

Walking a Thin Line: The Regulation of EPGs

by **Bart van der Sloot**

(LLM, MPhil), researcher at the Institute for Information Law, University of Amsterdam.*

Abstract: The digitisation of television broadcasting has facilitated an exponential growth both in the number and the diversity of programs and channels. Electronic Programme Guides (EPGs) help consumers find their way in this abundance of offerings. EPGs serve as a classical listing magazine or broadcasting guide with extensive information on television programs; like VCRs, they enable the recording of programs; as search engines, they allow users to

look for content on the basis of a keyword; and finally, EPGs list the most favoured programs on the first page, either on the basis of popularity, the personal profile of the consumer or on the basis of agreements with particular broadcasting agencies. This article assesses how various European countries approach the regulation of EPGs and determines whether and how they try to reaffirm guarantees for diversity and pluralism in the digital television environment.

Keywords: Electronic Programme Guide, EPG, regulation, Access Directive, due prominence, media law, competition law, consumer law, neutrality, diversity.

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A. Introduction

1 Traditionally, governments have been involved in regulating the media to promote quality and diversity in television programming, among other reasons. To this end, national regulating authorities have introduced rules to divide the scarce television capacity equally among the different groups in society, sometimes granting a preferred position to certain minorities in society such as religious minorities or groups with a minority language. This ensured that each group of any size had a chance to express its vision to and on society, and that other communities were able to take notice of differing viewpoints and ideologies. The rationale behind government interference was initially the equal division of the scarce transmission capacity; later it was the fear that commercial broadcasters would focus only on larger, well-off groups in society and not on commercially unattractive groups and minorities.

2 The question is whether this logic is still valid in the era of digital television, in which a digital television package easily consists of over 100 channels, some of whose packages target very specific interests – perhaps related to sports, eroticism or movies – or focus on specific groups with a certain religious, national or ethnic background. The television landscape is thus characterized by abundance rather than scarcity, making it both difficult and time-consuming for the consumer to determine which program to watch. EPGs help to tackle this problem. This has spurred a discussion on the question of whether governments still have a facilitating or regulating role to play in ensuring that diversity and pluralism are sufficiently guaranteed in the digital environment.

3 EPG regulation focusses on three issues. First, the programs that are listed on the first page of the EPG will attract more viewers than those on the second or third page. Some national regulators have implemented ‘due prominence’ rules, which require EPG providers to give public broadcasters or other se-

lected channels a preferred position in their page-ranking system. Since “[i]n the standard terrestrial television set, the public service channel is usually “number one on the dial” but in an EPG, it may be relegated to any other number, which could disadvantage it vis-à-vis competing channels,¹ this is a way to maintain the status quo. Since governments can influence the programming on the public channels – to guarantee diversity in programming, among other reasons – this rule allows governments to retain part of their influence over the content consumers watch. Second, there is a competition issue. By integrating services and entering into contractual agreements, an EPG provider might favour a broadcaster’s programs or channels with which it has an agreement. The question is how competition rules and the emphasis on network neutrality, which also plays a role in relation to EPGs, should be applied in this case.² Finally, some EPGs provide incomplete program information, incomplete access possibilities and are not user-friendly. Consequently, EPG regulation can be based on media law principles, with quality and diversity as one of its cornerstones; on competition law, which aims at stimulating market competition; and on general consumer law principles.

- 4 The structure of this article is as follows. First, in section 2, a short explanation will be provided on the different functions and services EPGs offer. Subsequently, section 3 provides a brief history of the development of EPG regulation in the European Community. Finally, the Dutch, the British and the German approaches towards EPG regulation are discussed in sections 4, 5 and 6; these three countries symbolize the different regulatory approaches governments can and have adopted with regard to EPGs. The main issue of this article regards the regulatory approach towards EPG regulation and the different choices to be made in this respect. The conclusion will focus on the dilemmas these choice represent, such as the choice between European-based or national-based regulation; between treating EPG providers as providers of content or as providers of access services; regulating EPGs on the basis of media law, competition law or consumer law principles; the choice for states to remain involved in media regulation or to abstain from EPG regulation; and between stimulating new developments in the digital broadcasting environment and maintaining their influence.³

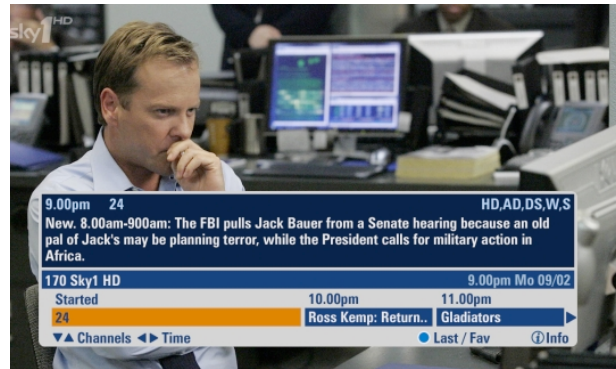
B. The electronic programme guide

- 5 An EPG offers a variety of functions. The picture below contains a sample screenshot of a standard navigation screen with a list of programs; with a click on a certain program, the user can access detailed information.



Picture 1: A standard navigation screen of an EPG.⁴

- 6 If the user chooses to watch a certain program, information on the current or subsequent programs can be obtained via a bar at the bottom of the screen.

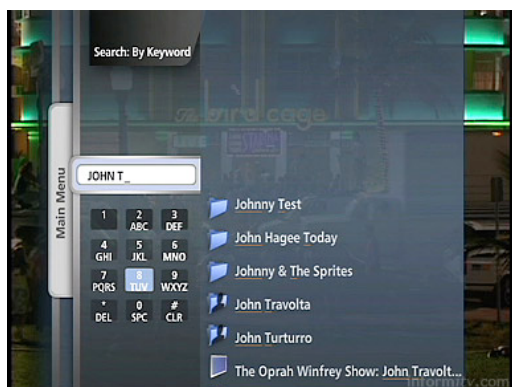


Picture 2: The information bar of an EPG.⁵

- 7 The EPG not only serves as an old-fashioned program guide, but may also incorporate a record function and may offer a Google-like search engine, through which programs can be found by entering a keyword.



Picture 3: The VCR function of an EPG.⁶



Picture 4: The search function of an EPG.⁷

- 8 Finally, in most EPGs it is possible to change the ranking of the programs on the navigation screen shown in the first picture so that, for example, BBC One and Two are not first, but a commercial channel is. Also, a ‘favourite list’ may be compiled, with a viewer’s favourite programs or with a cluster of programs with a similar topic or genre. From a regulator’s perspective, it is the page ranking that is pivotal since public channels might lose their prime position, EPG providers might unduly favour commercial parties with which they have contractual agreements and, given the fact that consumers may compile their own list of favourites and EPG providers may, as search engines do, personalize the search results on the basis of the personal profile of a particular consumer, some fear that this might diminish the possible serendipity and result in a filter bubble.⁸ The next section outlines the European framework for EPG regulation.

C. European Access Directive

- 9 Although it does not regulate EPGs, the Advanced Television Services Directive of 1995 contains the basis for the current regulation of EPGs in the European Union.⁹ The directive was primarily concerned with the promotion of the accelerated development of advanced television services¹⁰ and focused on behavioural rules for conditional access providers and providing certainty for investors in digital television services.¹¹ It required television access and related services to be offered on a fair, reasonable and non-discriminatory basis.¹² However, since ‘[p]olicy-makers as well as consumers were expecting broadcasting to continue to fulfil its traditional social and cultural role’¹³ and since ‘[c]ompetition rules alone may not be sufficient to ensure cultural diversity and media pluralism in the area of digital television’,¹⁴ the directive not only aimed at promoting technological developments but also at safeguarding pluralism.¹⁵
- 10 Since pluralism and competition can be countervailing interests,¹⁶ EPG regulation often finds itself torn between these two core values. Still it might

be said that the attempt at diversity is ill served ‘by under-developed competition law regimes, which fail to take into account pluralism and media diversity’.¹⁷ In addition, competition rules¹⁸ may also be concerned with the existence of certain public policy objectives, such as the preservation of pluralism and consumer choice.¹⁹

- 11 Although their main function is to provide content,²⁰ and consequently some regulators have treated EPGs primarily as such,²¹ it seems apparent that EPGs do not qualify as television programs or content services.²² Taking account of their dual role of transmission and selection, which is even further complicated by the fact that ‘the EPG provider has constitutional rights of its own that need to be respected’,²³ the regulation of EPGs is focused on avoiding anti-competitive practices against potential competitors, on the promotion of innovation, on the protection of civil rights of citizens and on promoting and preserving information plurality.²⁴
- 12 EPG services balance on a thin line between content providers and access services, two categories that are regulated under two different regimes in the European framework.²⁵ Currently, EPGs fall under the Access Directive,²⁶ which in some ways may be seen as the successor of the Advanced Television Services Directive. Like its predecessor, this assumes at its core that the bottleneck issues cannot be tackled only by competition rules; instead, public policy priorities – for instance, the preservation of pluralism – must also be taken into account.²⁷
- 13 Before the implementation of the Access Directive, some Member States had already implemented regulation on EPGs, including Italy, Ireland, France,²⁸ Spain,²⁹ Germany and the UK.³⁰ Interestingly, pursuant to a British case in which a digital television set-top box among others embedded an EPG by an aligned provider,³¹ the European Commission issued a notice that the competition rules may equally apply on access issues in digital communications sectors, to the extent that comparable problems arise.³² Furthermore, a European Union Green Paper stated that exclusive arrangements tying particular EPGs to particular service bundles may require intervention to ensure third-party access on a fair, transparent and non-discriminatory basis.³³ In a response, the Danish government stated that ‘...when the consumer is to choose among several hundred offerings, it is not immaterial in what order or context an offering is presented. Control of an EPG may therefore serve as a basis for drawing attention to one’s own offerings, while offerings that the controlling operator does not wish to be promoted are given a less conspicuous presentation.’³⁴
- 14 This served as a prelude to the Access Directive of 2002, which extended the anti-competition principles to new gateways that had emerged since 1995,

most notably EPGs and Applications Program Interfaces (APIs). This suggests that the Commission did not believe that specific access issues in the digital TV sector should be regulated by market forces at that stage.³⁵ The directive carried over the provisions regarding the obligation to provide conditional access on fair, reasonable and non-discriminatory terms³⁶ and allowed these obligations to be imposed on EPGs by national regulative authorities, to the extent that is necessary to ensure accessibility for end users to specified digital broadcasting services.³⁷ In contrast to APIs, in relation to which the European Commission has reserved the right to implement standards,³⁸ EPGs are left entirely to the Member States to be regulated with regard to access issues.³⁹ This is important since traditionally community law is more concerned with competition regulation and Member State legislation is more concerned with the protection of pluralism.⁴⁰

- 15 Besides the conditions regarding fair, reasonable and non-discriminatory terms, there was some discussion during the drafting process regarding the question of whether EPGs should fall under the conditions imposed on Conditional Access Systems (CASs); this was favoured by both the commission and members of Parliament,⁴¹ but the Council felt it to be overly rigid.⁴² As a compromise, the article regarding conditional access systems holds that Member States may impose obligations in relation to the presentational aspect of electronic programme guides.⁴³ However, it may not always be easy to distinguish between access and presentational aspects, since ‘... the presentational aspects of an EPG design are crucial in determining if and how services are accessible to end users’.⁴⁴
- 16 In conclusion, the European framework offers two grounds for EPG regulation by national authorities.⁴⁵ The European framework is primarily based on anti-competition rules and leaves room for regulation on presentational aspects of EPGs; the media law principles form no part of the rules, but the regulation of EPGs is left to a large extent to the national regulators, who traditionally are involved with promoting diversity and pluralism. The next sections describe the Dutch, the British and the German approach towards EPG regulation.

D. The Netherlands

- 17 The Netherlands only has sparse regulation on EPGs. The Telecommunications Act (Telecommunicatiewet)⁴⁶ holds that to guarantee access by end users to specified services that are broadcasted digitally and can be received using television or radio systems, a ministerial regulation may lay down rules with respect to granting access to electronic programme guides by providers. These rules may regard

the provision of access to electronic programme guides, the access conditions, providing information on obtaining access and the maintaining of separate bookkeeping for activities related to the provision of EPGs and for other activities.⁴⁷

- 18 The ministerial regulation to which the law refers never materialized. The Media Commission (Commissie voor de Media), the regulatory authority in the media (content) sector, announced a number of years ago that it was not planning to introduce regulations regarding the position of the channels in EPGs. When asked, the Independent Post and Telecommunications Authority (Onafhankelijke Post en Telecom Autoriteit), the regulating authority in the telecommunications sector, stated that it had no rules under which the EPGs would be regulated: ‘The rules on EPGs are sparse and unclear. There is no regulation which provides an interpretation of the law, so there is no possible applicability.’⁴⁸ The possible role of the two different regulators, one in the field media and the other in the field of telecommunications, says something about the regulation of EPGs. This matter will be further discussed in the next section on the UK.
- 19 During the parliamentary debate, there was no extensive discussion regarding EPG regulation. The explanatory memorandum to the law merely states that EPGs may be seen

*...as an electronic version of the familiar TV listings magazine. To encourage consumers to watch and listen to as many different digital services, it is important that they can inform themselves to the fullest extent possible on the available digital services. In this respect, EPGs can play an important role. A concise and complete EPG can be an excellent source of information. Providers of digital television or radio services should be able to include their program information in an EPG. This is not only in the interest of the content providers and the consumers, but also in that of the EPG provider. Indeed, an integral guide will normally be more regularly consulted than an incomplete one.*⁴⁹

- 20 Like a number of European countries, Holland has abstained from implementing specific EPG regulation. If there is any real regulatory approach to be discovered, it is not the pursuit for diversity and pluralism nor the focus on competition rules. Rather, the explanatory memorandum seems to be particularly concerned with consumer interest in terms of transparency, an integral offer and access to services and information.

E. The United Kingdom

- 21 Already from 1990 onwards, British EPG providers were put under license conditions ensuring a wide

range of services throughout the UK and fair and effective competition.⁵⁰ Since EPGs were not standardized, both competence and user freedom were hindered;⁵¹ similarly, both commercial issues and technical issues arose.⁵² In 1997, there were two codes of conduct in this field, one by the technical regulator, the Office of Telecommunications (OfTel), which interpreted EPGs as covered by the non-discrimination rules for telecommunications access service, and another code was drafted by the media regulator, the Independent Television Commission (ITC), which mandated that the visual interface of EPGs should grant public channels 'due prominence'.⁵³ The ITC and OfTel established a joint working group to ensure that there was consistency in regulation.⁵⁴ The question of due prominence applied to EPGs was new, since the regulatory approach had up to then been a question of scarcity rather than abundance of offerings.⁵⁵

- 22 Although the European legislation lagged behind, from an early stage the British approach provides an example of diversity-based regulation within a competition framework. This was due in large part to the fact that EPGs were considered both a technical telecoms and a broadcast programming bottleneck.⁵⁶ Some critics felt that the rules of OfTel and ITC were inconsistent with each other. Due prominence for public broadcasting channels seems to favour these channels not on the basis of their content but for their status. In an earlier stage, OfTel had already held this kind of favouring incompatible with the non-discrimination principle. OfTel presumed that discrimination by suppliers in favour of public service broadcasters or channels simply by virtue of their public service status would not be consistent with the non-discrimination requirement.⁵⁷
- 23 Next there was a case with regard to the due prominence clause, when the BBC moved from Sky's satellite to the Astra 2D satellite; as a reaction to this, Sky threatened the BBC that it would lose its top position on the provider's EPG. The BBC called in the ITC to determine the legality of Sky's announced action and to give clarification on the due prominence clause.⁵⁸ However, the ITC was not able to do so since BBC and Sky settled their dispute.⁵⁹
- 24 Subsequently, the Communications Act of 2003⁶⁰ provided for new provisions that were similar to those in the Broadcasting Act. It holds that the new, combined national regulating authority, the Office of Communications (OfCOM), is under the obligation to draw up a code giving guidance on the practices to be followed in the provision of electronic programme guides. The code must provide for rules regarding the due prominence of public service channels.⁶¹ According to the Code of Conduct,⁶² OfCOM considers that 'appropriate prominence' permits a measure of discrimination in favour of public service broadcasting channels. EPG providers should themselves ensure that the approach they adopt to fulfil the requirement of appropriate prominence is objectively justifiable. OfCOM does not give details on what appropriate prominence means, since it feels that there are many possible ways in which EPGs could display information about public television programs.⁶³ In considering whether a particular approach to listing public service channels constitutes appropriate prominence, OfCOM will take into account both the interests of citizens and the expectations of consumers. OfCOM does state that it would justify a decision by an EPG operator using a menu-based approach to position public service channels no more than 'one click' away from the home page. Giving public service channels first refusal on vacant listings higher in the category that they were placed might also be justified, according to OfCOM.⁶⁴
- 25 OfCOM further explains that when EPG providers enter into contracts with broadcasters, they should ensure that the terms are fair, reasonable and non-discriminatory and comply with an objectively justifiable method of allocating listings, such as objectively justifiable 'first come, first served' methods, alphabetical listings and listings based on audience shares. Undue prominence to a channel with which providers are connected and conditions specifying exclusivity to one EPG for any service or feature are prohibited unless when required in light of the appropriate prominence provisions.⁶⁵
- 26 During the consultation of the draft Code of Conduct, one of the debates concerned the due prominence provision.⁶⁶ The discussion primarily concerned the free and fair competition in the market and only to a limited extent the diversity policy. Although a number of respondents hoped for more detailed criteria on the 'appropriate prominence' clause, OfCOM stated that there were a number of different approaches that could be justified and that it believed that broad and general guidance maximizes the scope for diversity, to the benefit of consumers.⁶⁷
- 27 This standpoint was repeated time and again by OfCOM, for example, in 2008 when the OfCOM held its Second Public Service Broadcasting Review. In that report, OfCOM also seemed to play down the role of EPG prominence when it stated that

*[o]n one hand, an active trade in EPG positions in the multi-channel sector suggests that broadcasters believe their channels can increase viewing in higher EPG positions. However, there is equal evidence that viewers will seek out particular channels and content irrespective of EPG position as the figure below illustrates - many channels attract significant share despite being absent from the first page of a particular genre category.*⁶⁸
- 28 However, an external study for OfCOM from 2010 on the audience impact of page one EPG prominence

concluded that 28 of the 33 examined cases in which EPG listing was altered supported the argument that EPG positioning affects audience performance, 4 examples were inconclusive and only 1 supported the argument that EPG positioning did not affect audience performance at all.⁶⁹ It's not yet clear what OFCOM's response will be on this point.

F. Germany

29 In 1996 the German Broadcasting Treaty (Rundfunkstaatsvertrag)⁷⁰ already held that providers of systems which could control the selection of television programs and which are used as a super-ordinate interface for all services offered via that system must offer to all broadcasters, on fair, reasonable and non-discriminatory conditions, technical services enabling the broadcasters' services. More specifically, the law stated that the start-up page should make equal reference to public and private channels and ensure that the individual programs may be directly tuned into.⁷¹ This idea of equality in weight between public and private broadcasters has remained one of the distinguishing features of the German regulatory approach toward EPGs.

30 The current media law also regulates platform providers.⁷² According to the law, a platform provider is one who summarizes the supply of services by third parties via digital transmission services offered as an aggregated whole, or one who decides on the summary.⁷³ Regarding technical access freedom, the law provides that to ensure diversity of opinion and of choice, electronic programme guides may not discriminate without objective and reasonable justification.⁷⁴ The protection of diversity of opinion is one of the core goals of the law. Especially with regard to private broadcasters, the law imposes numerous provisions to ensure that its diversity policy is served.⁷⁵ EPGs are also regulated in that light and special rules exist for private platform providers. They must ensure that they also transmit public broadcasting programs⁷⁶ and take into account the provisions regarding diversity of opinion and offer.⁷⁷

31 According to the law, a statute may be drafted to specify details about the regulation of electronic programme guides, among others.⁷⁸ The regulatory authorities of the German *Länder* adopted (each for its jurisdiction) the statute on freedom to access digital services and on the regulation of platforms (*Satzung über die Zugangsfreiheit zu digitalen Diensten und zur Plattformregulierung*)⁷⁹ that names and describes in further details the main principles aimed to pursue the goal of diversity in offer and opinion. These principles are equal opportunity and non-discrimination.⁸⁰ Providers must ensure that access to distribution or marketing offers is not unduly (directly or indirectly) restricted, and that there is no discrim-

ination between similar providers without reasonable justification. Diversity in offer and opinion⁸¹ are the core values under the statute.

32 Equal opportunity is presumed if a provider gives everyone a realistic chance to access its access services. In contrast, conditions are presumed discriminatory if a provider offers the same service to one company under different conditions than to another company, unless the differences are objectively justifiable.⁸² Concerning EPGs, meeting the following conditions should always lead to the conclusion that the principles of equal opportunity and non-discrimination are respected:

- several lists with different sorting criteria are offered next to each other,
- the user has the ability to change the sequence of channels in the list or to create its own favourites list and
- a proffered list of favourites is offered without prefixed settings.⁸³

33 Furthermore, the statute holds that equal reference should be made to public and private programs.⁸⁴ This emphasis on the equality of public and private programs differs significantly from the British model that gives public channels due prominence, taking into account the particular importance of public service broadcasting and thus potentially causing the other broadcasters' chances of access and presentation to be unduly diminished.

The solution which has been adopted in Germany could prove to be a less intrusive, but nevertheless equally effective alternative. By providing that navigators must facilitate that the start-up page makes reference to public service and private channels which is equal in weight, ... the Interstate Broadcasting Treaty gives the public service broadcasters on the one hand and the remaining broadcasters on the other the same chances to be perceived without favouring the public service channels to the detriment of the other content providers.⁸⁵

34 It is then up to the user to choose what to view.

G. Conclusion

35 In many respects, EPG regulation balances on a thin line. First, there is a line between the position of EPG providers as providers of content and as providers of access services, two types that are regulated on different doctrines in EU law. EPGs are currently regulated under the European Access Directive, which means that EPG providers are primarily seen as access providers. However, the European rules allow national governments to treat EPGs in whole or in

part as providers of content. The fact that in both the Netherlands and initially in the UK, two regulators dealt with the topic of EPG regulation – namely the media (content) regulator and the regulator in the field of telecommunication – reflects this tension.

- 36 Second, there is a related distinction between rules that ensure diversity and pluralism on the one hand and antitrust regulation on the other. EPGs can be regulated under media law doctrines, which emphasize values such as the need for governmental interference to guarantee the quality and diversity in program offerings. Likewise they can be regulated by relying on competition law principles, with their particular emphasis on fair competition and a competitive market. Additionally, general consumer law aspects play a role in EPG regulation, emphasising the need for transparency, the importance of providing an integral service and laying out prohibitions on unfair trade practices.
- 37 Finally, the distinction between national and European regulation, in this case the Access Directive, is also of importance, as traditionally European law is more focused on competition aspects, and the national legislation is more concerned with encouraging diversity in media content.
- 38 On the European level, the choice has been made to treat EPGs primarily in the field of access services, to predominantly focus on antitrust principles and to opt for minimal regulation on the European level so as to allow national governments to introduce regulation based on media, competition or consumer law principles as they see fit. How the different European countries have used this margin of appreciation differs to a large extent. In this article, three countries that symbolize three types of approaches have been discussed: the Dutch, the British and the German regulation.
- 39 Though no specific regulation exists, the Dutch framework for EPG regulation is primarily based on consumer law practices. In contrast, the British regulation is dominated by media law principles as it allows for a preferred treatment of public broadcasting channels, which are traditionally used by the government to promote quality and diversity in program offerings. The ‘due prominence’ rule can be seen as a way to maintain the status quo because public channels are usually programmed first in the analogue television environment. Finally, in Germany, the core of the regulation of EPGs is based on the equal treatment of public and commercial channels in the EPG listings. This seems to be primarily concerned with the fear that certain EPG providers might enter into contractual agreements with television broadcasters and offer them a preferred position. This approach is thus based on competition law principles.
- 40 Another line that needs to be carefully observed by the national authorities is that of governmental interference to promote a qualitative and diverse television landscape while at the same time maintaining their neutrality. What neutrality means in this respect, however, is a matter of discussion. Roughly, three approaches towards state neutrality may be distinguished: exclusive, inclusive and compensating neutrality.⁸⁶ Exclusive neutrality implies that the government is not committed to any form of ideology, religion, etc. Manifestations of specific group characteristics such as crosses or headscarves by government officials are therefore forbidden.⁸⁷ In media terms, this means that the government does not adopt any rules that protect a specific category, group or ideology. Second, inclusive neutrality is based on the principle of proportionality; the government ensures that different groups in society are equally represented in government and have equal access to services.⁸⁸ This kind of neutrality is sometimes also referred to as proportional neutrality. ‘Proportional neutrality takes account of different comprehensive views by making representation of minority groups or state support for their culture proportional to their size. It requires that every group get representation in advisory councils and policy boards or funding for schools, broadcasting unions, and so on, in accordance with its share of the population.’⁸⁹ In media terms this might imply that the government ensures that different groups in society get equal attention or air-time in proportion to their size or number. Finally, compensatory neutrality means that governments actively promote and protect the interest of certain vulnerable minorities in society that are in need of special protection. For example, this may lead to a preferred treatment of religious minorities or those belonging to a language minority by giving them a larger time-slot on national television than their size would normally legitimate.
- 41 Again, governments make different choices in this respect, although as with the choice between media, competition and consumer law, a choice for one does not exclude the other. Still, it’s clear that the Dutch government is very reluctant to introduce any regulation that would actively ensure that EPGs offer a diverse and pluralistic programming; in doing so, it has chosen to adopt a form of exclusive neutrality in this field. In contrast, the British approach is partially based on the idea of compensatory neutrality, given the fact that the EPG regulation is primarily aimed at preserving the influence of public broadcasting channels in the digital environment and the fact that one of the main goals of the BBC is to stimulate minority ideologies, languages and cultures.⁹⁰ Furthermore, the BBC Broadcasting Agreement specifically calls for ‘appropriate coverage of sport, including sport of minority interest’⁹¹ and ‘appropriate provision in minority languages’⁹² and includes a special position for ‘co-funding by non-commer-

cial bodies for output in minority languages'.⁹³ The German approach aims at equality of different channels in the EPG listing by implementing safeguards to prevent a too dominant position of one or a number of specific broadcasters that may want to enter into contractual relations with EPG providers. This reflects the principle of proportionality that is also central to the idea of inclusive neutrality.

- 42 Finally, governments need to walk a fine line between stimulating new developments in the digital broadcasting environment and maintaining their influence; the original Advanced Television Services Directive was primarily concerned with the promotion of the accelerated development of advanced television services, but also maintained that competition rules alone may not be sufficient to ensure cultural diversity and media pluralism in the area of digital television. This dilemma is still prominent with regard to EPG regulation nowadays, since EPGs are no longer solely offered via a set-top box or digital TV, but increasingly through tablets, smartphones, apps and social networks.⁹⁴ This raises the question how far the legal definition of the 'EPG' and thus the scope of the regulation could and should reach since overly rigid regulation might hamper new developments and innovation; currently, the EPG regulation is mostly limited to the traditional EPG providers.⁹⁵ Will governments go so far as to impose media law principles on digital, Internet-based services? Only time will tell whether this will happen or whether this latest development might mean the end of EPG regulation – and perhaps, the de facto influence of media law-based regulation on the digital television environment.

* This article is the result of a study executed by IViR and TNO for the Dutch Ministry of Education, Culture and Science regarding the regulation of the audiovisual landscape in the Netherlands. <http://www.ivir.nl/publicaties/vaneijk/Distributierapport_TNO.pdf>.

- 1 O. Näränen, 'European Digital Television: Future Regulatory Dilemmas', *The Public*, 2004, 9-4, p. 26.
- 2 This also relates to the discussion on network neutrality spurred in Europe recently by the Citizens' Rights Directive of 2009 and the technological neutrality and service neutrality that have been confirmed by the Better Regulation Directive of 2009. Directive 2009/136/EC of The European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (Citizens' Rights Directive). Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and ser-

vices (Better Regulation Directive). See further Nico van Eijk, 'Net Neutrality and Audiovisual Services', *IRIS Plus*, 2011-5, p. 7-19. <http://www.ivir.nl/publicaties/vaneijk/IRIS_Plus_2011_5.pdf>.

- 3 For a short bibliography on convergence of communications, media regulation and pluralism, please refer to A. Harcourt, 'The European Union and the regulation of media markets', Manchester University Press, Manchester, 2005. T. Gibbons and P. Humphreys, 'Audiovisual Regulation under Pressure', Routledge, London and New York, 2012. T. Gibbons, 'Regulating Audiovisual Services. Library of Essays in Media Law', Ashgate, Farnham, Surrey, 2009. D. A.L. Levy, 'Europe's digital revolution: Broadcasting regulation, the EU and the nation state', Routledge, London, 1999. M. Michalis, 'Governing European communications: From unification to coordination', Lexington Books cop., Lanham, MD, 2007.
- 4 <<http://www.frequencycast.co.uk/cable.html>>.
- 5 <<http://crave.cnet.co.uk/televisions/skyhd-gets-new-epg-now-you-never-have-to-stop-watching-49301439/>>.
- 6 <<http://www.tomsguide.com/us/windows-in-the-living-room,review-477-8.html>>.
- 7 <<http://informatv.com/news/2007/05/25/verizonfiosshows/>>.
- 8 For further discussion on this topic, see N. Helberger, 'Diversity by Design', *Journal of Information Policy*, 2011-1. E. Pariser, 'The filter bubble: What the Internet is hiding from you', Viking, London, 2011.
- 9 The directive may be seen as the European adaptation of the Cable ACT 1992 from the US that also governs digital Conditional Access Systems.
- 10 Article 1 Directive 95/47/EC of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals (Advanced Television Services Directive).
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