JUDGMENT OF THE COURT (Third Chamber)

3 March 2011 *

In Case C-134/10,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 15 March 2010,

European Commission, represented by A. Nijenhuis and C. Vrignon, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Belgium, represented by M. Jacobs and T. Materne, acting as Agents,

defendant,

* Language of the case: French.

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta, G. Arestis (Rapporteur), J. Malenovský and T. von Danwitz, Judges,

Advocate General: P. Cruz Villalón,
Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its application, the European Commission seeks a declaration from the Court that, by failing to transpose correctly Article 31 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), the Kingdom of Belgium has failed to fulfil its obligations under that directive and Article 56 TFEU.

Legal context

European Union ('EU') law

2 Recital 43 in the preamble to the Universal Service Directive states:

'Currently, Member States impose certain "must carry" obligations on networks for the distribution of radio or television broadcasts to the public. Member States should be able to lay down proportionate obligations on undertakings under their jurisdiction, in the interest of legitimate public policy considerations, but such obligations should only be imposed where they are necessary to meet general interest objectives clearly defined by Member States in conformity with Community law and should be proportionate, transparent and subject to periodical review. "Must carry" obligations imposed by Member States should be reasonable, that is they should be proportionate and transparent in the light of clearly defined general interest objectives, and could, where appropriate, entail a provision for proportionate remuneration. Such "must carry" obligations may include the transmission of services specifically designed to enable appropriate access by disabled users.'

3 Article 31 of the Universal Service Directive provides:

'1. Member States may impose reasonable "must carry" obligations, for the transmission of specified radio and television broadcast channels and services, on undertakings under their jurisdiction providing 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. Such obligations shall only be imposed where they are necessary to meet clearly defined general interest objectives and shall be proportionate and transparent. The obligations shall be subject to periodical review.

2. "Neither paragraph 1 of this Article nor Article 3(2) of Directive 2002/19/EC (Access Directive) [(OJ 2002 L 108, p. 7)] shall prejudice the ability of Member States to determine appropriate remuneration, if any, in respect of measures taken in accordance with this Article while ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks. Where remuneration is provided for, Member States shall ensure that it is applied in a proportionate and transparent manner".

National legislation

4 Article 13 of the Law of 30 March 1995 concerning distribution networks for broadcasting and carrying on broadcasting activities in the bilingual region of Brussels-Capital (*Moniteur belge* of 22 February 1996, p. 3797), as amended by the Law of

16 March 2007 (*Moniteur belge* of 5 April 2007, p. 19229) ('the Law of 30 March 1995'), states:

'In order to guarantee plurality and cultural diversity, an operator 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 falling under the powers of the French or Flemish Communities, as designated by the King in an Order adopted by the Council of Ministers;

— television programmes broadcast by the public service broadcasters falling under the powers of the German Community, and designed by the King in an Order adopted by the Council of Ministers. The Minister responsible for that Order shall determine, after obtaining the opinion of the Institute [the Belgian Institute for Postal Services and Telecommunications], the methods of such broadcasting (where necessary via a shared channel);

— television programmes broadcast for Brussels-Capital which are broadcast by the regional broadcasters authorised by the French Community and the Flemish Community, taking account of their areas of transmission.

The Institute shall periodically monitor the need for the requirements referred to in the preceding subparagraph. Should the Institute consider that it is no longer necessary to maintain those requirements, it shall clearly state so in the annual report referred to in Article 34 of the Law of 17 January 2003 on the statute of the regulator of the Belgian postal and telecommunications sectors.

On the basis of the Institute's opinion, the Minister may provide that an operator shall be relieved of the requirements of that article.

An operator seeking to benefit from this dispensation shall send a reasoned request to the Institute, demonstrating the existence of at least one of the following factors:

(a) it is technically not possible for the operator;

(b) there are not enough end-users of the network who use it as their principal means of receiving television programmes so that the investment required to resolve the technical unfeasibility is unreasonable.

The Institute shall communicate its opinion to the Minster no later than six weeks after receipt of that request. That time-limit shall be suspended if the Institute considers that additional information is required from the operator.

If, on expiry of that period, the Institute has not given an opinion to the Minister, the Institute shall be deemed to have given a favourable opinion.'

The pre-litigation procedure

5 On 28 April 2006, the Commission sent a letter of formal notice to the Kingdom of Belgium expressing its doubts concerning the compatibility of Article 13 of the Law of 30 March 1995, in its original version, with Article 31(1) of the Universal Service Directive as well as with Article 49 EC.

6 By letter dated 5 October 2006, after contesting the complaints raised by the Commission, the Kingdom of Belgium informed the Commission that a review of the system for awarding 'must-carry' status in the Brussels-Capital region was required in the near future.

7 Following the notification by the Belgian authorities of amendments to Article 13 of the Law of 30 March 1995 introduced by the Law of 16 March 2007, the Commission by supplementary letter of formal notice of 27 June 2007 reiterated its doubts as regards the compatibility of those new provisions with Article 31(1) of the Universal Service Directive and with Article 49 EC. The Commission invited the Kingdom of Belgium to submit its observations within two months of receipt of that letter.

8 By letter of 1 August 2007, the Kingdom of Belgium requested an extension of the period prescribed for its reply in stating its intention to take the necessary action in response to the letter of formal notice, if need be by adapting the legislation. However, it pointed out its internal problems of an institutional nature to the Commission. The Commission granted an extension of the period for replying until 29 October 2007. A new request for an extension of that period that was sent to the Commission on 26 October 2007, relying on the same grounds, was rejected by the Commission.

9 By letter of 8 May 2008, the Commission issued a reasoned opinion to the Kingdom of Belgium inviting it to take the necessary measures to comply with that opinion within a period of two months from the date of its receipt.

10 The Kingdom of Belgium replied by letter dated 4 July 2008, claiming that the new legislation was compatible with Community law.

11 By supplementary reasoned opinion of 1 December 2008, the Commission, relying on the judgment in Case C-250/06 *United Pan-Europe Communications Belgium and Others* [2007] ECR I-11135, reiterated its assertion that the Belgian legislation did not meet the criteria of transparency and non-discrimination referred to in that judgment.

12 By letter dated 16 January 2009, the Kingdom of Belgium responded to the supplementary reasoned opinion by claiming that, following annulment by the Council of State (Conseil d'Etat) (Belgium) of the Ministerial Order on the designation of television stations covered by 'must-carry' status, no private broadcaster possessed that 'must-carry" status and that, therefore, the Kingdom of Belgium has complied with Article 31(1) of the Universal Service Directive.

13 As it was not satisfied with the Kingdom of Belgium's reply, the Commission brought the present action.

The action

Admissibility

Arguments of the parties

14 The Kingdom of Belgium contends that the action is inadmissible on three grounds.

15 First, Article 31(1) of the Universal Service Directive introduces only a mere option for Member States to impose 'must-carry' obligations. Since Article 258 TFEU relates only to a failure to fulfil an obligation, the conditions required by that article in order to bring an action for failure to fulfil obligations before the Court are not met.

16 Next, the Kingdom of Belgium claims that the present action is purely hypothetical. The national provisions referred to by the Commission cannot amount to a failure to fulfil obligations, since the Kingdom of Belgium did not apply them in an effective manner. According to that Member State, the procedure for designating television broadcasters benefiting from 'must-carry' status has not been used.

17 Finally, the Kingdom of Belgium claims that the third complaint relied upon by the Commission in its action, that that Member State did not restrict the 'must-carry' obligation to network operators which have a significant number of end-user subscribers, was raised for the first time at the stage of the application initiating proceedings. Consequently, the grounds in the pre-litigation procedure and in the

above-mentioned application were not identical, which prevented the Kingdom of Belgium from defending itself.

18 The Commission contends that the mere fact that the Kingdom of Belgium transposed Article 31(1) of the Universal Service Directive into national law eliminates the argument that this provision creates an option for the Member States, rather than imposing an obligation on them. Moreover, as regards the argument that the current action is purely hypothetical, the fact that the law implementing that provision has not been applied does not suffice to render that law compatible with EU law.

19 As regards the lack of identical grounds in the letter of formal notice, the reasoned opinion and the application initiating proceedings, the Commission states that such a plea of non-admissibility applies only to the relevant complaint and not to the entirety of the application. In any event, that complaint had already been put forward in the further letter of formal notice, the reasoned opinion and the additional reasoned opinion, and the amendment of its heading gives an indication of a restriction of the subject-matter of the complaint, allowed by the case-law of the Court, having regard to the withdrawal of one of the two parts of that complaint.

Findings of the Court

20 It is to be borne in mind that the Commission alleges that the Kingdom of Belgium failed to fulfil its obligations under the Universal Service Directive, having regard to the incorrect transposition of Article 31 of the latter.

21 As the Kingdom of Belgium points out, Article 31 introduces a mere option for Member States to adopt legislation providing for the imposition of 'must-carry' obligations to broadcast certain channels. However, in the present case it is common ground that the Belgian legislation, more specifically, the second indent of the first paragraph of Article 13 of the Law of 30 March 1995, provides that certain designated channels should benefit from 'must-carry' obligations. In this way, contrary to what it claims, the Kingdom of Belgium exercised that option by virtue of the existence of legislation transposing Article 31 of the Universal Service Directive into national law. The complaints raised by the Commission concern, inter alia, the question whether the transposition carried out by the Kingdom of Belgium is compatible with EU law.

22 As regards the argument that the present action is purely hypothetical, given that the Kingdom of Belgium has not effectively applied the second indent of the first paragraph of Article 13 of the Law of 30 March 1995, for no broadcaster to date has been the subject of the 'must-carry' obligation, it need merely be observed that such a fact cannot render that provision compatible with EU law.

23 So far as concerns the fact that the grounds relied on in the pre-litigation procedure and those relied on in the application are not identical, the fact remains that the Commission has actually amended the heading of its third complaint and withdrawn one of the two parts of that complaint.

24 First, however, the Court has already found that it is possible to limit the subject-matter of the proceedings at the stage of the proceedings before the Court (see, in particular, Case C-221/04 *Commission* v *Spain* [2006] ECR I-4515, paragraph 33; and judgment of 14 June 2007 in Case C-148/05 *Commission* v *Ireland*, not published in the ECR, paragraph 35.

25 Second, it is common ground that the part of the third complaint which was retained at the stage of the application initiating proceedings appears to be referred to both in the supplementary letter of formal notice and in the reasoned opinion and the supplementary reasoned opinion. The Kingdom of Belgium cannot therefore reasonably argue that that complaint was relied upon for the first time before the Court and that the Kingdom of Belgium was unable to avail itself of its right to defend itself in that respect.

26 Consequently, it is apparent from the foregoing considerations that the present action must be declared admissible.

Substance

Arguments of the parties

27 The Commission raises three complaints in support of its action.

28 The first complaint relates to the lack of general interest objectives clearly defined in the national legislation at issue. The Commission takes the view that that legislation refers to those general-interest objectives in very vague and general terms and that the specific criteria used by the national authorities to select the television broadcast channels to enjoy 'must-carry' status are not specified in that legislation itself or in the preparatory documents to that legislation.

29 Indeed, according to the Commission, only the recitals to the national legislation at issue state that, when the list of television broadcasters enjoying 'must-carry' status was drawn up, the general-interest objective pursued by that legislation had to be precisely described. The Commission recalls that, following *United Pan-Europe Communications Belgium and Others,* which specifically assessed whether Article 56 TFEU precluded Article 13 of the Law of 30 March 1995, in its initial version, the Ministerial Order of 17 January 2001 designating the television broadcasters enjoying 'must-carry' status was annulled by the judgment of the Council of State of 14 July 2008 on the ground, in particular, that the criteria relied upon by the public authorities were not known in advance.

30 By its second complaint, the Commission alleges that the procedure for granting 'must-carry' status under the second indent of the first paragraph of Article 13 of the Law of 30 March 1995 does not observe the principle of transparency.

31 First, the Kingdom of Belgium did not supply any additional information apart from that concerning the adopting of the Ministerial Order of 17 January 2001. Accordingly, without any objective criteria guaranteeing the essential minimum of transparency and legal certainty, the public authorities enjoyed a very broad discretion which could potentially be used in an arbitrary manner.

32 Next, the Commission maintains that the lack of transparency is made all the more apparent because the 'must-carry' obligation seems to apply to broadcasters, and therefore, in an unspecified manner, to all the television channels they broadcast, rather than to channels individually designated as such on account of the actual content of their televised programmes. Relying on *United Pan-Europe Communications Belgium and Others*, the Commission maintains that the word 'specified' used in

Article 31(1) of the Universal Service Directive must be interpreted as meaning that the 'must-carry' status is strictly limited to television broadcasters whose entire programme content is capable of attaining the proposed general interest objective.

33 Finally, it is apparent from that judgment that the criteria on the basis of which 'must-carry' status is awarded must be non-discriminatory and that the award of that status cannot be subject to a requirement of establishment in the national territory. According to the national legislation at issue, the 'must-carry' obligation concerns only the programmes broadcast by broadcasters falling under the powers of the French and Flemish Communities. Accordingly, the Commission takes the view that the exclusion of broadcasters established in the territory of another Member State, without specific justification, is contrary to Article 56 TFEU not only because it is discriminatory and restrictive in scope, but also because it lacks transparency and, thereby, breaches Article 31 of the Universal Service Directive.

34 By its third complaint, the Commission alleges that the scope of Article 31 of the Universal Service Directive was disregarded. It is clear from Article 13 of the Law of 30 March 1995 that, in contrast to the requirements of the provisions of the Universal Service Directive, a network operator that does not have a significant number of end-users who use that network as their principal means of receiving radio and television broadcasts is in principle subject to 'must-carry' obligations, unless a derogation is granted by the Minister.

35 The Kingdom of Belgium contests the allegation that it has failed to fulfil its obligations.

36 That Member State claims that the award of 'must-carry' status under its legislation is compatible with the principle of freedom to provide services. Indeed, that scheme applies only to Belgian broadcasters, established in the bilingual region of Brussels-Capital, and not to broadcasters established in other Member States.

37 According to the Kingdom of Belgium, that scheme does not constitute an advantage bestowed on national broadcasters to the detriment of broadcasters established in other Member States since the broadcasting obligation is awarded in return for significant obligations towards the Belgian Community entered into by the national broadcasters concerned. Moreover, in the Kingdom of Belgium's view, broadcasters established in other Member States, first, do not seek to benefit from the 'must-carry' obligation in the Brussels region, for television viewers in Brussels are not their target audience and second, they benefit from this obligation in their Member State of origin as well as from the freedom to broadcast in the Brussels region, in accordance with Article 14 of the Law of 30 March 1995. Besides, those broadcasters have other technical means available to have their programmes retransmitted.

38 The Kingdom of Belgium maintains that, in any event, if the scheme for the award of 'must-carry' status established under the national legislation at issue should be considered as a restriction of the freedom to provide services, it would be justified by overriding general interest reasons.

39 Indeed, that scheme is part of an audiovisual policy intended to enable television viewers to access local public service television broadcasters, or broadcasters that assume public service obligations. Its aim is to safeguard the pluralistic and cultural range of programmes available on cable networks and to ensure that all television viewers have access to that pluralism.

40 Moreover, as regards the compatibility of the 'must-carry' obligations under Article 13 of the Law of 30 March 1995 with the Universal Service Directive, the Kingdom of Belgium maintains that those apply only to the public service broadcasters falling under the powers for the French and Flemish Communities as well as to nearby television channels. The Kingdom of Belgium claims that it has not used that option to designate other broadcasters; accordingly, it cannot be alleged to have failed to fulfil its obligations.

41 Finally, the Kingdom of Belgium claims that the general interest objectives of its legislation are clearly defined in the Law of 30 March 1995 itself, since the legislation seeks to ensure pluralism and cultural diversity, and that the award of 'must-carry' status is subject to a clear and transparent procedure, which is determined by that law.

Findings of the Court

42 It must be noted from the outset that the designation of certain television channels as being subject to the 'must-carry' obligation, under Article 13 of the Law of 30 March 1995, constitutes a restriction of the freedom to provide services within the meaning of Article 56 TFEU, as the Court has already held, in relation to that designation made by Ministerial Order for certain private broadcasters under the initial version of that national provision, in *United Pan-Europe Communications Belgium and Others,* paragraphs 28 to 38.

43 The Court has consistently held that such a restriction of a fundamental freedom guaranteed by the Treaty may be justified 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 (*United Pan-Europe Communications Belgium and Others*, paragraph 39 and the case-law

cited). It is in the same vein that Article 31(1) of the Universal Service Directive allows Member States to impose reasonable 'must-carry' obligations where they 'are necessary to meet clearly defined general interest objectives' and requires them to be 'proportionate and transparent'.

44 Here, the objective pursued, identified in Article 13 of the Law of 30 March 1995, is to ensure plurality and cultural diversity. According to the well-established case-law of the Court, and as the Commission acknowledges in the present case, a cultural policy may constitute an overriding requirement relating to the general interest which justifies a restriction of the freedom to provide services (see, to that effect, *United Pan-Europe Communications Belgium and Others*, paragraph 41 and the cited case-law).

45 However, the Commission raises the question of the proportionality of the Law of 30 March 1995 and, more specifically, the appropriate nature of the procedure and the criteria used for designating the broadcasters benefiting from the 'must-carry' obligation.

46 The Kingdom of Belgium maintains that its authorities have not used the option to designate other broadcasters, other than those falling under the public services of the French and Flemish Communities and also those for local television channels, which are not affected by the present action for failure to fulfil obligations.

47 In this respect, it must be noted that, in actual fact, it is apparent from the Commission's application, read as a whole, and in particular the numerous references to the second indent of the first paragraph of Article 13 of the Law of 30 March 1995, as well as *United Pan-Europe Communications Belgium and Others,* which concerns

the conformity with EU law of a measure implementing Article 13, that the scope of the present action is limited to the designation, made by order, of programmes of those private broadcasters in accordance with the second indent of the first paragraph of Article 13. Accordingly, the Commission's argument, based on the fact that the second indent of the first paragraph of Article 13 of the Law of 30 March 1995 itself provides that television programmes broadcast by public service broadcasters falling within the powers of the French or the Flemish Community are subject to the 'must-carry' obligation, is irrelevant, for that provision is not the subject of a specific argument in the application and must therefore be considered not to be affected by that application.

48 However, it must be noted that Article 13 of the Law of 30 March 1995 seeks to ensure the transposition of Article 31 of the Universal Service Directive and that the second indent of its first paragraph specifically provides for the designation of those other, private, broadcasters, as beneficiaries of the 'must-carry' obligation.

49 Consequently, in so far as it is the manner in which the Universal Service Directive is transposed into national legislation which is the subject-matter of the action for failure to fulfil obligations, it is appropriate to determine whether the wording of the legislation itself harbours the insufficiencies or defects of transposition (see, to that effect, Case C-392/96 *Commission* v *Ireland* [1999] ECR I-5901, paragraphs 59 and 60; judgment of 20 November 2008 in Case C-66/06 *Commission* v *Ireland*, not published in the ECR, paragraph 59; and judgment of 12 February 2009 in Case C-475/07 *Commission* v *Poland*, not published in the ECR, paragraph 54).

50 As regards the first complaint concerning the lack of general interest objectives clearly defined in Article 13 of the Law of 30 March 1995, it must be recalled that, in accordance with the second sentence of Article 31(1) of the Universal Service Directive,

'must-carry' obligations may be imposed only where they are necessary to meet clearly defined general interest objectives and are to be proportionate and transparent.

51 Recital 43 of the Universal Service Directive provides that Member States should be able to lay down proportionate obligations on undertakings under their jurisdiction, in the interest of legitimate public policy considerations, but such obligations should only be imposed where they are necessary to meet general interest objectives clearly defined by Member States in conformity with Community law and should be proportionate, transparent and subject to periodical review.

52 Although it is true that the first line of Article 13 of the Law of 30 March 1995 provides that an operator is, in order to guarantee plurality and cultural diversity, to transmit, simultaneously and in their entirety, the television programmes of certain broadcasters falling under the powers of the Belgian Communities. Moreover, as the Court has held, the Law of 30 March 1995 thus pursues a cultural general interest objective which is, moreover, suitable for securing the attainment of the aim pursued (*United Pan-Europe Communications Belgium and Others*, paragraphs 42 and 43).

53 However, in the context of an interpretation of Article 56 TFEU, the Court has held, as regards the question whether the earlier version of the second indent of the first paragraph of Article 13 of the Law of 30 March 1995 is necessary in order to attain the aim pursued, 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 (*United Pan-Europe Communications Belgium and Others*, paragraph 44).

Accordingly, 'must-carry' status must be strictly limited to those channels having an overall content which is capable of attaining the general interest objective pursued (see, to that effect, *United Pan-Europe Communications Belgium and Others*, paragraph 47 and Case C-336/07 *Kabel Deutschland Vertieb und Service* [2008] ECR I-10889, paragraph 42).

54 Clearly, the mere statement of a general policy objective, which is not accompanied by any additional factor capable of enabling operators to determine in advance the nature and effect of the precise conditions and obligations to be fulfilled if they apply for the award of 'must-carry' status, does not permit these requirements to be met.

55 Consequently, it must be held that the second indent of the first paragraph of Article 13 of the Law of 30 March 1995 does not clearly define the actual criteria relied upon by the national authorities to select the television broadcasters benefiting from the 'must-carry' obligation and that that provision is not, therefore, sufficiently precise to ensure that the broadcasters thus selected are those whose content, in its entirety, is capable of meeting the general interest cultural objective pursued.

56 The first complaint raised by the Commission in support of its action is therefore well founded.

57 By its second complaint, the Commission alleges that the Kingdom of Belgium in its procedure for awarding 'must-carry" status under the second indent of the first

paragraph of Article 13 of the Law of 30 March 1995 has not observed the principle of transparency under Article 31(1) of the Universal Service Directive, having regard to the lack of criteria relied on for awarding 'must-carry' status, the failure to specify which television broadcasters benefit from that status and the ambiguity as to the requirement to be established on Belgian territory.

58 It should be noted, first of all, that Article 13 of the Law of 30 March 1995 designates those broadcasters whose programmes are to benefit from the 'must-carry' obligation. The second indent of the first paragraph of that article refers to any non-public television broadcaster falling under the powers of the French and Flemish Communities, which the King designates in an Order adopted by the Council of Ministers.

59 In that respect, Article 13 does not specify any objective criteria known in advance relied upon by the Belgian authorities in order to designate the programmes of those broadcasters benefiting from the 'must-carry" obligation. In actual fact, that very provision states only that the King designates by the Order adopted by the Council of Ministers which of those organisations shall benefit from that obligation.

60 In those circumstances, the criteria to be met for the award of 'must-carry' status are unknown to the non-public television broadcasters capable of benefiting from the 'must-carry' obligation. Consequently, such a procedure does not observe the principle of transparency, as provided for in Article 31(1) of the Universal Service Directive.

61 Next, it follows from the first sentence of Article 31(1) of the Universal Service Directive that Member States may impose 'must-carry' obligations on operators of electronic communications networks for transmitting specified radio and television broadcasts or services.

62 As regards the specified nature of the radio and television channels which may be covered by 'must-carry' status, the Court has already held that it is apparent from the wording of Article 31(1) of the Universal Service Directive that Member States must specify which channels are to be granted 'must carry' status (see *Kabel Deutschland Vertrieb und Service*, paragraph 24).

63 Furthermore, the Court has held that 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 capable of attaining the general interest objective pursued (see *United Pan-Europe Communications Belgium and Others*, paragraph 47; and *Kabel Deutschland Vertieb und Service*, paragraph 42).

64 According to the wording of the second indent of the first paragraph of Article 13 of the Law of 30 March 1995, it is conceivable that the King may designate, as benefiting from the 'must-carry' obligation, non-public broadcasters coming under the powers of the French and Flemish Communities, so that all the programmes broadcast by those broadcasters would automatically benefit from that obligation irrespective of the overall content of those programmes and their ability to meet the legitimate general interest objectives pursued by the national legislation at issue.

65 It follows that the second indent of the first paragraph of Article 13 of the Law of 30 March 1995 does not prescribe in a sufficiently clear manner that the benefit of the 'must-carry' status may be awarded only to those television channels specified, as required by Article 31(1) of the Universal Service Directive.

66 Lastly, it must be noted that 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 in the national territory (*United Pan-Europe Communications Belgium and Others*, paragraph 48).

67 In that respect, as the Commission has alleged, without being contradicted on this point by the Kingdom of Belgium, the requirement under the second indent of the first paragraph of Article 13 of the Law of 30 March 1995, that non-public broadcasters must fall under the powers of the Belgian Community, does not render it impossible that the award of 'must-carry' status requires, in law and in fact, those broadcasters to be established in Belgium.

68 In any event, that requirement is not sufficient to satisfy the condition of transparency under Article 31(1) of the Universal Service Directive. It is not clear from the second indent of the first paragraph of Article 13 of the Law of 30 March 1995 what the effect of the requirement is that non-public broadcasters must fall under the powers of the Belgian Community in order to benefit from 'must-carry' status.

69 In that respect, the Kingdom of Belgium has not explained what it means by broadcasters coming under the powers of its Communities.

70 It follows that the second complaint advanced by the Commission in support of its action is also well founded.

71 The Commission's third complaint relates to disregard of the scope of Article 31 of the Universal Service Directive on the ground that Article 13 of the Law of 30 March 1995 did not confine the 'must-carry' obligation to operators of electronic communications networks which have a significant number of end-user subscribers.

72 Subparagraph (b) of the fourth paragraph of Article 13 of that law permits the Minister, on the advice of the Institute, to relieve an operator of the 'must-carry' obligations if it does not have sufficient end-users of the network who use it as their principal means of receiving broadcast television programmes so that the necessary investment required to remove the technical problem would be unreasonable.

73 The 'must-carry' obligations arising from Article 31(1) of the Universal Service Directive may be imposed on operators of electronic communications networks only where a significant number of end-users of those networks use them as their principal means of receiving radio and television programmes.

74 In those circumstances, subparagraph (b) of the fourth paragraph of Article 13 of the Law of 30 March 1995 does not correctly transpose the requirement under Article 31(1) of the Universal Service Directive. The option for the Belgian authorities to relieve network operators of their 'must-carry' obligations if the number of end-users who use that network as their principal means of receiving broadcast television programmes is not sufficient to permit those authorities, in the event of refusing that dispensation, to impose those obligations on those operators. Furthermore, the operator concerned must prove that the conditions for obtaining the dispensation have been met.

75 Accordingly, as the 'must-carry' obligations under Article 31 of the Universal Service Directive can refer only to network operators that have a sufficient number of end users who use that network as their principal one, it follows that subparagraph (b) of the fourth paragraph of Article 13 of the Law of 30 March 1995 does not correctly transpose Article 31(1) of the Universal Service Directive.

76 In those circumstances, it must, therefore, be held that the third complaint raised by the Commission in support of its action is well founded.

77 Consequently, it follows from all the foregoing that, by failing correctly to transpose Article 31 of the Universal Service Directive, the Kingdom of Belgium has failed to fulfil its obligations under the provisions of that Directive and Article 56 TFEU.

Costs

78 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has asked that the Kingdom of Belgium be ordered to pay the costs and the latter has been unsuccessful in its defence, the Kingdom of Belgium must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby

1. **Declares that, by failing correctly to transpose Article 31 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'), the Kingdom of Belgium has failed to fulfil its obligations under the provisions of that Directive and Article 56 TFEU.**

2. **Orders the Kingdom of Belgium to pay the costs.**

[Signatures]