JUDGMENT OF THE COURT (Fourth Chamber)

22 December 2008 *

In Case C-336/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Verwaltungsgericht Hannover (Germany), made by decision of 14 June 2007, received at the Court on 19 July 2007, in the proceedings

Kabel Deutschland Vertrieb und Service GmbH & Co. KG

v

Niedersächsische Landesmedienanstalt für privaten Rundfunk,

intervening parties:

Norddeutscher Rundfunk,

Zweites Deutsches Fernsehen,

* Language of the case: German.

ARTE GEIE,

Bloomberg LP,

Mitteldeutscher Rundfunk,

MTV Networks Germany GmbH, successor in law to VIVA Plus Fernsehen GmbH,

VIVA Music Fernsehen GmbH & Co. KG,

MTV Networks Germany GmbH, successor in law to MTV Networks GmbH & Co. oHG,

Westdeutscher Rundfunk,

RTL Television GmbH,

RTL II Fernsehen GmbH & Co. KG,

VOX Film und Fernseh-GmbH & Co. KG,

RTL Disney Fernsehen GmbH & Co. KG,

SAT. 1 Satelliten-Fernsehen GmbH and Others,

Regio.TV GmbH,

Eurosport SA,

TM-TV GmbH & Co. KG,

ONYX Television GmbH,

Radio Bremen,

Hessischer Rundfunk,

Nederland 2,

Hamburg 1 Fernsehen Beteiligungs GmbH & Co. KG,

Turner Broadcasting System Deutschland GmbH,

n-tv Nachrichtenfernsehen GmbH & Co. KG,

Bayerischer Rundfunk,

Deutsches Sportfernsehen GmbH,

NBC Europe GmbH,

BBC World,

Mediendienst Borkum — Kurverwaltung NSHB Borkum GmbH,

Friesischer Rundfunk GmbH,

Home Shopping Europe GmbH & Co. KG,

Euro News SA,

Reise-TV GmbH & Co. KG,

SKF Spielekanal Fernsehen GmbH,

TV 5 Europe,

DMAX TV GmbH & Co. KG, formerly XXP TV — Das Metropolenprogramm GmbH & Co. KG,

RTL Shop GmbH,

THE COURT (Fourth Chamber),

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

Advocate General: M. Poiares Maduro,
Registrar: R. Seres, Administrator,

having regard to the written procedure and further to the hearing on 2 October 2008,

after considering the observations submitted on behalf of:

— Kabel Deutschland Vertrieb und Service GmbH & Co. KG, by H.-J. Niemeyer and W. Spoerr, Rechtsanwälte,

— the Niedersächsische Landesmedienanstalt für privaten Rundfunk, by A. Fischer, acting as Agent, and by C. Krebs, jurist,

— DMAX TV GmbH & Co. KG, formerly XXP TV — Das Metropolenprogramm GmbH & Co. KG, by A. Luedtke and P. Kempermann, Rechtsanwälte,

— Eurosport SA, by M. Schmittmann, Rechtsanwalt,

— Home Shopping Europe GmbH & Co. KG, by R. Schütz, Rechtsanwalt,

— Norddeutscher Rundfunk, by H. Brendel, jurist, and by W. Hahn, Rechtsanwalt,

— MTV Networks Germany GmbH, successor in law to VIVA Plus Fernsehen GmbH and Others, by J. Kreile, Rechtsanwalt,

— SAT. 1 Satelliten-Fernsehen GmbH and Others, by C. Wagner and A. Gründwald, Rechtsanwälte,

— Westdeutscher Rundfunk, by E.-M. Michel and M. Libertus, jurists,

— TM-TV GmbH & Co. KG, by E. Freifrau von Weichs, Rechtsanwältin,

— the German Government, by M. Lumma and J. Möller, acting as Agents,

— the Belgian Government, by T. Materne, acting as Agent, and by A. Berenboom and A. Joachimowicz, avocats,

— Ireland, by D. O'Hagan, acting as Agent, and by A. Collins SC, and N. Cahill, Barrister-at-Law,

— the Swedish Government, by A. Falk, acting as Agent,

— the United Kingdom Government, by V. Jackson, acting as Agent, and by M. Gray, Barrister,

— the Commission of the European Communities, by A. Nijenhuis and G. Braun, acting as Agents,

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 31(1) 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).

2 The reference was made in the course of proceedings between Kabel Deutschland Vertrieb und Service GmbH & Co. KG ('Kabel Deutschland') and the Niedersächsische Landesmedienanstalt für privaten Rundfunk (media authority for private radio of the *Land* of Lower Saxony; 'the NLM') regarding the obligation imposed on Kabel Deutschland by the NLM to broadcast over its analogue cable network the television channels of certain broadcasters designated by the NLM.

Legal context

Community law

Directive 2002/21/EC

3 It is stated in recitals 5 and 6 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33; 'the Framework Directive'):

> '(5) The convergence of the telecommunications, media and information technology sectors means all transmission networks and services should be covered by a single regulatory framework. That regulatory framework consists of this Directive and of … the Universal Service Directive … (called the "specific directives"). It is necessary to separate the regulation of transmission from the regulation of content. This framework does not therefore cover the content of services delivered over electronic communications networks using electronic communications services, such as broadcasting content, financial services and certain information society services, and is therefore without prejudice to measures taken at Community or national level in respect of such services, in compliance with Community law, in order to promote cultural and linguistic diversity and to ensure the defence of media pluralism. … The separation between the regulation of transmission and the regulation of content does not prejudice the taking into account of the links existing between them, in particular in order to guarantee media pluralism, cultural diversity and consumer protection.

(6) Audiovisual policy and content regulation are undertaken in pursuit of general interest objectives, such as freedom of expression, media pluralism, impartiality, cultural and linguistic diversity, social inclusion, consumer protection and the protection of minors. …'

4 Article 1(3) of the Framework Directive provides:

'This Directive as well as the specific directives are without prejudice to measures taken at Community or national level, in compliance with Community law, to pursue general interest objectives, in particular relating to content regulation and audiovisual policy.'

The Universal Service Directive

5 According to recital 43 of the Universal Service Directive, '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. …'.

6 Article 31 of that directive, contained in Chapter IV thereof, entitled 'End-user interests and rights', which concerns 'must carry' obligations, is worded as follows:

'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) 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

7 Paragraphs 52 and 53 of the State Treaty on Broadcasting (Rundfunkstaatsvertrag) of 31 August 1991, as amended by the Eighth Broadcasting Treaty Amendment (Achter Rundfunkänderungsstaatsvertrag) of 8 and 15 October 2004 ('the RStV'), transposed Article 31(1) of the Universal Service Directive into German national law.

8 As regards the retransmission of television channels on the analogue cable network, Paragraph 52(1) of the RStV provides:

'The simultaneous and unaltered retransmission of television programmes which can be received nationwide, or which are broadcast in Europe legally and in accordance with the provisions of the European Convention on Transfrontier Television shall be authorised under the laws of the *Länder* in so far as existing technical possibilities allow. The retransmission of television programmes may be suspended in conformity with European broadcasting regulations. Rules laid down under the laws of the *Länder* concerning the use of analogue channels shall be permitted, provided they are required in order to achieve clearly defined public interest objectives. Such rules may, in particular, be adopted in order to ensure a pluralistic media that is based on the principle of diversity of opinion. The details, particularly the order of priority of applicants with regard to the allocation of cable channels, shall be governed by the laws of the *Länder*.'

9 Paragraph 53a of the RStV provides:

'Paragraphs 52 and 53 shall be subject to periodical review, that is, every three years beginning with 31 March 2007, in accordance with Article 31(1) of the [Universal Service] Directive.'

10 In the *Land* of Lower Saxony, the Lower Saxony Law on the Media (Niedersächsisches Mediengesetz) of 1 November 2001, in the version applicable to the dispute in the main

proceedings, namely, that of 6 September 2005 ('the NMedienG'), governs the retransmission of broadcasting services and the supply of media services on the analogue cable network.

11 The allocation of channels on the analogue cable network is laid down in Paragraph 37(1), (2) and (7) of the NMedienG, which provides:

'1. Cable which is intended to receive television programmes on an analogue basis must enable reception of at least those television programmes which, according to this law, may be transmitted terrestrially or via the cable network or which are broadcast in accordance with another law of the *Land* of Lower Saxony. Where the technical capacities of the cable channels differ, access to the channels with the greatest capacity must be provided to the programmes referred to in the first sentence. As regards the transmission of citizens broadcast programmes, the first and second sentences must be applied only to the territories specified in Paragraph 28(1). …

2. In the absence of a sufficient number of cable channels for other television programmes, the [NLM] shall establish an order of priority for the purposes of allocating a cable channel to television programmes which have not been taken into account under subparagraph 1, which shall include, on a fair and equitable basis, media services within the meaning of the State Treaty on Media Services (Staatsvertrag über Mediendienste). The decisive factor in establishing that order shall be the contribution of the various programmes or services to the diversity of the cable service; account should be taken of needs in relation to regional news and as regards news concerning the area which extends beyond the borders of the *Land*.

…

7. On request by the territories specified in accordance with Paragraph 28(1), cable operators shall make available to them, free of charge, up to one television channel and one radio channel for the transmission of programmes of citizens broadcasters which have received authorisation for those territories.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 In the *Land* of Lower Saxony, Kabel Deutschland operates cable networks, which it owns. It has 32 channels permanently usable for analogue broadcasting available on those cable networks.

13 The 37 interveners in the dispute in the main proceedings are broadcasters of television programmes or providers of media services ('telemedia'), some of which provide teleshopping services (together, 'the broadcasters'). All these broadcasters provide access to their television channels or telemedia services on the cable networks of Kabel Deutschland. Some of those channels and services are also broadcast via the terrestrial network under the Digital Video Broadcasting Terrestrial standard ('the DVB-T') in parts of the *Land* of Lower Saxony.

14 By decision of 19 September 2005, the NLM, as the competent authority in that *Land*, allocated the 32 television channels available on Kabel Deutschland's analogue cable network as follows: 18 channels were allocated to broadcasters whose channels were classified as 'specified channels' by the NMedienG since they were already being broadcast under the DVB-T; another channel was allocated in part to Bürgerfernsehen (Citizens' television), and also to an organisation broadcasting a programme specified under the provisions of the NMedienG relating to specified territories; as regards the

remaining 13 channels, as there were more applicants than available channels, the NLM established an order of priority for the various broadcasters in accordance with Paragraph 37(2) of the NMedienG.

15 The result of that arrangement for cable usage was that the channels available on Kabel Deutschland's analogue cable network were fully utilised.

16 Kabel Deutschland instituted proceedings challenging the decision of 19 September 2005 before the Verwaltungsgericht Hannover (Administrative Court, Hanover), in which it claimed that the provisions of the NMedienG on the use of the analogue cable network are incompatible with Article 31(1) of the Universal Service Directive. According to Kabel Deutschland, the obligation imposed by the NLM to provide access to its analogue cable television network to television channels of certain broadcasters must be regarded as unlawful, since those channels are already being broadcast under the DVB-T standard in large areas of the *Land* of Lower Saxony and should therefore be available to the same end-users. Kabel Deutschland also alleged that the requirements that its analogue cable network be fully utilised is unlawful where, as in the present case, there are more applicants than analogue channels available.

17 In addition, on 19 April 2007, the NLM replaced the decision of 19 December 2005 with a similar decision which also resulted in Kabel Deutschland's analogue cable network being fully utilised. Save for changing some of the broadcasters, the content of that decision was the same as the one which it replaced; the decision of 19 April 2007 was also the subject of an action brought by Kabel Deutschland in new proceedings which were suspended at the request of the parties in the main proceedings.

18 In those circumstances, since it had doubts as to the compatibility with Article 31(1) of the Universal Service Directive of the obligation imposed on Kabel Deutschland under Paragraph 37 of the NMedienG, in particular, as regards the proportionality and reasonableness of such an obligation, the Verwaltungsgericht Hannover decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is a provision such as Paragraph 37(1) of the [NMedienG] compatible with Article 31(1) of the [Universal Service] Directive if a cable network operator is required to provide access, on more than half of the channels permanently usable for analogue broadcasting which are available on its networks, to programmes which — although they do not cover the whole of the *Land* of Lower Saxony — are already being broadcast terrestrially under the Digital Video Broadcasting Terrestrial standard ("the DVB-T")?

(2) Is a provision such as Paragraph 37(1) of the [NMedienG] compatible with Article 31(1) of the [Universal Service] Directive if a cable network operator is required to provide access to television programmes on its analogue cable networks even in those areas of the *Land* in which the cable end-user would in any event be in a position to receive the same television programmes terrestrially under the Digital Video Broadcasting Terrestrial standard … by means of a terrestrial antenna and a decoder?

(3) Are "television … services" within the meaning of the first sentence of Article 31(1) of the [Universal Service] Directive to be interpreted as including providers of media services or telemedia, for example teleshopping?

(4) Is a provision such as Paragraph 37(2) of the [NMedienG] compatible with Article 31(1) of the [Universal Service] Directive if, in the event of a shortage of channels, the competent national authority has to establish an order of priority of applicants which results in full utilisation of the channels available to the cable network operator?'

The questions referred

The first, second and fourth questions

19 By its first, second and fourth questions, which should be examined together, the referring court is essentially asking whether Article 31(1) of the Universal Service Directive is to be interpreted as meaning that it precludes national legislation, such as that at issue in the main proceedings, which, first, requires a cable operator to provide access to its analogue cable network to television channels and services which are already being broadcast terrestrially, thereby resulting in the utilisation of more than half of the channels available on that network, and, secondly, in the event of a shortage of channels, establishes an order of priority of applicants which results in full utilisation of the channels available on that network.

20 As a preliminary matter, it should be pointed out that the Universal Service Directive is part of the common regulatory framework on the telecommunications, media and information technology sectors, established by the Framework Directive and the specific directives, including the Universal Service Directive, as is apparent from recital

5 of the Framework Directive. It follows that this regulatory framework must be taken into account when interpreting the provisions of the Universal Service Directive.

21 Under Article 31(1) of the Universal Service Directive, Member States may impose reasonable 'must carry' obligations, for the transmission of specified radio and television broadcast channels and services, on undertakings 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 such broadcasts. That provision goes on to state that those obligations can be imposed only where they are necessary to meet clearly defined general interest objectives and must be proportionate and transparent.

22 In order for Member States to be able to impose 'must carry' obligations, the first sentence of that provision requires that the television channels must be specified and a significant number of end-users must use the electronic communications networks as their principal means to receive television broadcasts.

23 In the main proceedings, it is clear from the order for reference that the analogue cable network fulfils the latter condition since, in Germany, this method of transmission covers around 57% of households and thus constitutes the most widely used means of transmission.

24 As regards the specified nature of the channels which may be covered by 'must carry' status, 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.

25 In this connection, Paragraph 37(1) of the NMedienG states that the cable network which is intended to receive television programmes on an analogue basis must enable reception of at least those programmes which are allowed to be transmitted via the terrestrial network. According to Paragraph 37(2), the decision which the competent authority is required to take must specify, by establishing an order of priority of applicants, which channels the cable operator is required to broadcast. Therefore, those provisions specify which channels are to be granted 'must carry' status.

26 The mere fact that the result of applying the national legislation is that the cable operator is required, first, to provide access, on more than half of the available channels, to programmes broadcast terrestrially and, secondly, to set aside all channels still available on its network for transmission of the selected programmes, in accordance with an order of priority established by the competent authority, does not prevent those obligations from being regarded as relating to the transmission of 'specified' television channels within the meaning of Article 31(1) of the Universal Service Directive. By requiring that the television channels to be broadcast be 'specified', the directive does not seek to lay down a quantitative condition.

27 In those circumstances, it must be held that Paragraph 37 of the NMedienG accords with the conditions laid down in the first sentence of Article 31(1) of the Universal Service Directive, as set out in paragraph 22 of this judgment.

28 As regards the proportionality of the obligations imposed, raised by the referring court, it must be borne in mind that Article 31(1) of the Universal Service Directive requires that the obligations be reasonable, proportionate, transparent and necessary to meet clearly defined general interest objectives.

29 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 be imposed only 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.

30 Since Article 31(1) of the Universal Service Directive does not define the general interest objectives of the obligation to transmit television channels, they must be defined by the Member States in conformity with Community law.

31 For the purposes of assessing the definition of those general interest objectives laid down by the Member States and the proportionality of the measures taken to implement those objectives, regard must be had, as stated in paragraph 20 of this judgment, to the common regulatory framework of the telecommunications, media and information technology sectors.

32 As is apparent from recital 5 of the Framework Directive, a distinction should be made between the regulation of transmission and the regulation of content. That recital provides that the Community regulatory framework does not cover broadcasting content. As a consequence, Article 1(3) of that directive provides that that directive as well as the Universal Service Directive are to be without prejudice to measures taken at national level, in compliance with Community law, to pursue general interest objectives, in particular relating to content regulation and audiovisual policy. Recital 6 of the Framework Directive states that audiovisual policy and content regulation are to be undertaken in pursuit of general interest objectives, such as freedom of expression, media pluralism, impartiality, cultural diversity, social inclusion, consumer protection and the protection of minors.

33 In particular, it is appropriate to stress the importance of the fundamental freedom to receive information of which the recipients are end-users and which the Member States must guarantee, in accordance with Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.

34 It follows that Article 31(1) of the Universal Service Directive cannot be interpreted so as to undermine national legislation which, in compliance with Community law, pursues general interest objectives, in particular those relating to regulation of content and audiovisual policy. In accordance with that division of powers, Article 31(1) of the Universal Service Directive, which falls under Chapter IV thereof, entitled 'End-user interests and rights', does not establish a right for a cable operator to choose which channels to broadcast, but limits that right in so far as it may exist under applicable national law.

35 In order to examine whether the obligations to broadcast under Article 31(1) are proportionate, it must be stated that, as regards the general interest objectives pursued by the national legislation at issue in the main proceedings, it is apparent from Paragraph 37 of the NMedienG, read in conjunction with Paragraph 52(1) of the RStV, that this legislation seeks to ensure media pluralism and diversity of the service on the analogue cable network.

36 As is apparent from the order for reference, the objective of Paragraph 52(1) of the RStV is to ensure as wide a service as possible on the analogue cable network and diversity of opinion in a pluralist society taking account of regional particularities and subjects. Paragraph 37 of the NMedienG adopts the same objective and, in particular, subparagraph 2 thereof provides that the decisive factor in establishing the order of priorities of the channels is their contribution to the diversity of the cable service and

that, in that context, account must be taken of needs in relation to regional news and as regards news concerning the area which lies beyond the borders of the *Land* of Lower Saxony.

37 In that regard, it should be noted that the maintenance of the pluralism which the legislation in question seeks to guarantee is connected with freedom of expression, as protected by Article 10 of the European Convention on Human Rights and Fundamental Freedoms, 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; Case C-148/91 *Veronica Omroep Organisatie* [1993] ECR I-487, paragraph 10; Case C-23/93 *TV10* [1994] ECR I-4795, paragraph 19; and Case C-250/06 *United Pan-Europe Communications Belgium and Others* [2007] ECR I-11135, paragraph 41).

38 Consequently, it must be accepted that such national legislation pursues a general interest objective, since it seeks to preserve the pluralist nature of the television channel service in the *Land* of Lower Saxony and thus forms part of a cultural policy the aim of which is to guarantee, in the audiovisual sector, the freedom of expression of the different social, cultural and linguistic components which exist in that *Land* (see, to that effect, *United Pan-Europe Communications Belgium and Others*, paragraph 42).

39 In that context, the national court asks whether the obligation imposed on Kabel Deutschland, laid down in Paragraph 37(1) of the NMedienG, to provide access to the channels already broadcast under the DVB-T, resulting in the utilisation of more than half of the channels available on its analogue cable network, is proportionate within the meaning of the second sentence of Article 31(1) of the Universal Service Directive. The national court is therefore enquiring as to whether such a provision is capable of ensuring the achievement of the objective thereof, and does not go beyond what is necessary in order to attain it.

40 The very objective of ensuring that end-users are offered an identical service which is broadcast by the various means of transmission available militates against allowing the obligation to broadcast channels to be limited, having regard to the fact that, in certain regions of the *Land* of Lower Saxony, end-users are able to receive the same television channels terrestrially. Furthermore, this objective requires that the number of channels on the analogue cable network concerned by the obligation to broadcast should correspond to the number of channels which are broadcast terrestrially. Therefore, in the main proceedings, the obligation at issue, which results in more than half of the available channels being utilised, may be shown to be proportionate, in the absence of alternative measures enabling the objective to be achieved as effectively and in the light of the number of channels broadcast terrestrially as well as the availability of channels on the analogue cable network.

41 However, in order to protect a cable operator from unreasonable and arbitrary obligations, it is necessary to consider, first, the operation of the mechanism established by the legislation at issue in the main proceedings — in terms of which of the channels broadcast terrestrially serve as the reference point in the specification of the obligation to broadcast — functions, and, secondly, the resulting economic consequences for the cable operator.

42 As regards the reference system applied by that legislation, it must be noted that, in interpreting Article 49 EC, the Court has held that 'must carry' status should not automatically be awarded to all television channels transmitted by the same 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 (see *United Pan-Europe Communications Belgium and Others*, paragraph 47).

43 It must therefore be ascertained whether the reference system applied by the legislation at issue in the main proceedings entails such an automatic award of 'must carry' status.

44 In respect of the analogue cable network, Paragraph 37(1) of the NMedienG awards 'must carry' status to television channels which are already being broadcast under the DVB-T. It is apparent from the documents provided to the Court by the referring court that the decision on which of the television channels that are broadcast under the DVB-T this status is to be awarded is based on the criteria of pluralism and diversity of opinion, in accordance with the provisions of the NMedienG, and is adopted on the basis of those criteria by the general meeting of the NLM, which is independent of the public authorities and which comprises, for the most part, representatives of the civil community.

45 The reference system thus does not entail an automatic award of 'must carry' status, as mentioned in paragraph 42 of this judgment, but is simply a technical means of ensuring that the channels broadcast terrestrially — which, by virtue of their contribution to pluralism and diversity of opinion, have been allowed to be broadcast by this means of transmission — are also broadcast over the analogue cable network.

46 As regards the resulting economic consequences of the obligations imposed on the cable operator, it must be determined whether those obligations are unreasonable because they are likely to prevent the cable operator from performing them in conditions which are economically acceptable, in the light, where appropriate, of all its activities.

47 According to settled case-law, since this assessment is a matter for the national court, it is for the Court to provide the national court with all those elements for the interpretation of Community law which may be of assistance in adjudicating on the case pending before it, whether or not that court has specifically referred to them in its questions (see, inter alia, Case C-17/06 *Céline* [2007] ECR I-7041, paragraph 29).

48 Therefore, in determining whether the obligations imposed on the cable operator under the legislation at issue are unreasonable, it will be for the national court to have regard to the fact that, first, the cable operator is free to decide whether the channels are to be broadcast on its analogue or digital network, with the latter not being subject to similar rules, and that, secondly, Article 31(2) of the Universal Service Directive allows Member States to determine appropriate remuneration. In this regard, it is for the national court to ascertain whether the obligations imposed are such as to make the payment of such remuneration necessary.

49 The national court also seeks to know whether Paragraph 37(2) of the NMedienG runs counter to Article 31(1) of the Universal Service Directive, on the ground that this provision of national law requires the competent national authority, in respect of the remaining channels and in the event of a shortage of channels, to establish an order of priority of applicants which will result in the channels available on the analogue cable network being fully utilised.

50 It is apparent from Paragraph 37(2) of the NMedienG that, in the absence of a sufficient number of channels on the cable network for other television programmes, the NLM is to establish an order of priority for the purposes of allocating a cable channel to television programmes which have not been taken into account under Paragraph 37(1). The decisive factor for establishing that order of priority, according to that provision, is the contribution of the various programmes or services to the diversity of the cable service.

51 It must be accepted, in this regard, that the drawing-up of an order of priority for the allocation of the remaining channels available on the analogue cable network, on the basis of the applicants' contribution to the diversity of the service on that network, is an appropriate method for ensuring the attainment of the general interest objectives referred to by that provision. A provision of national law, such as Paragraph 37(2) of the

NMedienG, constitutes an appropriate means of achieving the cultural objective referred to, since, in such a situation, it enables television viewers to receive a pluralist and diverse range of programmes on the analogue cable network.

52 As regards the question whether the legislation at issue in the main proceedings achieves these objectives in a reasonable and proportionate manner, it must be noted that Article 31(1) of the Universal Service Directive does not establish a right for a cable operator to choose which channels to broadcast, but limits that right to the extent that it exists under applicable national law.

53 In the context of audiovisual policy, that legislation entrusts the competent authority, in the event of a shortage of available channels in relation to the demand for transmission channels, with the task of selecting the channels for broadcast over analogue cable from among the applicants, having regard to the contribution of their programmes to the diversity of the service and to the public's need for information, instead of allowing the cable operator itself to make its own selection on the basis of purely economic considerations. Therefore, this objective may make it necessary for all the available channels to be utilised for transmission of the channels, in the context of a transparent procedure which safeguards the rights of the cable operator, in order, as far as possible, that access is granted to the analogue cable network to the highest number of applicants who merit such access on the basis of the channels broadcast.

54 Consequently, since the obligations imposed are, in the context of national audiovisual policy, necessary in order to achieve the objectives of pluralism and media diversity, such legislation cannot, in principle, be regarded as disproportionate.

55 However, as regards the question whether the economic consequences resulting from the obligations imposed by the national legislation on the cable operator are unreasonable, it is for the national court to examine whether those consequences are such as to prevent the cable operator from fulfilling those obligations in acceptable economic conditions, in the light, where appropriate, of its activities.

56 In the light of the foregoing, the answer to the first, second and fourth questions must be that Article 31(1) of the Universal Service Directive is to be interpreted as meaning that it does not preclude national legislation, such as that at issue in the main proceedings, which requires a cable operator to provide access to its analogue cable network to television channels and services that are already being broadcast terrestrially, thereby resulting in the utilisation of more than half of the channels available on that network, and which provides, in the event of a shortage of available channels, for an order of priority of applicants which results in full utilisation of the channels available on that network, provided that those obligations do not give rise to unreasonable economic consequences, which is a matter for the national court to establish.

The third question

57 By this question, the national court is asking whether telemedia services, for example teleshopping, are included in the concept of 'television services' within the meaning of Article 31(1) of the Universal Service Directive.

58 It must be pointed out, first of all, that this provision contains no definition of the concept of 'television services'. In order to interpret this concept, it is therefore

necessary to examine both the wording and objective of the provision in the light of the purpose of the Universal Service Directive.

59 Article 31(1) of the directive provides that Member States may impose reasonable 'must carry' obligations, for the transmission of specified radio and television broadcast channels and services, on undertakings providing electronic communications. In that regard, the wording of that provision refers generally to radio and television channels and services, but does not specify what type of services may be subject to such obligations and, in particular, does not expressly state whether telemedia services may also be covered by 'must carry' status.

60 In fact, that provision does not concern the content of television channels and services, but refers rather to regulating their transmission by way of telecommunications networks.

61 This is also apparent from the wording of recital 43 of the Universal Service Directive, according to which Member States may impose certain broadcasting obligations on those networks as regards the distribution of radio or television broadcasts to the public.

62 Accordingly, it is clear from Article 31(1) of that directive, and the objective referred to by that provision, that the Community legislature refrained from imposing any limit on 'must carry' obligations as regards the content of television services.

63 Secondly, it must be borne in mind that the Court has already had the opportunity to examine the concept of 'television broadcasting services' within the meaning of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23), as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 (OJ 1997 L 202, p. 60) ('Directive 89/552').

64 In Case C-89/04 *Mediakabel* [2005] ECR I-4891, the Court held that a service comes within the concept of 'television broadcasting' referred to in Article 1(a) of Directive 89/552 if it consists of the initial transmission of television programmes intended for reception by the public, that is, an indeterminate number of potential television viewers, to whom the same images are transmitted simultaneously. In that regard, the determinative criterion for that concept is the broadcast of television programmes 'intended for reception by the public', since priority is to be given in the analysis to the standpoint of the service provider. Thus, the Court also held that the manner in which the images are transmitted is not a determining element in that assessment.

65 Telemedia services, such as teleshopping, broadcast by the various electronic communications networks, irrespective of the manner in which they are transmitted by those networks, are 'intended for reception by the public'. It follows that those services are 'television broadcasting services' within the meaning of Directive 89/552.

66 Such an analysis can be applied to the concept of 'television services' within the meaning of Article 31(1) of the Universal Service Directive. As was stated in paragraphs 52 and 53 of this judgment, the aim of that provision is not to define those services, but to regulate the way in which they are transmitted by the imposition of 'must carry' obligations. As a result, telemedia services, such as teleshopping, are television services for the purposes of that provision and fall within its scope.

67 However, telemedia services, as television services, can fall within the 'must carry' obligation imposed by Member States only if they satisfy the conditions laid down in Article 31(1) of the Universal Service Directive, as set out in paragraphs 22 and 26 of this judgment.

68 It is for the national court to establish whether such conditions are met in the light of all the facts of the case in the main proceedings.

69 The answer to the third question must be that the concept of 'television services' within the meaning of Article 31(1) of the Universal Service Directive includes telemedia services, such as teleshopping, provided that the conditions laid down in that provision are met, which is a matter for the national court to establish.

Costs

70 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 (Fourth Chamber) hereby rules:

1. **Article 31(1) 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) is to be interpreted as meaning that it does not preclude national legislation, such as that at issue in the main proceedings, which requires a cable operator to provide access to its analogue cable network to television channels and services that are already being broadcast terrestrially, thereby resulting in the utilisation of more than half of the channels available on that network, and which provides, in the event of a shortage of available channels, for an order of priority of applicants which results in full utilisation of the channels available on that network, provided that those obligations do not give rise to unreasonable economic consequences, which is a matter for the national court to establish.**

2. **The concept of 'television services' within the meaning of Article 31(1) of Directive 2002/22 includes services of broadcasters of television programmes or providers of media services, such as teleshopping, provided that the conditions laid down in that provision are met, which is a matter for the national court to establish.**

[Signatures]