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Draft Guidance Note on the Prioritisation of Public Interest Content

Introduction

1. Content prioritisation processes are the design and algorithmic decisions that promote content by making it more discoverable or prominent on a device or user interface. With the shift of media and information to the internet, search, discovery and ranking functions have become powerful determinants of access to content. Search providers, social media platforms, video user interfaces and app stores are increasingly seen as gatekeepers, gaining control of the online media environment, influencing audiences' choices, and filtering what content can be found and accessed online. Practices of prioritisation are embedded in these intermediaries' search functions, recommendation systems, newsfeeds and other forms of content curation. When specific content is prioritised and thereby made prominent and more discoverable, it gains increased reach, a potentially wider audience and/or is more likely to be accessed by a specific target group.[i]

2. A prominence regime is the prevailing framework of rules which establishes to what extent relevant internet intermediaries can, or should prioritise certain forms of content over others, and under what conditions of transparency, accountability and liability.

3. Currently, online content curation practices and related prioritisation decisions are not covered by a specific Europe-wide regulatory framework. A few national frameworks have been put in place but only apply to a limited set of digital intermediary services. Notably, electronic programme guides and cable services are covered by legacy broadcasting and must-carry rules, aimed at guaranteeing a diverse choice of audiovisual content provided over electronic networks.

4. Prioritisation practices of internet intermediaries have significant cultural, political and economic implications. In many cases, prioritisation is based on purely commercial considerations, but in some it is claimed that the public interest is taken into account. Notably, prioritisation of trusted news and authoritative information over other forms of content is promoted by internet intermediaries and States in response to mis- and disinformation. Prioritisation of public interest content can also mitigate the process of digital fragmentation, or proliferation of increasingly partisan content to the detriment of a shared sense of truth and common narratives, and help restore trust in public information, including public health messaging.

5. Prioritisation can be applied to promote media diversity and pluralism, a key goal of the European media and communication policies and the necessary condition for the effective exercise of the right to freedom of expression and information. It can furthermore advance an ethics of truth seeking and open deliberation in the evolving media systems of European democracies. If they are not deployed with care, however, content prioritisation practices could do more harm than good to European democracy, human rights and pluralism.[ii]

6. The principles in this document offer a checklist of reference points to guide States and public authorities, internet intermediaries, media actors, and civil society organisations as they seek to shape, deploy and/or monitor content prioritisation. While the principles concern media sector as a whole, the focus of this guidance note is primarily on news and information content. Furthermore, the principles do not deal with the potential impact on competition, or the role of competition law in resolving these problems, but the principles do apply particularly strongly to platforms that are more dominant, given their reach, scale and influence.[iii]

How prioritisation can impact democracy and human rights

7. By selecting content and prioritising it, internet intermediaries take on some of the functions so far reserved to media. Thus, some potential concerns about content prioritisation echo those associated with practices of media control and private censorship, which have long been considered incompatible with democracy. If States or powerful political, economic or other groups exercise control over the media agenda, and promote particular information sources over others, this can give them the ability to manipulate and frame public debate about their own policies and practices, which undermines the watchdog function of media in a democracy and trust and legitimacy of government.

8. Thus, just as online content moderation (downgrading or removal) by internet intermediaries can result in private censorship[iv], so too can prioritisation offer potential propaganda power which must be monitored and checked. Automated private censorship and propaganda, in the sense of information promoting a political agenda, are closely related because up-ranking some content obscures other content. Furthermore, if prioritisation is withdrawn, this can not only silence, but also deprive of revenue purveyors of alternative voices and messages.

9. Concerns also arise over potential decline of media diversity and pluralism and particularly users' exposure to diverse content. Aside from ideological or political considerations described above, risks inherent in prioritisation decisions also result from purely commercial considerations. Personalised search and content recommendation algorithms may lead users, more or less voluntarily, to less diverse content. Without appropriate incentives in place, this tendency can be exacerbated by users' interface design, and search and discovery functions that are primarily driven by an interest to maximise user engagement, rather than ensuring audiences' diverse consumption of content.

10. The design and architecture of internet intermediaries contributes to deep structural inequalities between content providers and dominant internet companies, and especially national and local media organisations including public service media (PSM) which do not have the scale, resources and capacity to compete in global markets. These asymmetries in power between the internet companies and content providers reliant on them can have particularly negative repercussions on the financial sustainability of national and local players relying on advertising revenues.

11. As they design policies and legal reforms that deploy regimes of prominence, States and internet intermediaries can face profound conflicts of interest. In the context of a sanitary crisis, for example, public authorities may have an interest in suppressing scientific information that reveals the inadequacy of their policy approach or prioritising praise of their policies. Internet intermediaries, for their part, may favour distributing engaging yet unchecked content over evidence-based information because of its higher virality and consequent advertising revenue. These conflicts of interest do not have to be intentionally or consciously acted upon by internet intermediaries or public authorities in order to harm democracy: a loose or opaque notion of what constitutes "responsible" communication, or "the public interest", can result in an antidemocratic chilling of speech by autonomous platforms, or the perception of such, which undermines trust in democracy.

12. Therefore, to the extent that human or automated judgements are being made about which content published online should be deemed worthy of interest and more widely distributed, norms and principles of media independence and media pluralism should apply to those judgements. Prominence regimes require careful balancing to ensure that everyone can

express their opinions while also able to access, discover and be reached by a variety of sources and content.

Relevant Council of Europe standards/instruments

13. The legal basis for the good practice principles to be followed in the development of prominence regimes is to be found in existing Council of Europe standards relating to freedom of expression and information, media freedom and media pluralism, as well as the emerging framework of principles for AI.[v]

14. Prominence regimes should take into consideration the standards stemming from Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5, the Convention). Freedom of expression has a fundamental role in imparting information and ideas of general interest, which the public is moreover entitled to receive. This undertaking is grounded in the principle of media pluralism, of which the State is the ultimate guarantor and which requires, as part of the State's positive obligation to ensure effective exercise of freedom of expression, to put in place a regulatory framework to protect media pluralism.[vi]

Good practice guidelines for States and public authorities for the regulation of prominence regimes

15. States should encourage, as part of their positive obligation to protect freedom of expression, media freedom and pluralism, the introduction of new non-commercial prominence regimes that meet the standards set out in paragraph 26 (i) – (iv) below. This includes support for the development of independent and participatory initiatives by internet intermediaries, media actors, civil society, academia and other relevant stakeholders that seek to improve users' exposure to the broadest possible diversity of media content online, as set out in Recommendation CM/Rec(2018)1 of the Committee of Ministers to member States on media pluralism and transparency of media ownership (paragraph 2.5.).

16. States may, where necessary, introduce appropriate and proportionate obligations for relevant internet intermediaries to ensure prominence of public interest content on their platforms. Regulatory interventions to this end should be limited to determining criteria or indicators for identifying sources of information to be considered of sufficient public interest to be prioritised by internet intermediaries.

17. The applicability of public interest criteria introduced by States can be limited to specific distribution platforms or services offering access to types of content considered to have a particularly important role for media pluralism due to their impact on public opinion formation. Such criteria should be based on clear, non-discriminatory, viewpoint neutral, transparent, objectively justifiable, quantifiable and measurable parameters. The criteria should not be designed to rank individual pieces of content.

18. States should refrain from obliging internet intermediaries to carry specific content they deem to be of public interest, deferring to independent third parties, such as national regulatory authorities or equivalent bodies, in determination of what constitutes public interest content and in assigning responsibilities to various internet intermediaries concerned. Detailed regulations related to the determination of public interest content and assignment of responsibilities can also be adopted by co-regulatory mechanisms, where appropriate, and should in any event involve the participation of internet intermediaries,

media actors, civil society and other relevant stakeholders, to meet the requirements of openness and inclusiveness.

19. Compliance with the state-mandated responsibilities of internet intermediaries concerning the application of state-mandated public interest criteria should be subject to oversight. This could be ensured by means of regular reporting by the relevant intermediaries about how policies and decisions relating to prominence regimes are made. The oversight function could be entrusted to independent national regulatory authorities or equivalent bodies, or to responsible co-regulatory mechanisms, which should have the necessary powers and resources to carry out their remit in an effective, transparent and accountable manner.

20. State-mandated requirements regarding the determination of categories of public interest content and assignment of responsibilities should not prevent the development, by internet intermediaries, of criteria to determine public interest content and design prominence regimes serving the public interest. These should be developed through initiatives open to multi-stakeholder participation as set out in paragraph 25 below.

21. States should be open and transparent in their own communications, particularly as regards the necessity of separating and clearly labelling advertising, public announcements, general communications and emergency communications. States should publish clear guidance on how these different forms are governed online and not seek prominence for party or candidate-specific messages.

22. The principle of separation between State and intermediaries should be respected. States should be legally restrained from obliging that their own statements and communications, including those of parliaments and governments or those of other public bodies, are made prominent by the platforms except where specifically prescribed by law, or under emergencies as determined by law.

23. States should ensure that media and information literacy is sufficiently funded and supported by intermediaries in order to ensure sufficient understanding of what determines content prioritisation including for specific vulnerable groups.

24. Respect for these standards of transparency, openness and oversight, and for the existing Council of Europe standards of freedom of expression, media freedom and independence should be taken into account when reaching judgements on the treatment of internet intermediaries in other realms of public policy. In addition, online platforms which through their wide geographical reach and user engagement act as significant gateways for the dissemination of news and other media content may have obligations for a higher standard of transparency of recommendation systems.[vii]

Good practice principles for internet intermediaries in designing prominence regimes

25. As a general principle, search and social media platforms, video on demand providers and other relevant internet intermediaries should reflect on the social impact of the design of their services. They should work together with civil society, media actors and other stakeholders and public authorities to design a prominence regime that serves the public interest. User interfaces and content recommendation algorithms should be designed to actively promote democracy, the rule of law and human rights, in line with the principles set out in the paragraphs below[viii].

26. Where appropriate, internet intermediaries should develop prominence regimes in accordance with state-mandated criteria for identifying public interest content. These regimes of prominence should be developed and applied in accordance with the conditions of transparency, fairness, and accountability set out below, also as a condition to benefit from the support of civil society and public authorities.

    (i) Four forms of **transparency or prioritisation practices** are required:

    a. of the **criteria / standards** for defining public interest content. Platforms should publish clear guidelines on what criteria / standards are applied, in addition to any state-mandated criteria, to identify issues of public interest for the purpose of prioritising content and why specific content is selected.
    b. of the **process of selection** of content deemed worthy of prioritisation: broadly how the criteria / standards are used for determinations of public interest and by whom or what.
    c. on **outcomes** of prioritisation processes. Reporting on content promotion and its impact on audiences for given sources, types and examples of content is necessary to maintain trust. Furthermore, there is a need for transparency and self-reporting regarding the effects on consumption produced by the algorithmic implementation of prioritisation practices. This can entail monthly and annual reporting of views of public interest content compared with other content, for example, and comparison of viewing on prioritised content and non-prioritised.
    d. prominence regimes should also be held to a standard of **explainability:** the criteria, process and outcomes of prioritisation processes need to be proactively explained in ways that allow understanding of why and how prioritisation decisions are reached and permit public trust.

In addition to transparency, prominence regimes should be independent and open to external involvement, oversight and audit, according to the following conditions:

(ii) **Independence** of decision-making about prominence from State and business interests. Legal and operational separation of the development and deployment of automated systems supporting prominence regimes and individual prominence decisions from advertising should be guaranteed. Where possible, there should be structural and operational separation between the commercial and strategic elements of the business, and the cultural and political parts that are involved in judgements about the public interest. Intermediaries that select and prioritise content should be independent and accountable for their decisions and actions to the public and their users through oversight structures allowing for effective audits.

(iii) **Openness and inclusiveness** of processes of setting standards of public interest and criteria. The principle of openness should apply to all content including that of PSM and educational, cultural and other bodies on a non-commercial basis. Where possible, third-party 'trusted flaggers' of public interest content or other external experts should be incorporated just as they are for harmful and illegal content. Public service media and trusted journalism initiatives for example can provide authentication of trustworthy content alongside their flagging of non-trustworthy content. Civil society, media actors and users can be involved in assignment of prominence benefits.

(iv) **Oversight**, and accountability of prominence regimes. Transparency and openness should be designed in a way that facilitates voluntary **audit of prioritisation** in the public interest against published criteria and human rights

impact assessments where appropriate. Intermediaries should work actively with industry wide co- and self-regulatory bodies and fact checkers to ensure effective audit.

(v) **Opt Out.** Because prominence regimes have the potential to operate as propaganda and private censorship, they should be subject to regular review by independent regulators and the various actors should be able to opt out:

a. Content providers should be able to opt out of prominence regimes.

b. Intermediaries should be able to opt out of prominence regimes on the basis of appeal to a regulator: the final decision should be for an independent regulator.

c. Users should have the option to opt out of prominence through personalisation or switching.

d. Defaults and opt-out rates should be subject to reporting and transparency.

[i] This is explained in detail in: Prioritisation Uncovered. Mazzoli and Tambini. (2020, Council of Europe).
[ii] See Prioritisation Uncovered, Mazzoli and Tambini. (2020, Council of Europe).
[iii] Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC.
[iv] Council of Europe Draft Guidance Note on best practices towards effective legal and procedural frameworks for self-regulatory and co-regulatory mechanisms of content moderation.
[v] Council of Europe Feasibility study on a legal framework on AI design, development and application based on Council of Europe standards, adopted by the Ad-Hoc Committee on Artificial Intelligence (CAHAI). See also the European Commission Guidelines for Trustworthy AI.
[vi] Specific guidance on state interventions and support measures involved in developing media regulatory frameworks can be found in Recommendation CM/Rec(2018)1 of the Committee of Ministers to member States on media pluralism and transparency of media ownership. The See also ECtHR, *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, ECHR 2012.
[vii] Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC.
[viii] recommendations of the Committee of Ministers to member States CM/Rec(2016)3 on Human Rights and Business, CM/Rec(2018)2 on the roles and responsibilities of internet intermediaries, and CM/Rec(2020)1 on the human rights impacts of algorithmic systems, as well as the UN Guiding Principles on Business and Human Rights