

Due Prominence in Electronic Programme Guides

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The digitisation of television broadcasting has facilitated an exponential growth both in the number and the diversity of programmes and channels. Electronic Programme Guides (EPGs) help consumers to find their way in this abundance in offer. EPGs serve as a classical listing magazine or broadcasting guide with extensive information on television programmes, like VCRs they enable the recording of programmes, as search engines they allow users to look for content on the basis of a keyword and finally, EPGs list the most favoured programmes 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. Some governments have adopted “due prominence” rules that require EPG providers to give public channels an equal or favoured treatment in their page ranking.

I. Introduction

In an environment where the number of television programmes and channels is constantly growing, the importance of adequate and effective search engines and navigation systems increases. The programmes 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 so-called “due prominence” rules, which require EPG providers to give public broadcasters or other selected channels appropriate prominence in their page-ranking system. Like must-carry rules, they serve as a way for governments to retain power over the changing audiovisual landscape and to preserve their influence through the public channels by giving these channels a preferred position. 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”,² the due prominence provision is a way to maintain the status quo.

When approaching this development, regulatory authorities will have to strike a balance between their neutrality on the one hand and their policy to stimulate diversity on the other. EPGs can be regulated under media law doctrines, which emphasise the need for governmental guarantees regarding the quality of and diversity in programming. EPGs can also be approached by relying on competition law principles, with their particular emphasis on fair competitive opportunities in the market. These may be used, for example, to lay restrictions on agreements between EPG providers and broadcasters with respect to the prominence given to particular programmes. Additionally, EPG regulation is affected by general consumer law, in which transparency, prohibitions on unfair commercial practices and restrictions and limitations on contract terms play a central role. This Zoom section shortly describes the European framework for EPG regulation contained in the Access Directive and then focuses on the national regulation of the United Kingdom and Germany.

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2) O. Näränen, “European Digital Television: Future Regulatory Dilemmas”, *The Public*, 2004, 9-4, p. 26.

II. European Access Directive

Since the pursuit of pluralism and fair and equal competition can be countervailing interests,³ EPG regulation often finds itself torn between these two core values. Although the main function of EPGs is to facilitate access to content by providing information on the content available,⁴ and consequently some regulators have approached them from this perspective,⁵ it seems apparent that EPGs do not qualify as television programmes or content services.⁶ EPGs balance on a thin line between content providers and access services: two categories which in European legislation are regulated under two different regimes.⁷ Currently, EPGs are regulated under the Access Directive,⁸ the core principle of which is that bottleneck issues cannot be tackled only by anti-competitive rules but that public policy priorities, for instance the preservation of pluralism, must also be taken into account.⁹

The Access Directive contains the obligation to provide conditional access on fair, reasonable and non-discriminatory terms¹⁰ and allows national regulatory authorities to impose these obligations on EPGs, to the extent that is necessary to ensure accessibility for end-users to specified digital broadcasting services.¹¹ In contrast to Application Program Interfaces (APIs), in relation to which the European Commission has reserved the right to implement standards,¹² the regulation of EPGs with regard to access issues is left entirely to the member states.¹³ This is important since, traditionally, EU law is more concerned with competition regulation while national law is more concerned with the protection of pluralism.¹⁴

Besides the conditions regarding fair, reasonable and non-discriminatory terms of access, the article contained in the Access Directive regarding Conditional Access Systems (CASs) provides that member states may “impose obligations in relation to the presentational aspect of electronic programme guides and similar listing and navigation facilities.”¹⁵ However, it may not always be easy to distinguish between access and presentational aspects, because “the presentational aspects of an EPG design are crucial in determining if and how services are accessible to end users.”¹⁶

It may be concluded that the regulation of EPGs is left to the member states; the European framework stipulates that they may impose obligations on providers both with regard to access issues and with regard to presentational aspects. There is no harmonisation of the national approaches towards EPG regulation in the EU. Among existing provisions regulating EPGs, the British and the German approach are the most developed and detailed; they will therefore be discussed below.

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- 3) N. Helberger & A. Springsteen, “Workshop Report: Vertical Limits – New Challenges for Media Regulation? (Summary of the Discussion)”, p. 8. In: IRIS Special, *Regulating Access to Digital Television. Technical Bottlenecks, Vertically-integrated Markets and New Forms of Media Concentration*, European Audiovisual Observatory, Strasbourg 2004.
 - 4) N. Helberger, “Directive 2002/19/EC ‘Access Directive’: Access Regulation”, p. 1136. In: O. Castendyk, E. Domming & A. Scheuer, *European Media Law*, Alphen aan de Rijn, Wolters Kluwer, 2008.
 - 5) T. Gibbons, *Regulating audiovisual services*, Farnham, Ashgate, 2009, p. 61.
 - 6) O. Castendyk & L. Woods, “Directive 89/552/EEC ‘Television without Frontiers’ Directive, article 1 (definitions)”, p. 282. In: O. Castendyk, E. Domming & A. Scheuer, *European Media Law*, Alphen aan de Rijn, Wolters Kluwer, 2008. H. Galperin, “Can the US transition to digital TV be fixed? Some lessons from two European Union cases”, *Telecommunications Policy*, 2002-26, p. 7.
 - 7) T. Kleist, “Begrüßung und Einführung”. In: EMR, “Die Zukunft der Fernsehrichtlinie: Dokumentation der Veranstaltung des Instituts für Europäisches Medienrecht (EMR) in Zusammenarbeit mit der Europäischen Rechtsakademie Trier (ERA)”, Baden-Baden, Nomos, 2005, p. 11.
 - 8) Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive).
 - 9) See also: N. Nikolinakos, “The new legal framework for digital gateways – the complementary nature of competition law and sector specific regulation”, *European Competition Law Review*, 2000-21, p. 1.
 - 10) Article 5 § 1 sub b Access Directive.
 - 11) Recital 10 Access Directive.
 - 12) Articles 17 and 18 Framework Directive. See also recital 6 of that directive. Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive).
 - 13) W. Schulz, “Extending the Access Obligation to EPGs and Service Platforms?”. In: IRIS Special, *Regulating Access to Digital Television. Technical Bottlenecks, Vertically-integrated Markets and New Forms of Media Concentration*, European Audiovisual Observatory, Strasbourg 2004, p. 49.
 - 14) Schulz (2004), p. 53.
 - 15) Article 6 § 4 Access Directive.
 - 16) N. Helberger, *Controlling access to content: regulating conditional access in digital broadcasting*, The Hague: Kluwer Law International, 2005, p. 230.

III. United Kingdom

In the UK, the regulation of EPGs is based on the doctrine of “due prominence” for public channels. Following an obligation stipulated by the Communications Act of 2003,¹⁷ the national regulatory authority, the Office of Communications (Ofcom), drew up the Code of practice on electronic programmes guides (hereinafter “the Code”)¹⁸ to be respected by EPG providers. In fulfilment of section 310 Communications Act the Code contains rules regarding the due prominence of public service channels.¹⁹

According to the Code, Ofcom considers that “appropriate prominence” permits a measure of discrimination in favour of public service broadcasting channels. EPG providers must be able to objectively justify their approach to the requirement for appropriate prominence. Ofcom does not give details on what appropriate prominence means, because in its opinion there are many possible ways in which EPGs could display information about public television programmes. 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 the principles of the Code “would justify a decision by an EPG operator using a menu-based approach to position public service channels no more than ‘one click’ from the home page. They might also justify giving public service channels first refusal on vacant listings higher in the category that they were placed.”²⁰

When EPG providers enter into contract with broadcasters, they should ensure that the terms are fair, reasonable and non-discriminatory and comply with an objectively justifiable method of allocating listings, for example objectively justifiable “first come, first served” methods, alphabetical listings and listings based on audience shares. It is prohibited to give undue prominence to a channel to which the EPG providers are connected or to condition a contract for any EPG service or feature on exclusivity, except where required in the light of the appropriate prominence provisions.²¹

During the consultation period for the draft Code, the discussion regarding the appropriate or due prominence rule was primarily concerned with free and fair competition in the market and only to a limited extent with diversity and pluralism. Although at the time a number of respondents had hoped for more detailed criteria on appropriate prominence, Ofcom stated that there were a number of different approaches that could be justified and that it believed that broad and general guidance would maximize the scope for diversity, to the benefit of consumers.²²

This view was repeated frequently by Ofcom, for example in 2008 when Ofcom held its Second Public Service Broadcasting Review. In that report, Ofcom also seemed to downplay the role of EPG prominence by stating 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 [...] – many channels attract significant share despite being absent from the first page of a particular genre category.”²³ However, in an external study for Ofcom from 2010 on the audience impact of page-one EPG prominence, it was concluded that 28 of the 33 examined examples in which EPG listing was altered, supported the argument that EPG positioning affects audience performance, four examples were inconclusive and only one supported the argument that EPG positioning did not affect audience performance altogether.²⁴ It is not yet clear what Ofcom’s response will be on this point.

17) <http://www.legislation.gov.uk/ukpga/2003/21/introduction>

18) <http://stakeholders.ofcom.org.uk/binaries/broadcast/other-codes/epgcode.pdf>

19) Section 310 Communications Act, <http://www.legislation.gov.uk/ukpga/2003/21/section/310/prospective>

20) Section 3 and 4 Code.

21) Paragraph 15 c. and g. Code.

22) Paragraph 14 Statement on Code on Electronic Programme Guides: Statement by Ofcom, available at: <http://stakeholders.ofcom.org.uk/binaries/consultations/epg/statement/statement.pdf>

23) Ofcom’s Second Public Service Broadcasting Review, Phase Two: Preparing for the digital future, p. 98, available at: http://stakeholders.ofcom.org.uk/binaries/consultations/psb2_phase2/summary/psb2_phase2.pdf

24) F. El-Husseini, “An Analysis of the Audience Impact of Page One EPG Prominence”, A Report for Ofcom, July 2010 Non-Confidential Version, p. 4, available at: http://stakeholders.ofcom.org.uk/binaries/consultations/review_c3_c5_licences/statement/attentionalreport.pdf

IV. Germany

In Germany, the media law regulates the so-called platform providers.²⁵ The protection of diversity of opinion is at the core of the law. Especially with regard to private broadcasters, the law imposes numerous provisions to ensure that its diversity policy is served.²⁶ EPGs are also regulated in that light and special rules exist for private platform providers. They must ensure that they also transmit public broadcasting programmes²⁷ and take into account the provisions regarding diversity of opinion and offer.²⁸ The regulatory authorities of the German *Länder* adopted (each for its jurisdiction) the *Satzung über die Zugangsfreiheit zu digitalen Diensten und zur Plattformregulierung* (Statute on freedom to access digital services and on the regulation of platforms, hereinafter “the Statute”)²⁹ that names and describes in further detail the main principles aimed at pursuing the goal of diversity in offer and opinion. These principles are equal opportunity and non-discrimination.³⁰ Providers must ensure that access to distribution or marketing offers is not unduly (directly or indirectly) restricted and that there is no discrimination between similar providers without reasonable justification.

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.³¹ 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 his own favourites list and
- a proffered list of favourites is offered without prefixed settings.³²

Finally, the Statute obliges EPGs to provide equal reference to public and private programmes.³³ This differs from the British model in which public channels should have due prominence, with which the particular importance of public service broadcasting is taken into account, but which could have the effect that the other broadcasters’ chances of access and presentation 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.”³⁴ It is then up to the user to choose what he wants to view.

25) § 52 RStV. Staatsvertrag für Rundfunk und Telemedien (Rundfunkstaatsvertrag – RStV) vom 31. März 1991, in der Fassung des Dreizehnten Staatsvertrages zur Änderung rundfunkrechtlicher Staatsverträge vom 10. März 2010 (vgl. GBl. S. 307), in Kraft getreten am 1. April 2010.

26) § 25-34 RStV.

27) § 52b para 1, sub 1 RStV.

28) § 52b para 1, sub 2 RStV.

29) See: *Satzung über die Zugangsfreiheit zu digitalen Diensten und zur Plattformregulierung gemäß § 53 Rundfunkstaatsvertrag 2008*, available at: http://www.die-medienanstalten.de/fileadmin/Download/ZAK_PDZ/Zugangs-und_Plattform-satzung_04.03.2009.pdf

30) § 4 *Satzung*.

31) § 4 paras 2 and 3 *Satzung*.

32) § 15 para 2 *Satzung*. See also: Birgit Stark, “Der EPG als Gatekeeper im Digitalen Fernsehen – Risikopotenzial durch neue Marktakteure?” *TV 3.0 - Journalistische und politische Herausforderungen des Fernsehens im digitalen Zeitalter*. 11. März 2008, Berlin FES Konferenzzentrum, available at: http://fes-stabsabteilung.de/docs/stark_tv_3_mr.pdf

33) § 15 para 5 *Satzung*.

34) A. Wichmann, “Electronic programme guides – a comparative study of the regulatory approach adopted in the United Kingdom and Germany: Part 2,” *Computer and Telecommunications Law Review*, 2004-10, p.5.

V. Conclusion

Programmes that are listed on the first page of the EPG need not be the public channels, but could also consist of channels that the consumer favours or with which the EPG provider has contractual agreements. Some national regulators have implemented so-called “due prominence” rules, which ensure a high position for public broadcasters in the page ranking of EPGs. Similar to must-carry rules, this requirement allows governments to retain power over the changing audiovisual landscape and to preserve their influence through the public channels. Must-carry rules achieve this by requiring that public channels be part of the broadcaster’s package; EPG regulation ensures this by requiring that public channels receive an equal or favoured treatment in the page ranking of programme guides.

The European framework contained in the Access Directive, leaves the regulation of EPGs to the national legislators. Whereas most European countries have no or very minor rules on EPGs, the UK and Germany have developed elaborate regulation in this respect, though their approach is different. While the German rules focus on the equality of public and private programmes, the British model requires that public channels have appropriate or due prominence, with which the particular importance of public service broadcasting is taken into account, but which could have the effect that the other broadcasters’ chances of access and presentation are unduly diminished.

Like must-carry rules, EPG regulation balances on a thin line between content and access regulation, between media-specific rules and general competition law, and between stimulating quality and diversity and maintaining a neutral role for the government. Both will be increasingly challenged by new Internet-based services. For example, EPGs are no longer solely offered via a set-top box or digital television, but are also provided via tablets, smart phones, apps and social network sites. It remains to be seen whether governments will go so far as to include Internet services in their must-carry or EPG regulation.