



The "Right to Information" and Digital Broadcasting: About Monsters, Invisible Men and the Future of European Broadcasting Regulation

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1. Introduction

2. Whose “right to information?”

3. How conditional access changes the way viewers access broadcasting

4. The recommendations of the focus group for a modernization of the European rules on access to audiovisual content

4.1 List of important events

4.1.1. Concept

4.1.2. Assessment

4.2. The right to short reporting

4.2.1. Concept

4.2.2. Assessment

4.3. General critique

5. Reform proposal

5.1. Individual right of access for viewers?

5.2. Pleading for a “Broadcasting-viewer protection law”

6. Conclusion

1. Introduction [1]

“What kind of a monster would do this to your child—would come into your home and put a padlock on his TV fun? What kind of a monster would force you to feed your TV set bucketfuls of dollars—or suffer the humiliation of being labeled a 'cheapskate' in the eyes of your children? There is such a monster. It's a greedy thing called Pay TV.”^[2]

This was the slogan of the “Californian Crusade for Free TV” in the 1960s. ^[3] The Californian Crusade for Free TV declared war on Subscription Television, Inc., a company whose goal it was to launch pay-TV services in Los Angeles and San Francisco in the summer of 1964. The Californian Crusade for Free TV found broad support among the public, movie theater owners, publishers, electronics manufacturers, stockbrokers and, last but not least, the Dodgers and Giants baseball organization. As the argument went, the public had the privilege of receiving broadcasting free of charge. ^[4] The campaign finally led to the end of Subscription Television, Inc.

Is it “monstrous” to control access to broadcasting content and demand money for access? Does the electronic control of access to information, a crucial element of a range of new business models in digital broadcasting, conflict with what is often referred to as the public's “right of

access to information?” And, if so, does existing European broadcasting law adequately address the conflict?

These are timeless questions that later played a prominent role in the revision of the Television Without Frontiers (TWF) Directive [5] and the modernization of provisions that protect the “right to information.” In the course of the revision, the European Commission issued in 2003 two discussion papers under the heading “Access to events of major importance for society.” [6] The Commission invited comments on Article 3a of the TWF Directive, a provision that allows Member States to draw up a so-called list of important events that may not be shown exclusively on pay-TV. It was also suggested to model a European right to short reporting on Article 9 of the European Convention on Transfrontier Television. [7] This part of the revision process was driven by the wish to modernize the European rules on private exclusionary legal or electronic control over viewers' access to broadcast television coverage of “important events” or news reports, and to bring European broadcasting law in line with Article 10 of the European Convention on Human Rights (ECHR)-Freedom of Expression. [8]

The results from the consultation were summarized in the Commission's communication on the future of the European audiovisual regulatory policy. Here, the Commission concluded that “the issue of right to access to newsworthy events needs further attention.” [9] As a consequence, in December 2004, focus group three, a group of experts from academia, industry, regulatory authorities, and other stakeholders, was invited to debate on possible revisions of the European TWF Directive to realize what the European Commission then called the “right to information.” [10] Based on the work of focus group three, the European Commission launched a second discussion paper with the same title in the summer of 2005. [11] Again, comments were invited, also in preparation for a major audiovisual conference, “Between culture and commerce,” that was held in September 2005 in Liverpool and where focus group three presented its final conclusions. [12]

The goal of this article is to discuss and critically evaluate the conclusions of the focus group and the different solutions that were suggested to protect the “right of the public to information.” It will do so from the perspective of the viewers, which whose right of access to information the measures are meant to protect.” Viewers of broadcasting content, or their representatives were rather invisible during the work of the focus group [13] and the consultations [14]. Moreover, the suggested approach for a modernization of the TWF Directive was characterized by a prevailing perception of the anonymous viewer as passive receiver of broadcasting. The article will explain that the arrival of electronic access control substantially changes the way viewers access broadcasting content. It will show why the traditional perception of the viewer no longer matches the realities in modern broadcasting markets and why measures that incorporate said user perception are not very effective in guaranteeing broad access to broadcasting content. This article concludes with concrete suggestions for a complementary course of action that guarantees that access for the individual members of the audience to broadcasting content is not obstructed by private exclusionary control of access.

2. Whose “right to information?”

The notion of the “right to information” is often used by lawmakers, academics, and stakeholders alike to refer to the fundamental role that access to information and knowledge plays in our cultural, democratic, and social life. This definition is somewhat misleading. The notion of a “right to information” is often understood as an entitlement of the individual citizen

to have access to all kinds of information. The way the European Commission and the Council of Europe talk about the “right to information” contributes to the shaping of this idea. What is often overlooked, however, is that the “right to information” as it is referred to in existing broadcasting law has little to do with a right of the individual citizen to access broadcasting information, notably information of major importance for democracy, culture, society, or the creation of knowledge. For the time being, at least in the concept of broadcasting regulation, such a right has yet to be created. This is at least the conclusion if one grounds, as both the European Commission and the Council of Europe do, the “right of access to information” in Article 10 of the ECHR–Freedom of Expression. [15] Article 10 of the ECHR is a provision that has fundamentally influenced in one form or another national broadcasting regulation and here in particular the provisions concerning the availability and accessibility of broadcasting content.

At this point, proponents of a right of access to information will interfere and point to the landmark decisions of the ECHR in *Guerra* and *The Sunday Times*. It was in *The Sunday Times* case that the ECHR coined the term of the right of the public to receive certain information. [16] And in *Guerra*, the ECHR left no doubt that “[i]n cases concerning restrictions on freedom of the press it [the court] has on a number of occasions recognized that the public has a right to receive information.” [17] To jump from these findings to the conclusion that the court acknowledged a right of the individual viewer to access certain information that is of particular interest would, however, go a step too far. Instead, the “right of the public to be properly informed” must be seen within the context of the traditional role of the media to make information accessible for the audience: “whilst the mass media must not overstep the bounds imposed on the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them.” And in *Guerra*, the court continues: “[the public has a right to receive information] as a corollary of the specific function of journalists, which is to impart information and ideas on matters of public interest.” [18] In other words, the right of access to information is the right of an undefined public to receive information and ideas on matters of public interest that the media impart, not the right of individual viewers to have access to media content. The mass media functions as an intermediary and carrier of the public interest to be informed. In this conception, the role of the individual citizen is a passive one, namely to receive information and ideas that the media choose to impart.

Meanwhile, the mass media's perception of its own function is changing. Programs are often no longer broadcast freely into the air for whoever wishes to receive them. Broadcasting programs are aggregated via central marketing platforms that are choosy when it comes to deciding to whom they impart broadcasting content and under which conditions. Thanks to electronic access control technologies, also referred to as conditional access, the media can suddenly choose not to impart information to certain viewers, for example, viewers who refuse or cannot afford to pay a subscription fee, who reside in a different Member State or who have acquired a set top box that is able to support the program of one but not another pay-TV operator. As will be shown below, there are good reasons to argue that economic and technological changes call for a fresh look at the “right to information,” the media's mission to inform the public properly and the role the viewer plays in this process. This fresh look is missing in the final recommendations of focus group three, which ignores, when dealing with the impact of electronic access control, the changes electronic access control is making to the traditional distribution pattern of broadcasting services.

3. How conditional access changes the way viewers access broadcasting

Conditional access is a technical solution for controlling access to electronic services, [19] and as such a vital element of the business model of any pay-TV service. Conditional access has been widely welcomed as a driving factor behind the prospering of the “information economy.” More specifically, conditional access refers to a combination of hardware (set top box) and software devices (encryption, Application Program Interface) that, combined, enable access to a service that is transmitted electronically to be blocked and subject access to an automated authorization process. Conditional access builds an “architecture of identification” [20] in which compliance with set conditions is an integral part of the authorization process.

From the viewers' perspective, electronic access control fundamentally changes the conditions under which electronic content is delivered to the viewer. The electronic control of access to content allows for new, more sophisticated pricing and marketing strategies than the concepts of financing through fees or advertising allow for. Using electronic access control, service providers can send targeted services to single members of the audience based on geographical location, market segment, or personal preferences. [21] More important, services are no longer “set off in the air” but marketed individually to subscribers. As long as broadcasting signals were uncontrollable, there was no tangible matter that could be sold to viewers. In free-TV, the contractual relationship is between the broadcaster and the advertiser; viewers “pay” for broadcasting content in the form of a public broadcasting fee and their attention. This changed when electronic access control was introduced to the distribution process. Conditional access systems implement structures of individualized control over the viewers. Viewers become consumers, and the individual relationship between citizen-consumer and service provider is governed in the first place by contract law instead of broadcasting law.

This also means, however, that operators of electronic access control can exercise considerable influence over market conditions, competition, and individual access to content. Technical or contractual conditions or the level of transparency in the subscription arrangement can ultimately influence viewers' access to information.

Access to information becomes subject to technical conditions

In pay-TV, the economic power of a technical platform or elements thereof can be influenced by the popularity of a certain embedded standard. This has to do with the close economic links that are often found between the technical and the service platforms, the dynamics of the market in general, and the influence of indirect network effects and first mover advantages in particular. [22] This is why pay-TV operators will often require viewers to rent or purchase a set top box that supports only the conditional access technology of a particular provider. The consequence is that (a) subscribers who own set top boxes that support the standard of a provider will often not be able to access services from other providers, and that (b) owners of other set top boxes might not be able to access the broadcasting content that is offered by the first provider. This is the argument behind the so-called decoder towers, namely the assumption that viewers are less likely to subscribe to a second pay-TV platform if both platforms require the purchase of different, incompatible set top boxes. Some argue that the importance of this argument will vanish if set top boxes are offered at lower prices or are subsidized by the pay-TV platform operator. On the other hand, as the example of the Apple iPod shows, exclusive control over a technical standard is an important and effective means of binding subscribers and content producers to a particular service platform and of preventing other service providers from gaining access to the consumer.

Closely related is the aspect of audience fragmentation. Arguably, digitization will favor the development of more specialized niche channels and hence increase the fragmentation of the viewer base. The use of electronic access control can further contribute to this process by dividing the audience into different zones of incompatible conditional access standards.

Audience fragmentation can also take place along national borders. Today's access-controlled services such as pay-TV are often restricted to a national territory and the required smart cards are only sold to residents. [23] This is often due to the licensing practice of content rights, which are often issued on a territorial or language basis. Other reasons are divergent broadcasting laws (for example, in youth protection), the character of a service as national service for citizens of that state (such as public fee-financed broadcasting), or, again, the use of different conditional access standards by the different pay-TV operators in the respective countries. The effect can be to reinstall territorial borders in transborder media such as satellite distribution. A Danish citizen living in France, for example, may be prevented from accessing the encrypted Danish public service broadcasts of DR1 and DR2 and hence from accessing information from his or her home country and cultural heritage.

Contractual conditions

Another strategy used to monopolize the viewer and to which relatively little attention has been paid in the pay-TV discussion, is that of contractual viewer lock-ins. Contractual lock-in. In this context, the duration of the subscription contract. Subscription contract is important as is the ease with which viewers can terminate the agreement. [24] Binding viewers to long-term subscription contracts or making it difficult to terminate the contract is a form of bundling. Bundling lock-in in time. For pay-TV, this is usually twelve to twenty-four months. This time frame may have a negative effect on the viewers' mobility and willingness to switch to other sources of broadcasting content before the end of their initial contract. [25] Subscription contracts frequently contain very far-reaching provisions about their automatic extension that are not always easy to detect. [26] Contractual conditions that "sanction" a contract termination can also have a discouraging effect. Examples include an obligation to return a set top box at the end of the contract or losing an e-mail address. [27] Here, terminating the contract has the additional consequence of effectively barring viewers from receiving any digital, access-controlled or other information services before they have invested in new equipment and/or services. Such contractual conditions may be legitimate, reasonable, and common in other sectors (for example, mobile phone subscriptions), but they can be a major problem in sectors such as the broadcasting sector where broad access to content and content from different sources is the ruling public policy objective.

Sub-forms of contractual lock-ins are program bundling strategies that oblige viewers to subscribe to a whole package of services even if they only wish to access one particular channel or that make the provision of certain information services (for example, premium channels. Premium channel) conditional upon the subscription to others (such as basic channels). [28] Again, this can discourage viewers from subscribing to additional services that resemble services they already have in their package.

Access to comparable service information

An important factor for viewer choice is information about what is on offer under which conditions and for which prices. [29] The significance of access to comparable information about content services is even greater in an environment of access-controlled information. In the unencrypted world, viewers can search and choose freely, for example, by flicking through broadcasting channels. When viewers come across channels or programs that are subject to electronic access control, it will be difficult for them to determine if they contain relevant content because they are encrypted or otherwise protected against access. This is even truer in the case of electronic access control to multichannel service platforms such as pay-TV. Here, viewers find themselves in front of closed doors knowing that the marketplace lies somewhere behind them. The opposite, however, is also true: How will viewers who subscribe to one service platform know about the services available outside the "walled garden?" This highlights the

importance of Electronic Program Guides (EPG), which are used by most pay-TV platforms. EPGs give their controllers enormous potential to manipulate the way viewers access and receive content, particularly where no independent alternatives that would allow viewers to compare and access different services are available. [30] Information problem informant

To summarize, individual control over access to content services introduces new features to the broadcasting world as we know it. The classic broadcasting model involves the undirected one-way transmission of electronic content toward a multitude of (anonymous) recipients. Once sent, electronic content can be received by anyone who has the necessary technical equipment and is within reach of the respective transmission medium, be it the footprint of a satellite or the local cable or telephone network. The possibility of exclusionary control over access to broadcasting content (with the help of conditional access technology) is changing the general distribution structure for what was commonly known as “broadcasting.” Pay-TV services address individual viewers separately to authorize access, influence their viewing behavior, send them bills, and provide them with specialized advertising or a specific service they requested. The new business models can influence viewers' access to broadcasting content in many ways.

4. The recommendations of the focus group for a modernization of the European rules on access to audiovisual content

Focus group three embraced two approaches to the problem of exclusionary control over access to broadcasting content and the “public's right to access to information.” [31] First, there was a strong majority for maintaining the list-of-important-events concept in its unchanged form. Ideas suggesting the European Commission make the list concept mandatory for all Member States, demand more involvement in the process of drafting the lists, or harmonize the interpretation of certain conditions (“substantial part of the public”) were rejected. Second, it was concluded, though not unanimously, that the list-of-important-events concept was not enough to protect the public's access to information and that a right to short reporting should be introduced in addition. Yet unclear are the conditions of, for example, whether to include press agencies, and the limitations to such a right. These two suggestions were brought forward during the consultations and will be taken into account in the final phase of the process of modernizing the European rules on audiovisual content. In the following, both suggestions are discussed critically from the perspective of their value to realize actual access to broadcasting content for Europe's citizens and to address the problems that were described in section 3. It will be shown that instead of modernizing the European framework they are focused on maintaining the status quo of an analog past.

4.1 List of important events

4.1.1. Concept

The recommendations of focus group three rely strongly on the existing lists of important events in Article 3a of the TWF Directive. The basic concept behind Article 3a of the TWF Directive is to limit the exclusive exploitation of transmission rights for the sake of a general public interest in the wide accessibility of certain content. Recital 18 of the revised TWF Directive stipulates that Member States should be able to take measures to protect the public interest, and here more specifically the “right to information,” and ensure wide access by the public to television coverage of national or non-national events of major importance for society. The list-of-important-events concept has already been described as a “new category of universal service.” Pay-TV operators are not entitled to the exclusionary exploitation of such rights. Unclear is what the scope of the limitation on the exclusive exploitation of such events is, what its duration is and under which conditions a partial or deferred coverage is acceptable. Bearing in mind that the

rights for deferred or partial coverage are sold separately, this question is important for the future licensing policy of such rights.

Article 3a recognizes the right of Member States to draw up so-called “lists of important events.” The lists identify events of particular public importance that should be shown—in their entirety or partially—on free-TV. Pay-TV operators are not banned from showing designated events providing the public has the possibility of following such events on free-TV as well. Note that Article 3a of the TWF Directive applies only to transmission rights for organized events and not to other content, for example, content that is subject to copyright law such as films and documentaries.

4.1.2. Assessment

It is not the intention of this article to expose a number of more general concerns regarding the list concept. The biggest challenge probably consists of defining the types of information that are of major importance to the public, the criteria used to define them, and, none the less important, who will be allowed to define them. [32] Instead, this article will focus on the viewer perspective and the extent to which the list concept makes content accessible to them.

The list concept deals with content that must be publicly accessible, meaning accessible for all viewers irrespective of whether they subscribe to a service or not. For the time being, such content is restricted to major sports events and some cultural events. Access to major sports events may, indeed, be of particular value to some members of the public. The truth is, however, that we cannot say which events citizens consider of major importance because citizens are not involved in the list-making process. The list concept reflects and protects a perception of the state of the content viewers should be able to see on free-TV. The list concept also fails to provide a solution for all the other content that is subject to electronic access control, for example, sports events that are not listed but that can still be of major interest to the public or individual members of the public. Finally, it does little to restore the balance between controllers of access to content and those individual viewers who are seeking access to information (see section 3). With the exception of the listed events, pay-TV providers are entirely free to foreclose electronic access to all kinds of content and content services and make access to such content subject to their own conditions and requirements.

The European Commission acknowledges that Article 3a of the TWF Directive might not suffice to take care of national public information policy concerns when dealing with content that is subjected to electronic access control. [33] Accordingly, the European Commission concludes that “the issue of rights to access to newsworthy events needs further attention” [34] and that it would invite focus group three to discuss the right to short reporting as a possible solution.

4.2. The right to short reporting

4.2.1. Concept

For the time being, European Union broadcasting law does not have a right to short reporting. It was suggested to model such a right on Article 9 of the ECTT:

“Each Party shall examine and, where necessary, take legal measures such as introducing the right to short reporting on *events of high interest* for the public to avoid the right of the public to information being undermined due to the exercise by a broadcaster within its jurisdiction of exclusive rights for the transmission or retransmission, within the meaning of Article 3, of such

an event” (stress by the author). [35]

The right to short reporting found its way into the Convention at the end of the 1980s. It was drafted to protect the public's “right to information” long before the issue of pay-TV attracted wider attention in Europe. Again, reference is made to Article 10 of the ECHR and a “right of access of the public to information.” [36] Pluralism is a second important aspect behind the right to short reporting, namely to encourage competition between several broadcasters. [37]

The right to short reporting does not guarantee coverage of the full event in free-to-air television but only the possibility to report about the event by those broadcasters that have not acquired the exclusive rights for full coverage. On the other hand, unlike the list-of-important-events-concept, “the public's right of access to information” is not restricted to cultural or sports events of “major importance for society.” It also applies to political and social events of “only” high public interest

High public interest such as less important sports and cultural events, and social or political newsworthy events such as a report about an accident, a natural disaster, or an armed conflict.

Conceptually, the right to short reporting in Article 9 of the ECTT probably comes the closest to an access right; only it is reserved for broadcasters. This is certainly true where it provides a right of access to an event's site. As far as the right to recording a signal for the purpose of using it in a short report is concerned, it resembles an exception to exclusive rights in the public interest similar to Article 5 (3)c of the Copyright Directive. [38] Unlike Article 3a of the TWF Directive, the right to short reporting does not impose any restrictions on the exclusivity of the transmission—the event can still be broadcast on an exclusive basis. But, similar to an exception in copyright law, it does oblige the entity that carries out the exclusive transmission to allow certain uses, namely the making of short reports. In other words, the right to short reporting makes the exercise of exclusive transmission rights subject to certain limitations.

4.2.2. Assessment

The right to short reporting is more flexible than the list-of-important-events concept in that it does not work with predefined definitions of “high public interest.” It is up to the broadcasters, and in the last instance the courts, to decide if an event is of “high public interest” or not. This increases the range of events that can be subject to a right to short reporting and are not restricted to a predefined list. One may wonder whether the courts are the best place to pass judgment on the rather political question of whether an event is in the public interest or not. Still, the right to short reporting provides more ad-hoc flexibility and room for a more audience-oriented decision of the events that are in the public interest. An implementation of the right to short reporting in the revised Directive should be considered seriously. Having said that, focus group three did not consider a very practical, major problem with the right to short reporting and access of the public to information, at least where it is invoked against pay-TV operators. The right to record a signal for the purpose of making a short report would not be effective if the primary broadcaster is not obliged to provide the signal in unencrypted form. The secondary broadcaster would first have to gain access to the encrypted signal or the event itself before being able to make a short report. Article 9 of the ECTT, however, does not include a corresponding obligation for the primary broadcaster. In practice, this could lead to lengthy negotiations and the risk that the interest of the public to be informed about a particular event becomes obsolete with the passage of time.

It must be noted that the audience plays a passive role in the right to short reporting; again, it is

the mission of the media to keep the audience informed and to decide which events it needs to know. The right to short reporting focuses on keeping the public informed more than on ensuring the public's full access to the content in question. This is easily explained by the fact that the right to short reporting protects informational interests only. The public does not need to watch the full event to be properly informed. What the right to short reporting does not guarantee is that viewers have a guarantee that content that is of importance to them personally is accessible at fair conditions and prices.

4.3. General critique

The goal of the list of important events and the right to short reporting is to ensure the universal accessibility of content that is subject to exclusive rights in free-TV. Article 3a of the TWF Directive imposes limits on the exclusive exploitation of transmission rights for certain events. The right to short reporting grants broadcasters a right to use content or access events that are subject to exclusive rights. Both instruments have different goals. The right to short reporting primarily protects the interest of citizens to be properly informed. Article 3a of the Television Directive also serves other public interest objectives, namely to promote access to content of importance for society in order to foster social cohesion, competition between free-TV and pay-TV, and, at least this is the interpretation of the author, public broadcasting.

One can doubt whether both tools, the list of important events and the right to short reporting, are adequate and effective in achieving their stated goals: to protect the public's access to event and news reports of public importance. It exceeds the scope of this article to expose the different lacunas in both concepts in their present form. [39] The author's main point of criticism in this article is that both initiatives focus entirely on maintaining a concept of broadcasting that belongs to the analog past. The existing solutions are incomplete as they do not really take into account the varied and individual interests or needs of modern viewers of broadcasting content, notably viewers of access-controlled broadcasting.

It was explained that one of the most significant changes brought by digitization in combination with electronic access control to the traditional broadcasting world is that viewers enter into an individualized, commercial, pay-directly-for-broadcasting-content relationship. The production of information goods and services is not for "free" and often requires substantial investment. It is neither economically rational [40] nor realistic to assume that viewers will satisfy their need for access to information in the future exclusively via free-TV. This will be even more so once the process of digitization has been completed and broadcasters and network providers are confronted with the need to recoup their investments in the digitization process. From the viewers' perspective, viewers will increasingly depend on access to an access-controlled platform before they can access particular content. The distribution of broadcasting content is shifting from a previously public sphere to a more personal sphere where the conditions for access to a service are directly negotiated between the service provider and the requester. It is the contractual relationship between the viewer, the subscriber, and the platform operator that will determine which content can be viewed under which conditions. The relationship between them is no longer governed by broadcasting law alone but also by the terms and conditions imposed by the platform operator. As explained above, the technical, contractual, or other conditions of the subscription package and the lack of a sufficiently transparent information environment will disadvantage subscribers and non-subscribers. They can pose serious obstacles not only to viewers' access to a commercial service, but also viewers' access to information. Neither the list-of-important-events concept nor the right to short reporting take these effects of electronic access control into account.

To conclude, both the right to short reporting and the list of important events are ill-prepared

for the resulting changes to the distribution structure, meaning the change from broadcasting to individual access, from viewer to consumer, and from public mission to profit-driven services. Where access to broadcasting content becomes a matter of private contracts and control over access to content, traditional concepts do not help much. Ensuring that some events or excerpts thereof remain available on free television may be a means of preserving the importance and competitiveness of free-TV in general and public broadcasting in particular. But the more pay-TV prospers and is perceived by viewers as a third possible form of financing broadcasting, the more urgent is the need to take into account the effect of electronic access control on viewers' access to digital content.

5. Reform proposal

Having concluded that the list-of-important-events concept and the right to short reporting are not sufficient safeguards of the viewers' access to information in a modern digital environment, the next question is how to reform the situation.

5.1. Individual right of access for viewers?

One option would be to plead for a right of access to information for individual viewers. There are, however, several reasons that would speak against such a right. It would go beyond the scope of this article to discuss the different reasons more in depth. [\[41\]](#) In short, an individual right of access to information could conflict with the equally valuable protection-worthy rights of others, notably the service providers' protection under Article 10 of the ECHR to impart information if and how they wish. It could conflict with the service providers' economic freedoms such as the freedom of contract and property. In other words, there is a need to carefully weigh differing interests before jumping to the conclusion that one private party should have a right of access to information over another private party. This process of weighing is, arguably, best done in parliament. This does not, however, prevent states from reaching the conclusion that there is a need to create a "right of access to information" over other private parties in the form of statutory rules. [\[42\]](#) If the states do reach this conclusion, they must carefully balance the interests of all parties concerned according to, among others, Article 10 (2) of the ECHR. Another question is if such a right is desirable. Do we want to create a media landscape in which one private party could make an enforceable claim against another private party to provide it with certain information it holds? What would this mean for the protection of property, the private sphere, and personal autonomy? Even providing such a right were restricted to a right against the media, where would the line between a private person and the media have to be drawn in a time in which transmission technologies can turn every viewer into a "broadcaster" or "press service?" In the case of pay-TV, a right of access to information might not even be very useful because it is not the intention of the provider of access-controlled broadcasting to refuse access but to sell access; albeit under his own conditions.

5.2. "Broadcasting-viewer protection law"

In other words, from the viewer perspective, it is not so much the question if they will have access to certain kinds of information but under which conditions they will be able to access the information and if the conditions are acceptable and affordable. This means that the key to finding a solution that takes the changing and increasingly interactive and individualized distribution patterns into account lies in the commercial relationship between content controller and viewer. The revision process of the TWF Directive confirmed again that the present approach in broadcasting law of dealing with electronic access control is still a top-down approach in which the state, state agencies or, as in the case of the right to short reporting, broadcasters determine which information is to remain accessible to viewers. This article suggests following a bottom-up approach, meaning that broadcasting regulators should, in

addition, address the contractual relationship between service providers and viewers and its impact on viewers' access to information.

Bottom-up approach

Arguably, one way of promoting individual access to content without interfering disproportionately with the programming autonomy of the content provider (as would be the case with an individual access right), is to create the conditions for fair and affordable access to broadcasting content. Viewers' access to informational content should not be inhibited by unfair access conditions in subscriber contracts, contractual or technical lock-ins or lock-outs, and a lack of adequate service information. A future goal for the regulation of pay-TV should be to ensure that pay-TV platforms are publicly accessible, meaning that the terms and conditions of access are such that all members of the public are not arbitrarily excluded for technical, financial, or transparency reasons. In the information society, each citizen should be able to benefit from new services that become available by means of advanced communications: "The information society is not only affecting the way people interact but it is also requiring the traditional organizational structures to be more flexible, more participatory and more decentralised." [43] Likewise, subscribers to one particular platform should not be unreasonably impeded from benefiting from access to various services and pluralism between different platforms because of technical, contractual, or informational lock-ins. The fairness and openness of the individual commercial relationship between service provider and viewer is key to preventing that electronic access control is used to the detriment of competition, viewers, and public information policy.

The commercial relationship between service providers (broadcaster or platform operator) and viewers is a relationship that has so far been ignored in European broadcasting law. Some aspects of subscription contracts may fall under e-commerce law. E-commerce law, however, is not designed to protect further-reaching public policy objectives attached to the product or service such as access to knowledge and the particular value that access to information has for democracy and society. Looking for possible models for a bottom-up approach to broadcasting regulation leads to a field of law that is not often discussed in context with broadcasting regulation: Telecommunications law, and here in particular the Universal Service Directive.

Example: Universal Service Directive

The Universal Service Directive a) seeks to balance the commercial relationship between viewer and service provider to stimulate a functioning marketplace and b) acknowledges the particular value of accessibility and availability of electronic communication to society *and* individual consumers. First, the Universal Service Directive requires a minimum level of availability and affordability of basic electronic telecommunications services (the so-called universal service obligations). Second, it guarantees a set of consumer rights and consumer protection rules for the sector for users and consumers of electronic telecommunications services. One underlying idea of the Universal Service Directive is that functioning competition and the broad availability of a range of different telecommunications services for consumers is not only a matter of access for service providers to telecommunications networks and facilities, but also a matter of access for consumers to services. As in European broadcasting law, there is a need in telecommunications law to strike the right balance between relying as much as possible on market mechanisms and competition to achieve a high level of choice and quality, and ensuring regulatory intervention to uphold a minimum number of consumers' rights throughout the European Union [44] and protection-worthy interests in the broad availability and accessibility of services, including services providing informational content. Enterprises with significant market power that charge excessive or predatory prices to consumers, apply unreasonable bundling strategies, or show undue preferences to certain consumers, can inhibit individual consumers' access, and, by so doing, the realization of general public interests. [45] This is why the Universal

Service Directive aims to

“ensure the availability throughout the Community of good quality publicly available services through effective competition and choice and to deal with circumstances in which the needs of end-users are not satisfactorily met by the market” (Article 1 (1) of the Universal Service Directive).

The following brief overview may provide an idea of how telecommunications law has already developed solutions for problems that broadcasting regulators are just starting to realize.

Fairness of Contractual Conditions

As far as consumer contracts are concerned, the Universal Service Directive provides a legal framework that gives NRAs instruments to ensure that service providers offer services to consumers at adequate, non-discriminatory conditions and fair prices, and refrain from unjustified bundling Bundling strategies. [46] The Universal Service Directive acknowledges that for “reasons of efficiency and social reasons, end-user tariffs should reflect demand conditions as well as cost conditions, provided that this does not result in distortions of competition.” [47] The Universal Service Directive also stipulates that service providers must provide consumers with a minimum level of legal certainty in subscriber contracts concerning contractual terms and conditions, service quality, contract and service termination conditions, compensation measures, and dispute resolution. Contracts must include information on prices, tariffs, and terms and conditions in order to increase the consumers' ability to optimize their choices and thus fully benefit from competition. [48] These provisions provide tools to tackle contractual lock-ins and unfair provisions in consumer contracts.

Adequacy of Technical Conditions

Regarding the problem of technical lock-ins, the Universal Service Directive offers a solution to the interoperability of consumer equipment. According to Article 24 of the Universal Service Directive, Member States must ensure that any analog television set has at least one open interface socket to connect additional devices and ensure interoperability. The provision, however, only refers to digital television equipment, not to set top boxes.

Questions concerning decoder interoperability are dealt with in the Access Directive and the Framework Directive. However, neither of the directives obliges operators in the pay-TV sector to provide for adequate interoperability solutions. In addition, under Articles 5 (1)b and 6 of the Access Directive, NRAs do not have as many possibilities to impose interoperability obligations on pay-TV providers as they do for all other telecommunications service and facilities providers according to Articles 8 to 13 of the Access Directive. It is true that the discussion about the adequacy and desirability of mandated interoperability can be very controversial. Nevertheless, the author concludes that there are valid and important arguments in favor of mandated interoperability solutions in areas in which mobility and fair access opportunities would otherwise be at risk. It is difficult to see why the (un)willingness of major industry players toward standardization in pay-TV would change in the future and why necessary initiatives in this field should be further postponed. Without imposing a particular standard, initiatives could focus on making consumer equipment interoperable through open interfaces and open standards for software and middleware. The approach of Article 24 of the Universal Service Directive to mandate a common interface could serve as a model.

Comparable service information

In terms of the transparency issue, the importance of comparable service information has already been acknowledged in the Communications Framework. The Universal Service Directive, and in

particular the provisions on directory services and transparency obligations in Articles 21 and 22, demonstrates that transparency, as a precondition for functioning competition and the realization of public information policy objectives, is taken very seriously in Europe. Access to telephony directory services, a kind of search agent, is even subject to a universal service obligation. The examples of TV guides for the broadcasting sector or search engines and browsers for the Internet demonstrate that there can be a market for independent information agents and that competition between such services is generally possible. Broadcasting regulators could seek to stimulate such competition. Article 21 (2) of the Universal Service Directive, a provision that mandates providing consumers with comprehensive, comparable and user-friendly service information, could serve as a model.

Convergence

It is worth noting that, at present, none of the potentially relevant provisions in the Universal Service Directive (in particular Articles 17, 20, 21, 22, and 32), with the exception of Article 24 (interoperability of television equipment), apply to the broadcasting sector. [49] European telecommunications law is based on the idea that the sector-specific regulation of media services is divided into transport, or technical aspects, and content-related aspects. Both aspects fall under very distinct regulatory frameworks. [50] This is another indication that, as far as broadcasting services are concerned, regulators handle a fundamentally different idea of the consumer/service-provider relationship than they do for all other communication services. In the case of digital broadcasting, viewers are still not considered active market participants or “consumers” —which they are in pay-TV—but passive receivers. Pay-TV services are distributed to viewers, in a similar way as telephony and other telecommunications services, on an individualized basis. Consequently, in pay-TV too, technical or contractual conditions in subscriber packages or the lack of transparency can be a means to impede or even foreclose access.

With ongoing convergence, the differentiation between broadcasting and non-broadcasting services is no longer justified *as far as the modalities of the way services are marketed to viewers are concerned*. It is difficult to see why viewers of digital broadcasting services should receive less legal protection than consumers of other electronic services.

6. Conclusion

Electronic access control brings an end to the idea of the anonymous viewer and the undirected mass distribution of online or broadcasting services to whoever decides to watch. Today, business models for the distribution of broadcasting services are based on commercial relationships between service providers and individual viewers. Contractual and technical conditions overrule the free access culture that was once the essence of many traditional broadcasting services. It can be expected that digitization will further accelerate this trend. For viewers, this has far-reaching consequences in terms of their access to and use of electronic information.

In order to guarantee that the outcome of this trend respects the “public's right to information” it is necessary to concentrate more on the contractual and technical arrangements between service providers and the individual(ized) members of the public: the viewers of broadcasting content. Decisions about the accessibility and availability of content are made at the level of the user/provider relationship. This is also the level at which individual viewers express which kind of content they find particularly important. At this stage, this article cannot do much more than hint at the need for a new perspective in broadcasting law—the viewer perspective—and for rules that protect the position of viewers in their dealings with broadcasting service providers.

Further research should be carried out to explore the question of how specific “broadcasting-viewer protection rules” should be to guarantee the broad accessibility and availability of broadcasting services at fair, non-discriminatory conditions, and an affordable price. Second, general consumer protection law applies to all kinds of services and is probably not designed to reflect the idea of information as a product of particular social and democratic relevance, continuous and reliable access to which should be available at affordable prices, with good quality, and on user-friendly terms. Further research is also needed to explore the potential of consumer protection law to realize public information policy goals, such as pluralism and the realization of freedom of expression and democratic principles. The example of the Universal Service Directive could be a good starting point and serve as a model. Unlike general consumer protection law, the Universal Service Directive leaves room to combine consumer protection with the realization of general competition and public information policy objectives in order to promote what the directive calls “the twin objectives of promoting effective competition whilst pursuing public interest needs, such as maintaining the affordability of publicly available services for some consumers.” [51]

The goal of this reform proposal is not to replace but to complement existing concepts, notably the list-of-important-events concept and the right to short reporting. In particular the suggestion to implement the latter into European broadcasting law should be taken seriously. Electronic access control should neither hamper competition between free-TV and pay-TV nor the functioning of the media. The same is true of the task of competing media to inform and to criticize. An important objective of the list of important events and the right to short reporting is to protect the competition between free and pay-TV. Both concepts, however, need further improvement to be effective.

Pay-TV is not a monster, and the arrival of electronic access control is not necessarily a threat to a flourishing media landscape; it could also be seen as an opportunity for new and more responsive content services. The precondition is, however, that individual viewers are no longer treated as if they were invisible to the broadcasting regulator. For an open and diverse broadcasting environment, it is vital that viewers can access access-controlled services at fair, affordable, and non-discriminatory conditions, that they have a real choice between different competing platforms, including platforms from other countries, and that they have reliable information about the services available to them.

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Notes

[1] Comments are welcome to helberger@ivir.nl. Parts of this article are an adaptation of chapters from Helberger 2005, *Controlling Access to Content – Regulating Conditional Access to Digital Broadcasting*, Kluwer International, Den Haag, September 2005. The book discusses more in-depth some subject matters that are raised in this article. The author would like to thank P.B. Hugenholtz, E. Dommering, N.A.N.M. van Eijk, A. Nieuwenhuis, W. Hins, T. Gibbons and W. Schulz for their comments on earlier drafts. All mistakes and omissions are entirely my own.

[2] “Darn that pay-TV!”, Advertisement in Los Angeles Times, 12 October 1964, sec. 3, p. 5.

[3] For a thorough overview on the Californian Crusade for Free TV, see Gunzerath.

[4] This was the official argument. Strategic and economic considerations of potential competitors of Subscription Television, Inc. will have played no lesser role.

[5] 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, Brussels, 17 October 1989, OJ L 298, p. 23 [hereinafter 'Television Without Frontiers Directive'] and Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, Brussels, 30 July 1997, OJ L 202, p. 60 [hereinafter 'Directive 97/36 Amending the Television Without Frontiers Directive']. In the following, references to the Television Without Frontiers (TWF) Directive refer to the directive in the form as amended by Directive 97/36 Amending the Television Without Frontiers Directive.

[6] European Commission, discussion paper, “Events of major importance for society”, available at: http://europa.eu.int/comm/avpolicy/regul/review-twff2003/twff2003-theme1_en.pdf (last visited on 11 November 2005) and “Access to short extracts of events subject to exclusive rights”, available at http://europa.eu.int/comm/avpolicy/regul/review-twff2003/twff2003-theme6_en.pdf (last visited on 11 November 2005).

[7] Council of Europe, European Convention on Transfrontier Television, Strasbourg, 5 May

1989, Text amended according to the provisions of the Protocol (ETS No. 171) which entered into force, on 1 March 2002 [hereinafter 'European Convention on Transfrontier Television—ECTT'].

[8] European Commission, The right to information and the right to short extracts, October 2004, available at:

http://europa.eu.int/comm/avpolicy/regul/Focus%20groups/fg3_extracts_en.pdf (last visited on 11 November 2005).

[9] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the future of European regulatory audiovisual policy, COM(2003)784 final., 15.12.2003, available at:

http://europa.eu.int/eur-lex/en/com/cnc/2003/com2003_0784en01.pdf (last visited on 11 November 2005).

[10] European Commission, The right to information and the right to short extracts, October 2004, available at:

http://europa.eu.int/comm/avpolicy/regul/Focus%20groups/fg3_extracts_en.pdf (last visited on 11 November 2005).

[11] European Commission, Issues paper for the audiovisual conference in Liverpool, Right to information and right to short reporting, July 2005, available at

http://europa.eu.int/comm/avpolicy/revision-tvwf2005/ispa_shortreport_en.pdf (last visited on 11 November 2005).

[12] Rapport final du groupe de travail 2 [should be 3, the author]. Droits à l'information et aux courts extraits, available at <http://europa.eu.int/comm/avpolicy/revision-tvwf2005/docs/liverpool-wg2-fr.pdf> (last visited on 11 November 2005) [hereinafter 'Rapport final du groupe de travail 2'].

[13] See list of the members of the focus groups, available at:

http://europa.eu.int/comm/avpolicy/regul/Focus%20groups/list_participants_fg_new2.pdf (last visited on 12 November 2005).

[14] See the list of written Contributions to the Public Consultation for the review of the "Television without Frontiers" Directive, <http://europa.eu.int/comm/avpolicy/regul/review-tvwf2003/contribution.htm> (last visited on 11 November 2005).

[15] Barendt, p. 49. See also De Meij/Hins/Nieuwenhuis/Schuijt, pp. 299-303, 306; Mackaay, p. 171. Extensively, Helberger 2005, 74 pp.

[16] European Court of Human Rights, Sunday Times, Strasbourg, 26 April 1979, Series A, No. 30 [hereinafter 'Sunday Times'], paragraph 65; European Court of Human Rights, Lingens, Strasbourg, 8 July 1986, series A No. 103 [hereinafter 'Lingens'], paragraph 41. Lingens concerned the case of an Austrian journalist who complained about his conviction because of defamation after he had written an article about SS crimes during the Second World War.

[17] European Court of Human Rights, Guerra and Others v. Italy, Strasbourg, 19 February 1998, No. 116/1996/735/932 [hereinafter 'Guerra'], paragraph 53.

[18] European Court of Human Rights, Guerra, paragraph 53.

[19] For a more detailed explanation, see Helberger 2005, 4 pp.

[20] Lessig, p. 34.

[21] O'Driscoll, p. 14.

[22] Shapiro, 3 pp.; Evans, p. 32

[23] See, for example, the subscriber conditions at <http://www.sky.com/ordersky/home> and <http://www.canalplus.nl> (last visited on 12 November 2005).

[24] Aghion/Bolton, 389 pp. (making a distinction between nominal length and effective length of a contract). See also Farrell/Shapiro, p. 125; Klemperer, p. 376

[25] Differentiating Aghion/Bolton, p. 399.

[26] See, for example, BBC World Service, Terms and Conditions, No. 2 (Terms): 'The Agreement shall be automatically extended for further periods of twelve months, subject to

payment of the Subscription by the Subscriber, unless terminated by either party giving to the other party not less than fifteen days written notice to expire on the last day of the then current term'. Also: Canalplus, Algemene voorwaarden van Canal+ N.V. voor de doorgifte en ontvangst van televisieprogramma's via de kabel en voor de doorgifte en ontvangst van digitale aardse televisiesignalen via de infrastructuur van Digitenne [hereinafter 'Terms and conditions Canal+ Nederland'], No. A4, available at <http://http://www.canalplus.nl> (last visited on 12 November 2005). in the small print that the contract must be terminated by registered letter.

[27] See Canal+, Terms and conditions Canal+ Nederland, No. C18. See also Shapiro, p. 11.

[28] On the effects for consumer switching costs Switching cost in case of pay-TV bundling see also Galbiati/Nicita/Nizi, p. 23; Harbord/Szymanski.

[29] Fritsch/Wein/Ewert, p. 294.

[30] Even where alternative EPGs are available, they may be not supported by the technical platform that consumers are subscribed to.

[31] Rapport final du groupe de travail 2, aao.

[32] See more in-depth on the list concept Helberger 2005, 96 pp.; Hins 318 pp.; Helberger 2002, 292 pp.

[33] Explanation by the author: In the above quote, the European Commission addresses the question of the need at the European level for an additional right to short reporting, and whether Article 5 (3)c of the European Copyright Directive satisfies the public information policy concerns of Member States when dealing with electronic access control, Council Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, Brussels, 22 June 2001, OJ L 167, p. 10 [hereinafter 'Copyright Directive'].

[34] European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the future of European regulatory audiovisual policy, aao, p. 16.

[35] See also Council of Europe, Recommendation No. R (91)5, of the Committee of Ministers to Member States on the right to short reporting on major events, where exclusive rights for their television broadcast have been acquired in a transfrontier context, Strasbourg, 11 April 1991 [hereinafter "Recommendation No. R(91)5 on the Right to Short Reporting"]. And: Draft Recommendation on the Right to Short Reporting on major events where exclusive rights have been acquired, updating Recommendation No. R(91)5 of the Committee of Ministers to Member States on the right to short reporting on major events where exclusive rights for their television broadcast have been acquired in a transfrontier context, Strasbourg, 16 April 2003, MM-Public(2003)003 [hereinafter 'Draft Recommendation updating Recommendation No. R(91)5 on the Right to Short Reporting'].

[36] Council of Europe, Recommendation No. R(91)5 on the Right to Short Reporting, Explanatory Memorandum, paragraph 4 and 5.

[37] European Convention on Transfrontier Television, Explanatory Memorandum, paragraph 174; Council of Europe, Recommendation No. R(91)5 on the right to short reporting, Explanatory Memorandum, paragraphs 1-2.

[38] For an extensive comparison see Helberger 2005, 109 pp.

[39] See instead Helberger 2005, 96 pp and 107 pp.

[40] Making access to information subject to price negotiations is not new in the media world. Consumers are used to paying for their newspapers. The same is true for films shown in cinemas or the purchase of CDs and DVDs. Here too, citizens do not usually access the information stored on a CD or DVD without having to pay first. Even the reception of public and commercial broadcasting is far from being 'for free'. To receive public and commercial free-to-air broadcasting, consumers not only have to purchase a television or computer, they must also subscribe to, for example, a cable or satellite network and 'pay' for some programmes in the form of public broadcasting Public broadcasting fees. For commercial, advertisement-financed

programmes they also pay in non-monetary but money-worth 'assets', such as time and attention.

[41] See instead Helberger 2005, 74 pp.

[42] See also Mackaay, p. 172, referring to information about criminals or hazardous products.

[43] G7 Summit, Conclusion of G7 Summit 'Information Society Conference', Doc/95/2/, Brussels, 26 February 1995.

[44] Proposal for a Directive of the European Parliament and of the Council on universal service and users' rights relating to electronic telecommunications networks and services, 19 December 2000, OJ C 365, p. 238, Explanatory Memorandum, section III.

[45] Council 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, Brussels, 24 April 2002, OJ L 108, p. 51 [hereinafter 'Universal Service Directive'], Recital 26.

[46] Universal Service Directive, Article 17 (2).

[47] Universal Service Directive, Recital 26.

[48] Universal Service Directive, Recital 30, Articles 20 (1), (2).

[49] Universal Service Directive, Recital 45, Framework Directive, Article 2 (c).

[50] European Commission, 'Towards a new framework for electronic communications infrastructure and associated services', The 1999 Communications Review, Brussels, 10 November 1999, COM(1999) 539 final [hereinafter '1999 Communications Review'], pp. vi-vii.

[51] Universal Service Directive, Recital 26.