



CAEC Complaint in Brussels against Must Carry rules in the Czech Republic

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The Czech Association of Electronic Communications (CAEC), member of Cable Europe, has recently lodged a complaint to the European Commission against the Czech Republic for infringing article 31 of Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) and article 49 of the EC Treaty. Cable Europe supports this initiative. A summary of the CAEC complaint is given in this document.

I. The Complaint

The complaint is directed against the provision of the Part IV, Transitional Provisions, paragraph 9 of the Act of 1 November 2007 No. 304/2007/Sb. (Collection of Laws of the Czech Republic), which amends some acts in connection with the completion of analogue terrestrial television broadcasting switchover to digital terrestrial television broadcasting.

According to this provision, a retransmission broadcaster in a cable system¹, when creating its basic program package, must include the following channels:

- All programs not protected by conditional access system of the statutory broadcasters (currently only Česká televize), which can be received by a conventional terrestrial terminal in the location of the cable system, regardless of whether they are broadcast analogue or digitally
- Until 31 December 2011, all general interest programmes, not protected by conditional access, licensed in the Czech Republic, and available via analogue terrestrial broadcasting, including local and regional broadcasting on frequencies shared with a licensed nationwide broadcaster

The licensed broadcaster in a cable system and the retransmission broadcaster in a cable system are also obliged, if so requested by the municipality or voluntary association of municipalities, to reserve free of charge one channel for an unpaid information system serving exclusively for the purposes of the municipalities.

The amendment to the Czech Media Act entered into force on January 1st 2008 and had following consequences for UPC (with respect to cable only):

- the obligation to continue to carry the current 7 channels available via DTT in lowest digital tier;

¹ This term is defined in §2 art.1 letter h) of the Media Act as constituting operators of, in this case, a cable TV network distributing television signals to the public but lacking any broadcast licence of their own.



- the obligation to carry an additional 8 new channels (being Ocko, Z1, TV Barrandov, FEBIO TV, RTA, TV Pohoda, NOVA 2, PRIMA 2) in the lowest digital tier, as soon as such channel becomes available via DTT and is available to 70% of all Czech households;
- the obligation to carry channels that become available to 70% of all Czech households in the lowest digital tier
- Programmers are not allowed to charge UPC for the carriage of any such channels and UPC is not allowed to charge its subscribers for the receipt of such channels.

II. Compatibility with Community Law

CAEC complains that these provisions breach art.31 of the Universal Service Directive and are incompatible with Article 49 of the EC Treaty.

1. Article 31

Article 31 of the Universal Service Directive stipulates that Member States may impose reasonable Must Carry obligations where they are 'necessary' to meet 'clearly defined the general interest objectives' and shall be 'proportionate' and 'transparent'. The obligations shall be subject to 'periodical review'.

Further to this provision, the following arguments are put forward:

1. The contested provision neither regulates nor defines the general interest concept and it omits it altogether. Subjectively, general interest is here determined by the interest of a small group of private content providers, operators of digital television channels, which the act defines in the way that the must carry obligation applies to all current and any future broadcasters of all nationwide terrestrial digital programs not protected by the conditional access system.
2. The contested provision sets non proportionate must carry obligations because it applies to all nationwide terrestrial digital programs not protected by the conditional access system, which are broadcast by the nationwide broadcaster under a license for nationwide digital terrestrial television broadcasting or under a compensation license, regardless of whether these entities already exist and supply the content, or exist formally but do not supply the content yet, or will only emerge some time in the future.
3. The contested must carry rules are not transparent, as there is no decision making process in place to arrive at the must carry obligation.
4. The contested provision does not provide for periodical reviews of the must carry provisions.



2. Article 49

Using the European Court of Justice ruling of 13th January 2007 regarding Belgian must carry regulations², the complaint argues that section 9 of the Czech Act violates the principles embedded in this ECJ ruling:

1. There is no transparent procedure based on criteria that are known in advance to the television broadcasting entities because some entities, to which the "must carry" status is granted generally and without any restrictions, have not started broadcasting and have not even obtained the license; this creates a precondition for arbitrary exercise of the assessing power by the Czech Republic as a member state.
2. The granting of the must carry status in the Czech law is not based on objective criteria suitable for ensuring pluralism and allows access mainly to domestic and local news channels when this access is sufficiently provided even without must carry status.
3. The criteria, according to which the must carry status is granted, is openly discriminatory, and it damages and unilaterally disadvantages the retransmission broadcasters in a cable system.
4. Lastly, the contested provision does not fulfil the objective of general interest, which is the preservation of pluralistic character of the television program offer conformed to the cultural policy of the member state, and is disproportionate with respect to this objective.

III. Conclusion

The Czech provision does not comply with the provisions of art.31 of the Universal Service Directive and art. 49 of the EC Treaty in particular because it does not fulfil clearly defined general interest objectives; the must carry obligation was imposed directly by the law without allowing for periodical reviews and was set without observing the requirement that it should target the electronic communications networks used for the distribution of radio or television broadcasts to the public where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcasts.

CAEC therefore requests the Commission to pursue this matter with the Czech authorities with the aim of securing conformity between Czech law and Community law.

Cable Europe 4829

² Verdict of the Court of Justice (Third Senate) dated 13 December 2007 in case C-250/06, the subject of which is the request for decision on a preliminary question based on article 234 ES, filed by the decision of Conseil d'État (Belgium) of 17 May 2006, delivered to the Court of Justice on 6 June 2006.