaning of Article 49 EC.

39 The Court has consistently held that such a restriction on a fundamental freedom guaranteed by the Treaty may be justified only where it serves overriding reasons relating to the general interest, is suitable for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it (see, inter alia, Case C-398/95 SETTG [1997] ECR I-3091, paragraph 21; Case C-6/98 ARD [1999] ECR I-7599, paragraphs 50 and 51; and Cipolla and Others, paragraph 61).

40 As regards, first, the objective pursued by the national legislation at issue in the main proceedings, the Belgian Government submits that its aim is to preserve the pluralist and cultural range of programmes available on television distribution networks and to ensure that all television viewers have access to pluralism and to a wide range of programmes, particularly by guaranteeing to Belgian citizens of the bilingual region of Brussels-Capital that they will not be deprived of access to local and national news and to their culture. That legislation thus seeks to harmonise the audiovisual landscape in Belgium.

41 In that regard, it should be noted that according to the well-established case-law of the Court, a cultural policy may constitute an overriding requirement relat-

ing to the general interest which justifies a restriction on the freedom to provide services. The maintenance of the pluralism which that policy seeks to safeguard is connected with freedom of expression, as protected by Article 10 of the European Convention on Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, which freedom is one of the fundamental rights guaranteed by the Community legal order (see Case C-288/89 Collectieve Antennevoorziening Gouda [1991] ECR I-4007, paragraph 23; Commission v Netherlands, paragraph 30; Case C-148/91 Veronica Omroep Organisatie [1993] ECR I-487, paragraph 10; and TV10, paragraph 19).

42 Consequently, it must be accepted that the national legislation at issue in the main proceedings pursues an aim in the general interest, since it seeks to preserve the pluralist nature of the range of television programmes available in the bilingual region of Brussels-Capital and thus forms part of a cultural policy the aim of which is to safeguard, in the audiovisual sector, the freedom of expression of the different social, cultural, religious, philosophical or linguistic components which exist in that region.

43 As regards, secondly, the question whether that legislation is suitable for securing the attainment of the aim pursued, it must be acknowledged, as the Advocate General rightly observed at point 13 of his Opinion, that having regard to the bilingual nature of the Brussels-Capital region national legislation, such as that at issue in the main proceedings constitutes an appropriate means of achieving the cultural objective pursued, since it is capable of permitting, in that region, Dutch-speaking television viewers to have access, via the network of cable operators broadcasting in that area, to television programmes having a cultural and linguistic connection with the Flemish Community and French-speaking television viewers to have similar access to television programmes having a cultural and linguistic connection with the French Community. Such legislation thus guarantees to television viewers in that region that they will not be deprived of access, in their own language, to local and national news as well as to programmes which are representative of their culture.

44 As regards, thirdly, the question whether the legislation at issue in the main proceedings is necessary in order to attain the aim pursued, it must be noted that, while the maintenance of pluralism, through a cultural policy, is connected with the fundamental right of freedom of expression and, accordingly, that the national authorities have a wide margin of discretion in that regard, the requirements imposed under measures designed to implement such a policy must in no case be disproportionate in relation to that aim and the manner in which they are applied must not bring about discrimination against nationals of other Member States (see, to that effect, Case C-379/87 Groener [1989] ECR 3967, paragraph 19, and Case C-112/00 Schmidberger [2003] ECR I-5659, paragraph 82).

45 In particular, such legislation cannot render legitimate discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of Community law relating to a fundamental freedom (see, to that effect, Case C-205/99 Analir and Others [2001] ECR I-1271, paragraph 37, and Case C-390/99 Canal Satélite Digital [2002] ECR I-607, paragraph 35).

46 Therefore, as the Commission points out, the award of must-carry status must first of all be subject to a transparent procedure based on criteria known by broadcasters in advance, so as to ensure that the discretion vested in the Member States is not exercised arbitrarily. In particular, each broadcaster must be able to determine in advance the nature and scope of the precise conditions to be satisfied and, where relevant, the public service obligations it is required to observe if it is to apply for that status. In that regard, the mere setting out, in the statement of reasons for the national legislation, of declarations of principle and general policy objectives cannot be considered sufficient.

47 Next, the award of must-carry status must be based on objective criteria which are suitable for securing pluralism by allowing, where appropriate, by way of public service obligations, access inter alia to national and local news on the territory in question. Thus, such status should not automatically be awarded to all television channels transmitted by a private broadcaster, but must be strictly limited to those channels having an overall content which is appropriate for the purpose of attaining such an objective. In addition, the number of channels reserved to private broadcasters having that status must not manifestly exceed what is necessary in order to attain that objective.

48 Lastly, the criteria on the basis of which must-carry status is awarded must be non-discriminatory. In particular, the award of that status must not, either in law or in fact, be subject to a requirement of establishment on the national territory (see, to that effect, Case C-211/91 Commission v Belgium [1992] ECR I-6757, paragraph 12).

49 Furthermore, even where the requirements laid down for the award of must-carry status apply without discrimination, in so far as those requirements are capable of being more easily satisfied by broadcasters established on the national territory by reason, in particular, of the content of the programmes to be transmitted, they must be essential for the attainment of the legitimate objective in the general interest which is being pursued.

50 It is for the national court, in the light of the information before it, to examine whether the national legislation at issue in the main proceedings satisfies those conditions.

51 The answer to the third and fourth questions must therefore be that Article 49 EC is to be interpreted as meaning that it does not preclude legislation, such as the legislation at issue in the main proceedings, which requires, by virtue of a must-carry obligation, cable operators providing services on the relevant territory of that State to broadcast television programmes transmitted by private broadcasters falling under the public powers of that State and designated by the latter, where such legislation:

– pursues an aim in the general interest, such as the retention, pursuant to the cultural policy of that Member State, of the pluralist character of the television programmes available in that territory, and
– is not disproportionate in relation to that objective, which means that the manner in which it is applied must be subject to a transparent procedure based on objective non-discriminatory criteria known in advance.
It is for the national court to determine whether those conditions are satisfied.

**Costs**

52 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

**On those grounds, the Court (Third Chamber) hereby rules:**

Article 49 EC is to be interpreted as meaning that it does not preclude legislation of a Member State, such as the legislation at issue in the main proceedings, which requires, by virtue of a must-carry obligation, cable operators providing services on the relevant territory of that State to broadcast television programmes transmitted by private broadcasters falling under the public powers of that State and designated by the latter, where such legislation:
– pursues an aim in the general interest, such as the retention, pursuant to the cultural policy of that Member State, of the pluralist character of the television programmes available in that territory, and
is not disproportionate in relation to that objective, which means that the manner in which it is applied must be subject to a transparent procedure based on objective non-discriminatory criteria known in advance.
It is for the national court to determine whether those conditions are satisfied.

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**OPINION OF ADVOCATE GENERAL**
**Poiares Maduro**

delivered on 25 October 2007 (1)
Case C-250/06
United Pan-Europe Communications Belgium SA
Coditel Brabant SA
Société Intercommunale pour la Diffusion de la Télévision (Brutele)
Wolu TV ASBL
v
État Belge
*(Reference for a preliminary ruling from the Conseil d'État (Belgium))*

1. The Court of Justice is asked to give a ruling in order to enable the Conseil d'État (Council of State) (Belgium) to assess the compatibility with Community law of national measures imposing must-carry obligations on operators of cable distribution networks in the region of Brussels-Capital. Although the reference for a preliminary ruling relates to competition law and freedom to provide services, I shall, for reasons that I shall set out below, address the problems raised by the referring court mainly in the light of Article 49 EC.

**I – Facts, national legal framework and reference for a preliminary ruling**

2. The applicants in the main proceedings are cable operators. Through their networks they distribute television channels in the bilingual region of Brussels-Capital. They have lodged an action before the referring court for the annulment of two orders issued by the Minister for Economic Affairs and Scientific Research on 17 January 2001 and 24 January 2002 respectively. Both orders are based on the Law of 30 March 1995 concerning the distribution networks for broadcasting and the exercise of broadcasting activities in the bilingual region of Brussels-Capital ('the Broadcasting Law').

3. Article 13 of the Broadcasting Law outlines a must-carry obligation for cable operators in the region of Brussels-Capital. It provides:
'Cable operators who have a permit to operate a distribution network for broadcasts in the bilingual region of Brussels-Capital must transmit simultaneously and in their entirety the following TV programmes:
– television programmes broadcast by the public service broadcasters falling under the powers of the French Community and those falling under the powers of the Flemish Community;
– television programmes broadcast by any other broadcasters of the French or Flemish Communities, as designated by the competent minister.'

4. The Ministerial Order of 17 January 2001 sets out the reasons for the must-carry rules and grants eight broadcasters must-carry status. Its wording is as follows:
'Whereas the must-carry regime is part of an audiovisual policy designed to enable television viewers to have access to both public service broadcasters and private broadcasters which assume public service obligations;
Whereas the aim of the must-carry regime is to safeguard the pluralistic and cultural range of programmes available on television distribution networks and to ensure that all television viewers have access to that pluralism;
Whereas this regime is unquestionably justified in the public interest;
Whereas the choice of private stations enjoying must-carry status has been made in the interest of harmonising the audiovisual landscape in Belgium;
Whereas the French Community and the Flemish Community have been consulted;
Whereas must-carry status should be granted to designated broadcasting organisations in return for significant obligations being imposed and to which they have agreed;
Whereas certain designated broadcasting organisations are entrusted with a public service task;
Whereas must-carry status must be conferred on asbl Télé Bruxelles and vzw TV Brussel with a view to promoting the development of local television, broadcasting local news aimed at the local public;

Whereas the consequence of withdrawing must-carry status would be to jeopardise the very existence of those television broadcasting organisations which could not bear the high costs of distribution,
It is hereby ordered:
Article 1
A distributor which is authorised to operate a television distribution network in the bilingual region of Brussels-Capital is required to transmit, simultaneously and in their entirety, the television programmes of the following broadcasters:
1. Vlaamse Media Maatschappij n.v.
2. TV Brussel v.z.w.
3. Belgian business television n.v.
4. Media ad infinitum n.v.
5. TVi s.a.
6. A.s.b.l. Télé Bruxelles
7. Canal+ Belgique s.a.
8. Satellimages s.a.
… ’

5. The order of 24 January 2002 amends the order of 17 January 2001 and grants must-carry status to two more broadcasters: Event TV Vlaanderen NV and YTV SA. I shall refer to the orders of 17 January 2001 and 24 January 2002 collectively as ‘the contested measures’.

6. The applicants have argued before the Conseil d’État that the award of must-carry status to certain television broadcasters constitutes a grant of special rights within the meaning of Article 86 EC, which is likely to distort competition in breach of Articles 3(1)(g), 10, 82 and 86 EC. Furthermore, the applicants have argued that the contested measures restrict the freedom to provide services by reducing the number of available channels and by exempting broadcasters with must carry-status from negotiations with the cable operators. According to the applicants, this amounts to a breach of Article 49 EC.

7. By order of 17 May 2006 the Conseil d’État referred the following questions to the Court of Justice:
‘(1) Must the obligation imposed on undertakings which distribute television programmes by cable to distribute certain pre-determined programmes be interpreted as conferring on the programmes’ authors a “special right” within the meaning of Article 86 EC?
(2) If the first question is to be answered in the affirmative, must the rules referred to at the end of Article 86(1) EC (namely “the rules contained in this Treaty, in particular ... those rules provided for in Articles 12 and Articles 81 to 89”) be interpreted as not permitting Member States to require undertakings which distribute television programmes by cable to distribute certain television programmes by private broadcasting organisations, but “falling under” (within the meaning of the Belgian Law of 30 March 1995 concerning the distribution networks for broadcasting and the exercise of broadcasting activities in the bilingual region of Brussels-Capital) specified public powers of that State, with the result that the number of programmes coming from other Member States or non-members of the European Union and of organisations not falling under those public powers has fallen by the number of programmes covered by the “must-carry” obligation?
(3) Must Article 49 EC be interpreted as meaning that a prohibited barrier to the freedom to provide services exists from the time a measure taken by a Member State, in the present case the obligation to retransmit television programmes over cable distribution networks, is liable to impede directly or indirectly, actually or potentially, the provision of services from another Member State to recipients of those services in the first Member State, which will be the case where, on account of that measure, the service provider finds itself in an unfavourable position when negotiating for access to those networks?
(4) Must Article 49 EC be interpreted as meaning that a prohibited barrier to the freedom to provide services exists because a measure taken by a Member State, in the present case the obligation to retransmit television programmes over cable distribution networks, is granted only to undertakings established in that Member State in the majority of cases, owing to the place of establishment of those benefiting from the measure or the fact that they have some other link to that Member State – while there is no justification for such a barrier based on overriding reasons of public interest in compliance with the principle of proportionality?’

**II – Assessment**

**A – The third and fourth questions**

8. I shall first address the third and fourth questions raised by the referring court. These questions essentially ask whether national measures, such as the one at issue in the main proceedings, which impose on cable operators a must-carry obligation in respect of certain broadcasters, restrict the freedom to provide services and, if so, whether such measures are none the less compatible with Community law.

9. The services at issue – the transmission of television signals by cable – clearly come within the ambit of the notion of ‘services’ within the meaning of Article 49 EC. (2) Broadcasters and cable operators have to work together in order to provide these services. In this context, they can rely on Article 49 EC to challenge national measures that treat the provision of services on a purely domestic level more favourably than the provision of services on an intra-Community level. (3) Such measures can be upheld only if they are suitable and necessary for the pursuit of a legitimate public interest and if the disparate impact on the domestic provision of services and on the intra-Community provision of services is proportionate to objective differences between those services. (4)

**Whether a restriction exists**

10. A must-carry policy such as the one at issue in the present case facilitates the distribution of the channels of broadcasters who have must-carry status, but it also works to the detriment of broadcasters who have not been granted that status. It is common ground that the cable television distribution networks under discussion have limited bandwidth. Thus, by allocating a

number of channels to broadcasters with must-carry status, the total amount of available channels on the networks is reduced accordingly. It appears from the submissions made to this Court that the analogue distribution networks at issue in the present case have a capacity of approximately 40 channels, of which approximately 20 have to be reserved for the channels of broadcasters with must-carry status. As a result, cable operators may not be able to distribute certain channels which they would have distributed, were it not for the must-carry rules. By way of example, the applicants in the main proceedings have asserted that the must-carry rules have led Coditel to remove the television channels Arte, RAI Uno and La Cinquième from its analogue network. Essentially, the beneficiaries of must-carry status have a competitive advantage, since they do not have to negotiate with cable operators and compete with other broadcasters in order to secure the distribution of their channels via cable television distribution networks.

11. It is not entirely clear from the order for reference whether Article 13 of the Broadcasting Law requires that broadcasters have to be established in Belgium in order to be eligible for must-carry status. Although the Belgian Government has argued that the award of must-carry status is not necessarily limited to broadcasters based in Belgium, the beneficiaries mentioned in the contested measures are all domestic broadcasters. Moreover, at the hearing, the Belgian Government indicated that the fact that one of these broadcasters had recently changed its place of establishment to Luxembourg would be taken into account in the forthcoming evaluation of its must-carry status, even though the contents of its programmes had not changed. In any event, since the must-carry policy aims, in the words of the Belgian Government, to 'guarantee that Belgian citizens [have] access to local and national information and to their cultural heritage', foreign broadcasters are less likely than domestic broadcasters to obtain must-carry status. In practice, therefore, must-carry rules such as those at issue in the present proceedings render access to television distribution networks more difficult for broadcasters based in other Member States than for domestic broadcasters. Even if they do not expressly require establishment within the Member State, such rules effectively treat the provision of purely domestic broadcasting services more favourably than the provision of cross-border broadcasting services. For that reason, they constitute a restriction on the freedom to provide services.

**Whether the restriction is justified**

12. The Belgian Government has emphasised that the aim of the must-carry policy is to safeguard the pluralistic and cultural character of programmes transmitted through television distribution networks in the region of Brussels-Capital and to ensure that all television viewers in that region can benefit from a pluralistic and diverse range of television programmes. The Court has already held that an audiovisual policy which is intended to establish a pluralist broadcasting system that aims to safeguard the freedom of expression and the different social, cultural, religious, philosophical or linguistic components in society, is indeed capable of justifying a restriction on the freedom to provide services. (5) However, in order to be permissible under Article 49 EC, the national measures at issue must, first and foremost, be an appropriate means of ensuring that the interest of securing pluralism is attained. (6)

13. It appears to me that the must-carry policy presently at issue has to be understood, to a large extent, against the specific background that Brussels-Capital is a bilingual region. Within this region, each cable operator covers an area, consisting of several municipalities, in which it is the sole distributor of analogue cable television. The must-carry rules can be applied to ensure that viewers in each municipality have access to channels that have a linguistic and cultural connection with the French Community, as well as to channels that have a linguistic and cultural connection with the Flemish Community. In such a setting, must-carry rules constitute a suitable means of ensuring that television viewers in a particular region have access, in their own language, to local and national information and to programmes that foster their cultural heritage.

14. A must-carry policy adopted for this purpose inevitably favours broadcasters whose programmes have a special degree of cultural proximity to the viewers in the region concerned. However, while the Treaty does not prohibit the adoption of measures that protect and promote a Member State's national cultural and linguistic heritage, such measures must not in any circumstances be disproportionate in relation to the aim pursued and the manner in which they are applied must not bring about arbitrary discrimination against service providers established in other Member States. In other words, a policy for the promotion of national cultural and linguistic heritage does not give a Member State free rein to adopt measures which grant a competitive advantage to domestic economic operators. (7)

15. In the framework of the preliminary reference procedure, the final assessment of proportionality is often left to the referring court. (8) None the less, it is important for the Court of Justice to draw attention to particular enquiries the referring court might need to make in order to exercise the review of proportionality with which it is entrusted. In the present case, there are, in my view, three aspects the referring court must verify in particular.

16. First, the referring court should make sure that, insofar as the award of must-carry status is conditional on requirements that broadcasters established in other Member States are less likely to fulfil than domestic broadcasters, these requirements are indeed necessary for the purpose of safeguarding pluralism and access to local and national information. (9) Most importantly, as the ruling in VT4 exemplifies, a broadcaster may very well provide television programmes, including news programmes, of which the contents are tailored to the public in one Member State, while being established in another Member State. (10) The referring court must therefore make certain that, in practice, the fact that a

broadcaster is established in Belgium is not a relevant factor as such for the award of must-carry status.

17. Second, the referring court should verify whether, in the light of the total number of available channels, the number of channels that has to be reserved for broadcasters with must-carry status does not manifestly exceed the number of channels necessary in order to achieve the aim of safeguarding pluralism and access to local and national information. In this context, it is incumbent upon the referring court to make sure that must-carry status is not granted unreservedly in respect of all channels of a particular broadcaster, but that it is limited to those channels that indeed contribute to that aim.

18. Third, the referring court should establish whether basic procedural safeguards are in place to prevent the award of must-carry status resulting in arbitrary discrimination. When a Member State awards must-carry status to a number of broadcasters, it must do so pursuant to transparent and non-discriminatory procedures, on the basis of clearly defined criteria that can be known in advance.

19. These three aspects also reverberate through Directive 2002/22/EC, (11) which the Member States were under a duty to implement by 25 July 2003. Article 31(1) of that directive, which essentially expresses principles that flow from the Treaty, provides that 'Member States may impose reasonable "must-carry" obligations'. It goes on to stipulate that such obligations 'shall only be imposed where they are necessary to meet clearly defined general interest objectives and shall be proportionate and transparent' and 'shall be subject to periodical review'.

20. Thus, Article 49 EC does not preclude national measures which impose a must-carry obligation on cable operators in a particular region in order to ensure that viewers in that region have access to local and national information and to programmes that foster their cultural heritage, provided that such measures are proportionate in relation to the aim pursued and that the manner in which they are applied does not bring about arbitrary discrimination against service providers established in other Member States.

**B – The first and second questions**

21. I do not propose an answer to the first and second questions. By these questions, the referring court asks whether must-carry status must be regarded as a 'special right' within the meaning of Article 86 EC and, if so, whether that provision, read in conjunction with other Treaty provisions, precludes the award of must-carry status. The applicants in the main proceedings have argued that the must-carry rules distort competition between operators of cable distribution networks and operators of other types of distribution networks. They have also argued that, by awarding must-carry status to certain undertakings, the Belgian State effectively places these undertakings in a dominant position which they are liable to abuse.

22. The order for reference, however, does not contain any indication regarding, in particular, the definition of the relevant market, the calculation of the market shares held by the various undertakings operating on that market, and the supposed abuse of a dominant position. In those circumstances, the questions of the referring court concerning the Treaty rules on competition must be held to be inadmissible. (12)

**III – Conclusion**

23. In light of the foregoing considerations, I suggest that the Court give the following answer to the questions referred by the Conseil d'État:

Article 49 EC does not preclude national measures which impose a must-carry obligation on cable operators in a particular region with the aim of ensuring that viewers in that region have access to local and national information and to programmes that foster their cultural heritage, provided that such measures are proportionate in relation to the aim pursued and that the manner in which they are applied does not bring about arbitrary discrimination against service providers established in other Member States.

It is for the referring court to establish whether the measures in question comply with the principle of proportionality. In particular, it is incumbent upon the referring court to verify that:

– in so far as the award of must-carry status is conditional on requirements that broadcasters established in other Member States are less likely to fulfil than domestic broadcasters, these requirements are necessary in order to achieve the abovementioned aim;

– the number of channels that has to be reserved for broadcasters with must-carry status does not manifestly exceed the number of channels necessary in order to achieve that aim;

– the award of must-carry status takes place pursuant to transparent and non-discriminatory procedures, on the basis of clearly defined criteria that can be known in advance.

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1 – Original language: English.

2 – See, for example, Case 155/73 Sacchi [1974] ECR 409, paragraph 6; Case 52/79 Debauve [1980] ECR 833, paragraph 8; Case C-211/91 Commission v Belgium [1992] ECR I-6757, paragraph 5; and Case C-23/93 TV10 [1994] ECR I-4795, paragraphs 13 and 16.

3 – See, to the same effect, Joined Cases C-544/03 and C-545/03 Mobistar and Belgacom Mobile [2005] ECR I-7723, paragraphs 31 to 33; Case C-205/99 Analir and Others [2001] ECR I-1271, paragraph 21; and Case C-255/04 Commission v France [2006] ECR I-5251, paragraph 37.

4 – See, to the same effect, Case C-322/01 Deutscher Apothekerverband [2003] ECR I-14887 and my Opinion in Case C-434/04 Ahokainen and Leppik [2006] ECR I-9171.

5 – Case C-288/89 Collectieve Antennevoorziening Gouda [1991] ECR I-4007, paragraphs 22 and 23; Case C-353/89 Commission v Netherlands [1991] ECR I-4069, paragraphs 3, 29 and 30; and Case C-148/91 Veronica Omroep Organisatie [1993] ECR I-487, paragraph 9.

6 – Collectieve Antennevoorziening Gouda, cited in footnote 5, paragraph 24.
7 – See, in a different context but to the same effect, Case C-379/87 Groener [1989] ECR I-3967, paragraph 19, and Case C-180/89 Commission v Italy [1991] ECR I-709, paragraph 20.
8 – See, for example, Case C-20/03 Burmanjer [2005] ECR I-4133 and Case C-441/04 A-Punkt Schmuckhandel [2006] ECR I-2093.
9 – See, for instance, Collectieve Antennevoorziening Gouda, cited in footnote 5, paragraph 24.
10 – Case C-56/96 VT4 [1997] ECR I-3143, paragraphs 8 and 22.
11 – Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (OJ 2002 L 108, p. 51).
12 – See, for instance, Case C-134/03 Viacom Outdoor [2005] ECR I-1167, paragraphs 25 to 29.