Controlling access to content: regulating conditional access in digital broadcasting

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Citation for published version (APA):

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Chapter 5

Summary and Conclusion

5.1. Summary

Pay-TV is an example of a sophisticated content management and distribution infrastructure designed to sell digital content to consumers. In pay-TV, access to services is controlled electronically. The role that technology plays in this context is prominent—conditional access is a means of identification, authorization and control. Conditional access also enables distribution channels to be secured and lasting commercial relationships to be established with consumers.

This study provides a critical analysis of how current European broadcasting law, competition law and telecommunications law have responded to the challenges from electronic access control for competition and consumer access to access-controlled content. It examined how access-controlled platforms in digital broadcasting are regulated, and if the existing regulatory framework is adequate to realize the policy goals for this sector. The purpose of this chapter is to summarize the main findings, and provide some conclusions about the current framework, its inadequacy to deal with electronic access control in digital broadcasting and how it could be reformed. In a last section, Chapter 5 explains why electronic access control is a phenomenon that is not reserved to the digital broadcasting sector.

5.1.1. Changes and Regulatory Implications

As an element of a business model for digital broadcasting, electronic access control changes the sector’s traditional distribution patterns in different ways. These changes impact the applicability and adequacy of current pay-TV regulation. They also trigger the need to rethink existing concepts and have led to a number of regulatory initiatives at the European level.

The most obvious change is that electronic access control allows for fine-grained private control over individual access to broadcasting content. Conditional access allows for a high degree of individualization and differentiation. This is why conditional access is well-suited for business models that are based on strategic exclusion, meaning, on the one hand, the exclusion of consumers from access to the content they are not willing to pay for, and, on the other hand, the exclusion of competitors from access to consumers. One can imagine conditional access as an intelligent, strong wrapping paper that is able to decide who may unwrap which particular content under which conditions. Unlike traditional parts of the transmission infrastructure, conditional access is not blind to the content of the
service distributed; instead, the content and the conditions attached to it are made an integral part of the technical routine. This is why the use of conditional access plays a role for transport-related and content-related questions, notably the conditions under which consumers can access content.

Secondly, electronic access control solutions are often not operated by the broadcasters themselves, but by intermediary platform operators, such as BSkyB or Canal+. The intermediary platform takes on a middle-function between consumers, operators at the service level and operators at the technical distribution or, as the study calls it, transport level. Such platform operators are ‘information brokers’ that bring third-party content providers and consumers together and present consumers with content services, content à la carte or in pre-selected packages. Like business-to-consumer (B2C) platforms, intermediary platforms can and will engage in marketing strategies other than single broadcasters would or could do. Traditional free-TV broadcasters sell consumer attention to advertisers and/or finance themselves through public fees. Pay-TV platforms can also offer advertising-financed content, but their main business strategy is to sell content directly to consumers. The economic success of intermediary platforms depends on their ability to get, on the one hand, attractive service providers, and, on the other hand, large subscriber numbers on board and keep them. Pay-TV platforms can attract consumers by offering them a whole ‘world’ of services. Such platforms concentrate on the commercial side of packaging and selling content to consumers. In so doing, they can generate efficiency advantages individual broadcasters would not be able to generate in the form of (large-scale) bundling and price differentiation models.

This also means, however, that control over a dominant conditional access standard, a popular programme package, or an Electronic Programme Guide can result in bottleneck situations for competition. In areas in which a platform operator succeeds in monopolizing its consumer relationships, it can be more difficult for consumers to switch platforms and for rivals to gain access to this part of the consumer base.

**Regulatory Implications**

Once consumers have subscribed to one pay-TV platform, they are entangled in a web of contractual, technical and informational relationships with its operator. The privately dictated terms and conditions of access in subscriber contracts overrule one of the basic concepts on which broadcasting law is based, namely that once a service has been sent, it is principally ‘freely’ available. This also means, however, that the supremacy of broadcasting law to shape the broadcasting offer and to guarantee that the latter complies with a number of public information policy rationales is eroded by the exercise of private control over consumer access to broadcasting content. With pay-TV, the controller of the intermediary pay-TV platform decides which content citizens can watch under which conditions. Broadcasting regulators are confronted with new issues, such as bottleneck control,
access issues, and how to prevent platform operators from abusing their commercial relationship with consumers to exercise excessive influence over choice and the accessibility and availability of digital broadcasting content.

Restricting choice and participation can conflict with the realization of competition, the Internal Market and the public information policy interests that govern this sector. Chapter 1 and 3 described the competition problems involved, and why conditional access can become a bottleneck to market entry. Chapter 2 explained why electronic access control in broadcasting can raise considerable concerns regarding the fragmentation of society into subscribed and unsubscribed citizens. It discusses the exclusion of citizens who cannot, for technical or financial reasons, have a subscription. Pay-TV can bring inequalities into the ‘broadcasting’ world as we know it. Finally, controlling access to access-controlled platforms can also conflict with the interests of consumers in exercising choice, accessing services from other Member States and fair dealing when ‘purchasing’ digital broadcasting content.

Traditionally, issues of access to the distribution platform were a matter for European telecommunications law. The question is whether the access rules in telecommunications law, which deal with conditional access, are able to effectively address access issues for both competitors and consumers in the pay-TV sector.

5.1.2. ELECTRONIC ACCESS CONTROL AS A BOTTLENECK TO MARKET ENTRY

‘Bottleneck’ control refers to a situation of monopoly control over a scarce resource, be it an element of the technical level or the service level. Scarcity can have legal (subject to exclusive licenses), practical (not easy to duplicate) or market-related reasons, for example, when the controller of a resource has economic reasons to exclude rivals from accessing that resource. Bottleneck control becomes a competition issue when it prevents competitors from entering a market.

Bottleneck control poses several challenges for regulators. The first challenge consists of finding a formula to determine which facilities are potential bottleneck facilities and which conditions must be fulfilled before refusing access to this facility has an anti-competitive effect. This is because, as long as monopoly control is not accompanied by abusive behaviour, it is very likely to be accepted as the result of a successful business strategy, at least according to competition law principles. From a public information policy point of view, there can be other public policy reasons why monopoly control, even without abusive behaviour, is not desirable. An example is that bottleneck control would result in excessive private influence in the broadcasting sector. Another challenge consists of finding adequate and effective remedies.

There are no Bottlenecks as such in Pay-TV

In the general competition law analysis in Chapter 3, we saw that bottleneck facilities are identified on a case-by-case basis. Within the framework of merger
analysis, the European Commission sought to avoid ex ante the creation of anti-competitive structures that could result in bottleneck situations. Under the heading 'Essential Facilities Doctrine', the European Court of Justice and the European Commission specified the conditions under which competition law authorities can remedy existing bottleneck control ex post. These conditions are dominant market power, the fact that the facility is essential for market entry and the creation of a new product and, last but not least, the fact that it cannot be reasonably expected that a rival duplicates the facility.

Articles 5 (1)b and 6 of the Access Directive, the relevant provisions in European telecommunications law that deal with bottlenecks in pay-TV, pursue another approach. The provisions list specific facilities—conditional access, Electronic Programme Guides and Application Programme Interfaces—and declare them as bottlenecks as such, principally irrespective of their controller's degree of market power or the competitive situation in general.

The study criticized the sector-specific approach towards bottleneck definition under Articles 5 (1)b and 6 of the Access Directive for a number of reasons. First, the bottleneck character of control over a conditional access system, an Electronic Programme Guide or an Application Programme Interface, is often not so much the result of control over the facility, but of specific market conditions, notably control over a proprietary de facto standard—possibly strengthened by the existence of intellectual property rights—together with a lack of adequate interoperability solutions. This is closely related to the existence of strong indirect network effects, the degree of market power of the bottleneck controller and individual/collective adaptation costs in the pay-TV sector. It is true that Article 6 (3) of the Access Directive leaves room for NRAs to make the imposition of access obligations subject to a market test. However, we also saw in Chapter 4 that Article 6 (3) of the Access Directive is subject to a number of conditions that could restrict its application in practice. In addition, as Chapter 3 and the analysis of the European Court of Justice's interpretation of the Essential Facilities Doctrine and the European Commission's decisions in the pay-TV sector have demonstrated, the existence of a controller with significant market power alone does not make a facility a bottleneck facility, unless the controller has incentives to refuse access to that facility because it is profitable. Whether refusal of access to a facility is profitable or not depends on different factors, such as the degree of vertical integration, the core business of the enterprise and the competitiveness of related markets. Imposing access obligations on facilities that are not true bottlenecks risks creating overregulation and negative investment incentives. Articles 5 (1)b and 6 of the Access Directive do not leave sufficient room for National Regulatory Authorities to take these considerations into account as Articles 8 to 13 of the Access Directive do. Articles 8 to 13 of the Access Directive apply to bottleneck situations concerning all telecommunications infrastructures and facilities that do not fall under Articles 5 (1)b and 6 of the Access Directive. Instead of pre-defined
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bottlenecks and obligations, telecommunications National Regulatory Authorities identify critical bottlenecks within the context of the market situation.

No valid reasons were found that would justify discriminating between broadcasters and non-broadcasters and between bottleneck facilities in pay-TV and other technical bottlenecks. The study rejects the assumption underlying Articles 5 (1)b and 6 of the Access Directive that the conditional access system, Application Programme Interface or Electronic Programme Guide can only be bottlenecks for broadcasters and not for providers of interactive or telecommunications services. Second, the Application Programme Interface, the Electronic Programme Guide and the conditional access system are not the only potential bottlenecks in pay-TV.

By distinguishing between providers of access-controlled broadcasting and non-broadcasting services, for example, providers of on-demand services that are delivered via the internet, Articles 5 (1)b and 6 of the Access Directive create artificial barriers between different kinds of services that are eventually received via the same set top box. This outcome threatens to obstruct the realization of the so-called multi-platform approach, a guiding rationale of European policies in the converging media environment. The flexible approach under Articles 8 to 13 of the Access Directive better reflects market reality.

Access Obligations—Not the Optimal Remedy in Pay-TV

Secondly, with the increasing sophistication and diversity of the digital service market in general and the underlying transmission processes in particular, the question of what is needed to respond to bottleneck problems and obstacles to market entry is becoming increasingly difficult to answer. In this respect, too, Articles 5 (1)b and 6 of the Access Directive leave National Regulatory Authorities little flexibility to decide what the most efficient remedy against anti-competitive bottleneck control is. Moreover, Articles 5 (1)b and 6 of the Access Directive leave little room for telecommunications National Regulatory Authorities to differentiate between anti-competitive and non-anti-competitive control over technical facilities in pay-TV. As opposed, according to Articles 9 to 13 of the Access Directive National Regulatory Authorities can choose from a toolbox of different instruments the most effective remedy. Possible regulatory measures include access obligations, transparency enhancing measures and obligations to publish technical specifications. Bearing in mind that the long-term goal of the Communications Framework is to deregulate and prevent overregulation, an orientation towards a more flexible approach and general economic and competition law principles would seem the better route to follow.

Access obligations, meaning the obligation to share one’s facility with competitors, are a traditional remedy for bottleneck situations in general competition law and telecommunications law. They are, however, not by default the adequate remedy for bottleneck situations. Access obligations are a means of controlling the behaviour of the dominant bottleneck controller. This kind of remedy might be necessary and appropriate in mature markets in which new entries
seem unlikely without forcing existing players to share crucial resources. Access obligations may be necessary in situations in which a bottleneck facility is a natural monopoly or an essential facility, namely when the duplication of the facility is not an option and when the refusal to provide access would prevent market entry. Here, forced access to the facility may be the only viable way to stimulate competition in a related market.

In the case of pay-TV, it is already very questionable whether there are facilities that cannot be duplicated, or for which no alternative is available. The development of conditional access systems, set top boxes, Application Programme Interfaces, Electronic Programme Guides, etc. is no any longer driven only by a small number of pay-TV providers. Major software and hardware manufacturers, such as Microsoft and Nokia, are already in the business of developing conditional access systems and even complete technical solutions for the distribution of pay-TV. With digitization and the development of more differentiated service offerings and alternative forms of payment, the demand for electronic access control systems will be further stimulated by broadcasters and non-broadcasters. It follows that the conditional access system, the Application Programme Interface and the Electronic Programme Guide are probably all facilities for which the duplication of and competition between alternative systems in a market is possible and, arguably, desirable.

The study explained that from a competition policy point of view access obligations are controversial. After examining general competition law and sector-specific access obligations, it is apparent that access remedies that were successfully applied to traditional bottleneck situations are not necessarily the best or most effective way of dealing with 'new' technical bottleneck situations, such as control over conditional access. It may be true that there are situations in which access obligations are necessary and helpful, notably in settled and established markets. As far as the pay-TV sector is concerned, one should be careful not to take this assumption for granted, as much will depend on the time-frame. In the short term, at least in smaller pay-TV markets, competition between competing platforms in one market might seem unlikely. In the medium and long term, however, the broadcasting sector will face stimulating effects from digitization, which is a declared policy goal of the European Union as well as the European Member States. Access obligations should be imposed only in exceptional situations in order to avoid overregulation and negative investment impulses. Furthermore, the possible side-effects of access obligations—to stifle demand for alternative facilities and increase the power of one particular standard—should not be overlooked. Relying on access obligations as a remedy to bottleneck situations risks promoting a static position of the established players in the pay-TV sector at the cost of promoting a dynamic competitive environment in the future.

Finally, the study concluded that for similar reasons access obligations could be counterproductive, not only from a competition policy point of view, but also from a public information policy point of view. Monopoly control over a pay-TV
platform may still be acceptable from a competition point of view. However, the requirements of pluralism and diversity of sources raise serious concerns about whether it is desirable to actively promote the creation and strengthening of one dominant access-controlled pay-TV platform. The risk is that one player can exercise excessive influence on large parts of the audience as well as influence the position of free-TV providers in general and public broadcasting in particular.

5.1.3. Consumer Access to Access-Controlled Platforms

The European Communications Framework leaves questions about the distribution of pay-TV services to consumers, that is questions concerning the retail market, outside of its scope. The broadcasting retail market has traditionally been a matter of broadcasting regulation and general competition law. Main objectives behind broadcasting law are the realization of public information policy principles, such as the realization of freedom of expression, fair access opportunities, democratic principles, the broad availability of information of general importance for the public, and the free flow of services in the Internal Market. The realization of these goals pivots around the question of how to ensure that a range of plural and diverse content is broadly available and accessible to consumers, alias citizens.

Electronic access control triggers valid concerns about the general availability and accessibility of content for consumers, including access to transborder services. This is particularly true for content of public interest—often that is the content that is most likely to disappear behind the electronic fences of pay-TV. Other concerns are the quality of the content offering, including the principles of diversity and pluralism, as well as the future of public broadcasting as a qualitatively high-standing programme offering. More generally, the latter is a question of how electronic access control impacts the popularity of free-TV programmes, including public broadcasting programmes and competition between free-TV and pay-TV. Less outspoken but no less pressing, are distinct policy concerns of national governments about their ability to use the broadcasting medium directly or indirectly for the realization of public policy objectives. Both the general availability of and the choice between information sources become a question of access and slips away into private control.

Broadcasting law does not seek to accommodate these concerns by granting consumers access rights to access-controlled platforms. European broadcasting law has taken another route. The approach of current European broadcasting law that deals with pay-TV is to make control over access to particular content non-exclusive. The underlying idea is that certain content should also be available outside access-controlled platforms. Moreover, this is the idea that it is the role of the media to act as an intermediary between the audience and the information source and, in so doing, to realize the ‘right of the public to being properly informed’. The role of the audience or of individual members of the audience is best
described as the role of passive information receivers, not as active information seekers who negotiate access to content they wish to receive.

This approach is reflected in the two main instruments that European broadcasting law has developed within the context of pay-TV. These are the right to short reporting and the list-of-important-events concept.

*List of Important Events*
Article 3a of the Television Without Frontiers Directive recognizes a right of Member States to ensure that particular popular sports or cultural events can be transmitted in full or in part, in parallel or deferred on free-TV. Member States are entitled to draw up so-called lists of important events, meaning events that should not be exclusively transmitted on pay-TV. Hence, the list-of-important-events concept mandates the non-exclusivity of particular content that is considered of major public interest. The role of free-TV in this concept is to act as a carrier of general interest content and make it publicly available.

*Right to Short Reporting*
The right to short reporting enables all broadcasters to inform their audience about particular news, sports and cultural or social events, even if a third party holds the exclusive rights to the transmission of that event. A precondition is that the broadcaster considers the event to be of high public interest and newsworthy, and that the transmission complies with the requirements of a ‘short report’. Unlike the list-of-important-events concept, the right to short reporting does not touch on the exclusivity of a transmission right. Instead, the right to short reporting, or rather its effect, is better compared to an exception in copyright law. It gives broadcasters the right to make certain use of material to which another party holds exclusive rights. In contrast to the list-of-important-events concept, the right to short reporting does not aim so much at ensuring consumer access to a particular event, but at consumers being informed about the essence of the event to the extent that it is newsworthy and of public interest. Another difference is that, for the right to short reporting, the broadcasters determine which information is of public interest, whereas this task is left to the governments for the list-of-important-events concept.

*Helpful, but not Helpful Enough*
Chapter 2 examined the list-of-important-events concept and the right to short reporting in depth and concluded that, in combination, both provisions might provide some guarantee that those parts of the audience that are unsubscribed do not remain ignorant if particular events are shown through access-controlled broadcasting. The list-of-important-events concept aims at the broad accessibility of events of public importance, free from exclusive electronic control. The right to short reporting addresses the impact of exclusive electronic control over content for the media’s mission to keep the audience properly informed. Both instruments are valuable tools that can stimulate the broad accessibility of content in free-TV. They
are also regulations that can stimulate competition between services. Both regulations restrict the exclusive control over particular content thereby stimulating journalistic and economic competition between free-TV and pay-TV providers. Having said that, both instruments were drafted to 'protect' consumers from pay-TV, meaning to remedy the effects of electronic exclusion. They do not tackle the question of the consumers' situation regarding content that is offered on pay-TV.

One can doubt whether the impact of electronic access control on the accessibility and availability of digital content can be addressed effectively by simply relying on free-TV as a solution. One reason to doubt this is based on the valid assumption that when digitization is completed, electronic access control in digital broadcasting will gain in popularity and importance as a business model. If digitization progresses and electronic access control becomes a common form of collecting remuneration, pay-TV will more than ever be part of the media landscape. It is not unlikely that, for consumers, pay-TV could become a common and perhaps even particularly popular way of consuming digital content. It is already very questionable whether the notion of a broadly available free-TV programme will, under these circumstances, still carry the same value as before. Most importantly, however, protecting consumers in such a situation 'from' pay-TV instead of ensuring that pay-TV services are offered in a way that respects their legitimate interests is like holding on to an idea from the past with all one's might.

It is also worth noting, that, despite what the pay-TV critics say, pay-TV does not necessarily have to be a development for the worse. Conditional access can also offer new and attractive opportunities. Conditional access explores new ways of collecting remuneration, and the technology offers ample opportunities for innovative, interactive and differentiated service offerings. Now, content offered on pay-TV is mostly entertainment content, such as films and sports. The question is if this must necessarily stay this way, or if electronic access control could be used to finance other, high-quality content. Conditional access could be a means of improving media responsiveness. As Brittan puts it:

'If the state is to pay the piper, or regulate the piper's activities, it will eventually seek to call the tune—to the amazed indignation of the broadcasting fraternity which thinks it can have the benefits of state finance or regulation without paying the costs' 858

Individualization and interactivity can provide consumers with a way to pay the piper and express their preferences through a means the market understands: Euros, dollars, etc. Maybe the time is ripe for the audience to use technical and market developments to actively exercise choices in digital broadcasting. Pay-TV could give the audience the opportunity to become more than 'eyeballs', namely active players. A necessary precondition is that consumers have a choice and the freedom to exercise it. Without claiming completeness, this study has identified some factors

858 Brittan 1989, p. 32.
that explain why the position of consumers who wish to access content on access-controlled platforms and exercise choice can be weak.

**Concern No. 1: Fairness of Contractual Conditions**

For consumers to benefit from pay-TV, the services offered to them must be acceptable. The adequacy and fairness of terms and conditions under which pay-TV services are offered will influence the consumers' willingness to accept access-controlled services. In a study that was performed in the UK for the former British telecommunications regulator Oftel, consumers indicated that they tend to feel overpowered by pay-TV operators, which they described as 'strong global players that ... could, ... and would, do exactly what they want'.\(^{859}\) Examples stated were the changing of the configuration of packages, deleting key channels from packages consumers had subscribed to, moving the best-quality programmes to pay-per-view programmes (particularly sports and films), and pricing issues, such as the demand for fees in addition to the monthly subscription.\(^{860}\)

More generally, the arrival of individual consumer-service-provider contracts in the broadcasting sector calls for more attention to be paid to the way subscriber contracts are drafted and to ensure that terms and conditions of access are fair. Common not only to the broadcasting sector are examples of potentially unfair conditions, such as the demand for unreasonably high prices and the imposition of conditions that are in no way related to the request for content. This can be the requirement to provide personal information on age, number of children, education, profession, etc. when subscribing to a pay-TV service, or the condition that the consumer must accept information mail. Subscription contracts can force consumers to subscribe to more channels than they wish to receive as the result of extensive bundling strategies. Conditions can directly or indirectly conflict with established rights and principles: privacy concerns and concerns about far-reaching control to the access and usage of digital content are further issues. The latter fall, in part, under privacy and copyright regulations, fields of law in which it might be worth conducting further research.

To examine the legitimacy and adequacy of contractual conditions in pay-TV subscription contracts could be the subject of a study on its own. Relevant for the context of this study is its more abstract observation that the fairness and adequacy of contractual conditions in the commercial relationship between consumers and pay-TV providers is a matter that falls outside traditional broadcasting law. Fairness of contractual conditions is a matter that is better known from consumer protection law. This is another field that needs further research. Traditional broadcasting law does not have provisions for consumer protection. It does not acknowledge the existence of a commercial relationship between the consumer and the service

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\(^{859}\) Counterpoint Research 2001, p. 21. See also the submission by Voice of Listeners & Viewers 2001.

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provider. This deficiency can be explained by the ‘once-sent-accessible-for-all’ character of traditional broadcasting services.

Concern No. 2: Contractual Lock-ins/Lock-outs
Nobody would seriously argue that the choice between a basic channel, a family package and a premium channel would allow consumers to express any specific preferences, not to mention the ability to influence the structure of broadcasting markets—particularly if all three bundles came from the same provider. Competition between different access-controlled services, consequently, would be true only in an environment in which consumers have the choice between a considerable number of affordable competing offers and sufficiently small or differentiated programme units, and in which they are in a position to actively exercise this choice. A further major obstacle for the realization of fair access opportunities and the possibility to exercise choice could be the effect of bundling strategies. Three particularly critical examples in this context are large-scale programme bundling, the bundling of premium and basic services and making the subscription to a pay-TV platform conditional on the purchase of a particular conditional access technology. Other no less critical forms, are forms of bundling in time, notably long-term subscription contracts and other such terms that restrict consumer mobility.

The potential anti-competitive and welfare decreasing effects of such strategies require careful scrutiny. To some extent, bundling strategies can be addressed applying competition law. Chapter 3, however, demonstrated why the tying prohibition in general competition law is subject to major uncertainties, vagueness and timely delays and why, furthermore, this is not a provision that can be easily invoked by consumers.

Concern No. 3: Technical Lock-ins/Lock-outs
Of major importance is the aspect of the lack of adequate interoperability solutions. The lack of interoperability solutions can result in technical lock-in or lock-out situations that deprive consumers of the possibility to access services of their choice. Interoperability in information markets in general and in pay-TV markets in particular is a topic that has already received much attention. And rightly so. This study concluded that choice is also a matter of the quality of consumer equipment and whether it is able to process rival services, including services form other Member States. This is also why interoperability is a major factor for consumer acceptance of pay-TV services on a large scale.

Concern No. 4: The Information Problem
The last major factor in this list, the importance of which cannot be emphasized enough and whose dimension in the broadcasting sector is still often not properly understood, is what the study calls the ‘information problem’. Behind the information problem lies the realization that access and choice are, among other
things, a matter of access to trustworthy, comprehensive and comparable information about the available services from different providers. The ability to find and compare such information can be a major problem in a digital multi-channel environment. The importance of search engines for access to content on the internet illustrates this situation well. The search engine example also illustrates the value of transparency in the form of reliable unbiased information as a means to overcome informational lock-ins.

The regulation concerning Electronic Programme Guides in European law lack vision in this respect. The potential impact of the Electronic Programme Guide on economic and ideological competition, democracy and culture is still widely underestimated. For the time being, the public information policy discussion concerning Electronic Programme Guides still pivots around the question whether public broadcasters should receive a prominent place or not. But the potential of information agents, such as the Electronic Programme Guide, goes far beyond ensuring that consumers have access to particular programmes of particular public interest. Looking towards the future, information agents have the potential of becoming platform-independent gateways for access to content irrespective of national borders and language obstacles or of the technical transport platform used.

5.1.4. REFORM PROPOSAL: A BOTTOM-UP APPROACH

To conclude, this study suggests that tackling electronic access control in digital broadcasting is tackling at least four issues—fairness of access conditions, contractual lock-in or lock-out situations, technical lock-in or lock-out situations and the information problem. 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 being made available by means of advanced communications: ‘The information society is not only affecting the way people interact but it is also requiring the traditional organisational structures to be more flexible, more participatory and more decentralised’. Likewise, subscribers to one particular platform should not be unreasonably impeded from benefiting from 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 consumer is key to preventing that electronic access control is used to the detriment of competition, consumers and public information policy.

There is no need to reinvent the wheel. Technical and contractual lock-ins and information problems are not new issues, and they have already been answered for

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other sectors. For all media sectors other than the broadcasting sector, the key role that the fairness of the conditions of access for consumers plays in guaranteeing the accessibility of electronic services has already been widely acknowledged. 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 Universal Service Directive, part of the Communications Framework, acknowledges 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. A study of the provisions of the Universal Service Directive revealed that it would address the four aforementioned factors, namely fairness of contractual conditions, contractual lock-ins, technical lock-ins and the information problem, were it not for the pitfalls of technology-dependent regulation.

The existing European regulatory framework might have been a good starting point to address urgent access issues in the digital broadcasting sector if the Communications Framework had kept its promise to realize a more technology-independent approach to regulation. 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. It is difficult to see why consumers of digital broadcasting services should receive less legal protection than consumers of other electronic services.
Figure 10—Different regulatory frameworks applicable to broadcasting, telecommunications and information society services. Figure 10 provides a schematic overview of the different regulatory frameworks that apply to broadcasting, telecommunications and information society services offered via one and the same pay-TV platform. The figure illustrates the aspects of access to the technical infrastructure (Access Directive: Articles 5 (1)b and 6 (access to the conditional access platform), and Articles 8 to 13 (access to telecommunications services and facilities). It also illustrates how differently the position of consumers (Universal Service Directive: Articles 17 to 30 (consumer access to services) and Article 32 (must-carry)) and the accessibility of content (TWF: Article 3a (list of important events), ECTT: Article 9 (the right to short reporting)) is regulated at the European level. This is done despite the converging nature of pay-TV platforms and the alleged horizontal approach of regulation under the Communications Framework.

5.2. Conclusion

The study concludes that there is no convincing reason to treat electronic access control in the digital broadcasting sector different from other technical facilities in the telecommunications sector. The above figure 10 illustrates the different regulatory environments that apply to broadcasting and non-broadcasting services. It shows that the broadcasting sector falls under a differing access regime, and that the rules on consumer protection and control of the retail market do not apply to broadcasting services. The present approach creates unnecessary obstacles for the realization of competitive and convergent service markets and the so-called multi-
platform approach. Furthermore, the figure illustrates the strict separation of content and transport-related aspects. This is a further obstacle to the effective regulation and supervision of access-controlled service platforms. Because of the often tight integration of the technical and content platforms as elements of one and the same service platform, a number of interactions take place at both levels. Regulating and supervising the technical platform while ignoring content-related aspects or the retail market in general is difficult, if not impossible. As the figure shows, the approach leaves a regulatory gap: consumer access to access-controlled services.

The study further concludes that access obligations, such as provided for in Article 6 of the Access Directive (access to the conditional access system), are not always the best tool to resolve bottleneck situations in the pay-TV sector. Access obligations are also not sufficient to address valid competition and public information policy concerns that arise in conjunction with conditional access. What is needed are tools to remedy the abuse of the commercial relationship between consumers and pay-TV providers. Most importantly, a stronger focus on the position of consumers is needed. Without claiming completeness, the study suggests to give National Regulatory Authorities four tools to deal with conditional access:

- The ability to mandate interoperability solutions.
- The ability to prohibit anti-competitive bundling practices in the retail market.
- Transparency enhancing measures, including the public availability of comparable service information.
- The ability to monitor the adequacy of contractual conditions, pricing, etc. in pay-TV provider-consumer contracts also in the digital broadcasting sector.

In addition, National Regulatory Authorities should have sufficient flexibility to consider market-related factors, such as the likelihood of new market entries, economies of scale and scope, the degree of product diversification, the existence of market entry barriers, the need to recoup investments as well as security and capacity considerations.

These tools already exist for the non-broadcasting sector, which is why this study concludes that the various distinctions that still rule the Communications Framework are not helpful at all. The study advocates abandoning Article 6 of the Access Directive, which is still based on technological distinctions and which does not give NRAs a lot of flexibility. Instead, the more flexible approach in Articles 8 to 13 of the Access Directive should apply. Second, it suggests interpreting Article 5 (1)b of the Access Directive (access to Application Programme Interfaces and Electronic Programme Guides) in the sense of the flexible concept under Articles 8 to 13 of the Access Directive. Third, it recommends putting an end to the exclusion of the broadcasting sector from the application of the Universal Service Directive, and in particular Articles 17, 20, 21, 22 and 32, to ensure that consumers can have access to access-controlled services at fair, affordable and non-discriminatory conditions. Discrimination on grounds of residence should also be acknowledged as a form of discrimination. Doing this would be a first step in ensuring that
consumers within the European Union have fair access opportunities when confronted with electronic access control. Strengthening the position of consumers is in the interest of functioning competition in the digital service sector. Strengthening the position of consumers is also in the interest of consumers, alias citizens, in an access-controlled broadcasting environment. Finally, strengthening the position of consumers is in the interest of public information policy where it is directed at utilizing new technical and economic developments and creating the conditions that enable consumers to optimally benefit from the possibilities of digital media.

Further research should explore the question of exactly how helpful existing consumer protection law can be to address all consumer concerns for the pay-TV case. This study, furthermore, repeatedly pointed to the fact that subscribers are not only consumers but also citizens. 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 assess to what extent consumer protection law can realize public information policy goals, such as pluralism, the realization of freedom of expression and democratic principles. The Universal Service Directive could be a good starting point provided its scope is being extended to also cover broadcasting services. 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. This is 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’.

Another aspect is that electronic access control should neither hamper competition between free-TV and pay-TV nor the functioning of the media. The same is true for initiatives to stimulate the creation and distribution of content regardless of consumer demand. Electronic access control must not obstruct competing media in complying with their task to inform and to criticize. European broadcasting law has developed two potentially useful instruments, the list of important events and the right to short reporting, which, however, need further improvement to be effective.

5.3. Conditional Access is not a Phenomenon Reserved to Pay-TV

Electronic access control and its effect on competition and individual access to content are not reserved to the broadcasting domain. The electronic management and enforcement of exclusive content rights and the controlled distribution of

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digital content to individualized customers is not a strategy that is specific to broadcasting. The possibility to target niche areas, collect remuneration, control content and maintain individualized commercial relationships with consumers are aspects that make the use of electronic access control techniques equally attractive for, for example, the internet sector. In the internet sector too, access-controlled service platforms, such as portals and B2C platforms, form the integrating link between various service providers and consumers.

The similarities do not end with the way services are marketed. The provision of exclusive content and controlled access to such content becomes a means to attract subscribers and to monopolize profitable distribution channels. The iTunes example from Chapter 3 demonstrates that, correspondingly, many of the concerns that the study listed for the realization of competition and public information policy objectives in the pay-TV case have already been made for other sectors. It was repeatedly argued that the combination of exclusive control over content and the portal, and control over Apple’s proprietary FairPlay Digital Rights Management solution together with the iPod, could be a means to monopolize the consumer base, influence competition in one’s favour and exclude consumers who do not comply with the operator’s business rules. Similar to the pay-TV case, private electronic control over digital content raises for the internet issues of consumer freedom to access and choose between different services.

The iTunes case triggered a new West Coast crusade against electronic content control, this time led by competitor RealNetworks who also operates a music download store. RealNetworks launched the ‘Freedom of Choice’ campaign to help consumers ‘break the chains that tie their music device [iPod] to proprietary music downloads’. And, according to RealNetworks, ‘We are here to inform AND motivate’. Note how a traditional public policy argument—freedom of choice—is again made with the intention of mobilizing consumers against a rival’s business methods. RealNetworks understood very well that strategies to monopolize the consumer base can have an effect on competition and that a means to remedy monopoly control is to ‘break the chains’, meaning to inform and to remove technical and contractual lock-ins.

Not only competitors complain about proprietary content-control schemes on, for example, the internet; consumers complain too. Again, the complaints from consumers, consumer representatives and scholars repeat arguments that are eerily familiar to the case of electronic access control in digital broadcasting. For example, the English Consumers’ Association complained to the Office of Fair Trade about price discrimination between FairPlay-protected content that is sold in the UK and tracks that are sold in France and Germany. The Consumers’ Association claimed that this was in conflict with the European Union’s Internal

861 http://www.musicfreedomofchoice.org/
Market principles.\textsuperscript{604} Furthermore, and also within the internet context, access to content becomes a matter of complying with the service provider’s contractual terms and conditions. Here too, private control over access to content triggers public information policy concerns. One example is the on-going discussion about the relationship between technological content protection measures and the objectives of intellectual property law, meaning the effect of electronic control on access to and the use of creative works. Copyright law is characterized by a well-developed ideology of sharing in return for the assignment of certain exclusive exploitation rights. This idea is reflected in the attempt of copyright law to achieve a balance between the assignment of exclusive exploitation rights and the need to limit exclusive control over creative works where the interest in the wide usage and the dissemination of them is preponderant. Here too, there are concerns about the negotiating position of consumers and the compatibility of consumer-content-provider contracts with legitimate consumer rights and interests.

Are there lessons to be learned from the pay-TV case? Obviously, one would first have to analyze exactly how far electronic access control in the digital broadcasting sector and other cases of electronic control, for example Digital Rights Management use on the internet, are comparable. While some rationales are broadcasting specific, others may be not. The purpose of this last section is to take the pay-TV example further in order to stimulate this discussion.

A lesson that could be learned from the pay-TV case is that there can be a certain tension between electronic control of access to content and public information policy objectives. This conflict is particularly apparent in the case of broadcasting. It might be worth, however, conducting further research to determine the extent to which the public accessibility and availability of content is an important rationale behind regulatory policies for the internet. One factor that could bring the policies for the different sectors closer to each other is convergence and the European policy objective of promoting multiple access to services through digital television, mobile and internet platforms alike. Another factor could be the role that intellectual property law plays. Finally, access to electronic services and electronic exclusion are issues that are also discussed in context with European policies for the internet domain.

Providing the finding was that there are also tensions in the internet sector between electronic access control and public information policy objectives, it could be worth discussing the approach of broadcasting law and building on the experiences gained. European broadcasting law responds to the fact that it is the combination of electronic access control of and exclusive rights to content that affects the accessibility and broad availability of content. It advocates to impose

\textsuperscript{604} The Office of Fair Trade (OFT) has decided to refer the matter further to the European Commission, as this was an issue that touched upon broader Internal Market issues, namely how the online exploitation of music is licensed across Europe. OFT Press Release, available at <www.ofr.gov.uk/news/press+releases/statements/2004/itunes.htm> (last visited on 20 March 2005).
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limitations on the electronic enforcement and scope of exclusive exploitation rights, at least regarding content of public interest.

Another lesson that could be learned from access control in digital broadcasting is that Articles 8 to 13 of the Access Directive and the Universal Service Directive provide tools for dealing with bottleneck situations and anti-competitive behaviour that is targeted at monopolizing the consumer base. The pay-TV case also ascertains that caution is in place concerning access obligations as a remedy to technical bottlenecks that are the result of dominant standards. Articles 8 to 13 of the Access Directive and the Universal Service Directive, however, provide viable alternatives in form of tools that stimulate competition at the facility and service levels, providing this is economically possible. In order to do this, the pay-TV case demonstrated that the effective regulation of electronic access control needs to take both the competitors’ and the consumers’ position into account. Guarantees concerning the fairness, affordability and adequacy of retail conditions are needed, as is market transparency. Making sure that the terms and conditions of access are fair, affordable and non-discriminatory is not ‘just’ a matter of fairness and consumer protection, it can be an important element of realizing competition and access to content.