Prominence of audiovisual content and services of general interest

Summary of the workshop

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Summary of the workshop

Strasbourg, 5 December 2023

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1. Introduction

It is not easy to stand out in a crowded market, especially if your competitors are taller and have broader shoulders and a louder loudspeaker. But, as mentioned in the European Commission's Cinema Communication, audiovisual works are not only economic goods, offering important opportunities for the creation of wealth and employment, but also (and very importantly) cultural goods which mirror and shape our societies. Therefore, the findability and discoverability of European audiovisual content is first and foremost a matter of cultural diversity. Only if a variety of voices can be effectively heard, and a multitude of works effectively enjoyed by the greatest numbers, can there be real cultural diversity. At the same time, increased cultural diversity helps boost freedom of expression, free opinion-forming and access to reliable information.

In order to bring some balance to the marketplace and allow European works and services of general interest to stand out from the crowd, the Audiovisual Media Services Directive (AVMSD) uses the term "prominence" in two respects:

- The first is in relation to the rules regarding the promotion of European works in non-linear services. Article 13 of the 2010 AVMSD first mentioned this term and the revised 2018 AVMSD reinforces this prominence obligation.
- The second is in relation to the promotion of general interest content. The current AVMSD contains a provision recognising for member states the possibility to take measures to ensure the appropriate prominence of audiovisual media services of general interest (Article 7a AVMSD).

With regard to the option to take measures to ensure the appropriate prominence of audiovisual media services of general interest, only 10 member states (BE, BG, CY, DE, FR, GR, IE, IT, PT, RO) have introduced such a possibility in their national legislation, some of them even without further explanation of how this prominence should be achieved or how to define such services. This apparent lack of interest by member states has been pointed out by the European Parliament, which has called on the Commission (in these terms the IMCO opinion to the CULT Committee) and ERGA (in these terms the final INI report of the CULT Committee) to present guidelines in relation to Article 7a AVMSD.[1] These guidelines are also prominently

[1] See Final Report of Committee on Culture and Education on the implementation of the revised Audiovisual Media Services Directive (2022/2038(INI)) (Rapporteur: Petra Kammerevert), 14 April 2023, in particular p. 23, https://www.europarl.europa.eu/doceo/document/A-9-2023-0139_EN.html. See also Opinion of the Committee on the Internal Market and Consumer Protection for the Committee on Culture and Education on the implementation of the Audiovisual Media Services Directive (2022/2038(INI)) (Rapporteur for opinion: Marc Angel), 2 March 2023, https://www.europarl.europa.eu/doceo/document/IMCO-AD-734307_EN.pdf.

featured in the proposed European Media Freedom Act (EMFA),[2] which explains that such guidelines would be important to achieve legal certainty given the possible impact of the national measures taken under Article 7a AVMSD on the functioning of the internal media market.

Concerning the proposed EMFA, it is noteworthy that it introduces a right of users to easily change the default settings of any device or user interface controlling or managing access to and use of audiovisual media services in order to customise the audiovisual media offer according to their interests or preferences in compliance with the law (Article 19 EMFA proposal). This provision, however, shall not affect national measures implementing Article 7a AVMSD.

These media regulation provisions must also be seen in the light of the online regulatory framework provided by the Digital Services Act (DSA),[3] notably with regard to its rules regarding platforms' recommender systems (Article 17 DSA), provisions enhancing transparency of terms and conditions which touch upon media freedom and pluralism, and content moderation (Article 14 DSA) and risk mitigation assessment and measures that VLOPs are obliged to adopt (Articles 34 (1) (b), and 25 (1)) DSA).

This 2023 edition of the annual workshop organised by the European Audiovisual Observatory resumed in-person after three years and aimed to discuss the opportunities and challenges raised by the rules on prominence of European works and services of general interest set in the Audiovisual Media Services Directive (AVMSD) seen in the wider context of the Digital Services Act Package (DSA) and the European Media Freedom Act (EMFA). It was organised in cooperation with the European Broadcasting Union (EBU); editorial responsibility remained with the Observatory.

The discussion kicked off with a learning session (**Session 1 - "Setting the scene"**) on the different fields of application of prominence tools in the media sector and discussed the concept of "general interest", presenting the topic from a practical perspective, given the possibilities offered by the most recent technologies.

After this comprehensive overview, **Session 2 – "Prominence of services of general interest"** explored, in an analytical manner, national prominence rules under Article 7a AVMSD, bringing to the fore advantages and disadvantages of current rules and experiences with their application/implementation from different stakeholders' perspectives.

Session 3 dealt with **"Prominence in the digital space"** also in view of rapidly changing media markets and the use of new technologies, in particular algorithmic content curation/recommendation and voice commands. It looked beyond the AVMSD and took into account current and future regulatory solutions (included in the Digital Services Act and the Media Freedom Act proposal).

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[2] Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU (Text with EEA relevance), COM(2022) 457 final,), 16 September 2022, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0457.

[3] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R2065&qid=1666857835014.

The workshop rounded off with the **World Café brainstorming Session 4**, in which three main aspects were discussed in small "stakeholder groups" with a forward-looking approach in light of wider legal provisions adopted or still in the making, such as on media content on online platforms (Article 17 EMFA), customisation of media offers (Article 19 EMFA), news and current affairs content (Article 6 EMFA), platforms' recommender systems (Article 17 DSA), and provisions on media freedom and pluralism and content moderation (Article 14 DSA):

- Which tools and remedies are available?
- What can you do in your group and what can you not do?
- What do you expect from the other groups?

2. Opening of the workshop

Susanne Nikoltchev, Executive Director of the European Audiovisual Observatory (EAO), welcomed the participants and highlighted the significance of the EAO workshop. Firstly, this event facilitated a diverse gathering of participants, enabling fruitful exchanges on specialised topics, and fostering a learning opportunity for the EAO, this time in close cooperation with the EBU. The chosen topic held relevance due to its ongoing and increasingly pertinent nature, transcending the EU-27 and engaging other global institutions like the Council of Europe in a crucial debate.

Marie Farigoules, Director of the European Youth Centre (EYC), welcomed everybody and noted that the main purpose of the EYC is to act as a laboratory for youth participation, hosting activities aimed at promoting youth engagement, and promoting and revitalising democracy.

Maja Cappello, Head of the Department for Legal Information of the EAO, introduced the topic and explained the purpose of the workshop, which was designed to take the form of an informal and active conversation, with a multi-stakeholder approach to learn more about the definition of content and services of general interest and the technical, economic, and legal aspects of prioritisation.

3. Session 1 – Setting the scene

The first session of the workshop was chaired and introduced by Francisco Cabrera, Senior Legal Analyst of the Department for Legal Information of the EAO. The session started with an introduction on the complexity of efforts to ensure content and services stand out in a world where fierce competition diminishes the possibility of this occurring. To quote Seth Godin: "In a busy marketplace, not standing out is the same as being invisible." As to the definition of general interest and the determination of content to be given prominence, the question arose as to whether public interest is what the public is interested in, or if it is something different.

But the "what" is also closely linked to a quantitative aspect. Think of the priority boarding system used by some airlines today: passengers can buy the right to board the plane before those who do not pay for this service. However, if every passenger buys priority boarding, the purpose of the service is defeated and everyone has to wait in the same queue. The same goes for prominence: If most content is considered to be of general interest and therefore given prominence, then nothing stands out from the crowd and the purpose of prominence is defeated. .

The European Union introduced the possibility for its member states to support content of general interest through Article 7a within the Audiovisual Media Services Directive (AVMSD).[4] At the time of writing, 10 countries (BE, BG, CY, DE, FR, GR, IE, IT, PT and RO) have implemented this "may provision".

Recital 25 AVMSD explains the wording of Article 7a by referring to content of general interest; as a result, the two texts do not perfectly correspond to each other.[5] Given their broad drafting, other provisions may fill in the gaps by providing more comprehensive details, such as:

- The proposed Article 15 of the proposal for a regulation establishing a common framework for media services in the internal market (European Media Freedom Act –

[4] Article 7a of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02010L0013-20181218:
Member States may take measures to ensure the appropriate prominence of audiovisual media services of general interest.

[5] Recital 25 AVMSD reads:
Directive 2010/13/EU is without prejudice to the ability of Member States to impose obligations to ensure the appropriate prominence of content of general interest under defined general interest objectives such as media pluralism, freedom of speech and cultural diversity. […].

EMFA)[6] which gives the possibility to the future Board for Media Services (replacing the current ERGA) to provide expertise on regulatory, technical or practical aspects as regards the appropriate prominence of audiovisual media services of general interest when the European Commission issues guidelines related to the topic.

- Articles 14, 25, 34, and 38 of the Digital Services Act respectively on terms and conditions, online interface and organisation, risk assessment and recommender systems.[7]

Past EAO reports have addressed these issues and are available online.[8]

3.1. General introduction to the topic

Tarlach McGonagle (Universities of Leiden and Amsterdam) presented two main paradoxes with regard to the concept of general interest.

Firstly, the promotion of general interest pervades society but lacks a precise definition. This concept encompasses various notions, and a broad definition might encompass all matters relevant to public and societal issues while excluding private ones. Consequently, such a comprehensive definition may include controversial topics that differ in significance across societies, such as LGBTQ+ rights.

Defining what constitutes the public sphere is equally intricate. Societies are inherently diverse, comprising numerous interconnected public spheres ("sphericules") that coexist and sometimes conflict with each other. Ensuring the promotion of public interest in media policy requires a look beyond the collective of diverse public interests. To promote a pluralistic democracy, a unifying element beyond these varied interests must be found.

The second paradox revolves around prominence (visibility/accessibility). Does accessibility need for instance to translate into practical effectiveness, catering to linguistic diversity within a society, being suitable for younger audiences, addressing cognitive aspects, and ensuring the presence of content; or, under another scenario is it enough for the content to be simply accessible or does it have to be prominent? Moreover, if content is pushed excessively, this raises concerns about individual autonomy. There is a risk of an overbearing state presence, which can be perceived as too intrusive or controlling.

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[6] Proposal for a regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0457.

[7] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32022R2065.

[8] See *Public interest content on audiovisual platforms: access and findability, IRIS Special*, European Audiovisual Observatory, Strasbourg, 2023 (https://rm.coe.int/iris-special-2023-01en-public-interest-content/1680ad084d) and *Prominence of European works and of services of general interest, IRIS Special*, European Audiovisual Observatory, Strasbourg, 2022 (https://rm.coe.int/iris-special-2022-2en-prominence-of-european-works/1680aa81dc) .

Finally, this presents a broader puzzle, emphasising the necessity of precise regulatory calibration. On one hand, one needs to look at media-specific regulations and instruments (e.g., Art. 7 AVMSD - which focuses on what can be done with regard to AVMS providers) but it is also necessary to look at media-centric angles (e.g. Digital Services Act (DSA), the Convention on the Rights of the Child[9], provisions in the Council of Europe's Framework Convention for the protection of national minorities governing language and content,[10] and the UN Convention on the Rights of Persons with Disabilities).[11]

On top of regulatory calibration, it is imperative to ensure amenable conditions for content production, including those related to financial aspects, and to guarantee the actual creation of content. Simultaneously, addressing access to content, leveraging technological possibilities, and enhancing content visibility and audibility through effective distribution mechanisms and incentivisation are crucial considerations in a world fed with a plethora of digital content. The aim should be to ensure that content of general interest is not just produced but effectively heard and seen.

3.2. Overview of market practices on content prioritisation

Eleonora Mazzoli's presentation (UK regulator Ofcom) centred on navigating the variety of available content in practical terms. In the current landscape flooded with content, providers of audiovisual media services often struggle to capture a substantial audience. The challenge for content providers lies in comprehending how to effectively engage audiences within the digital sphere. A significant aspect of the solution involves understanding the necessary economic investments.

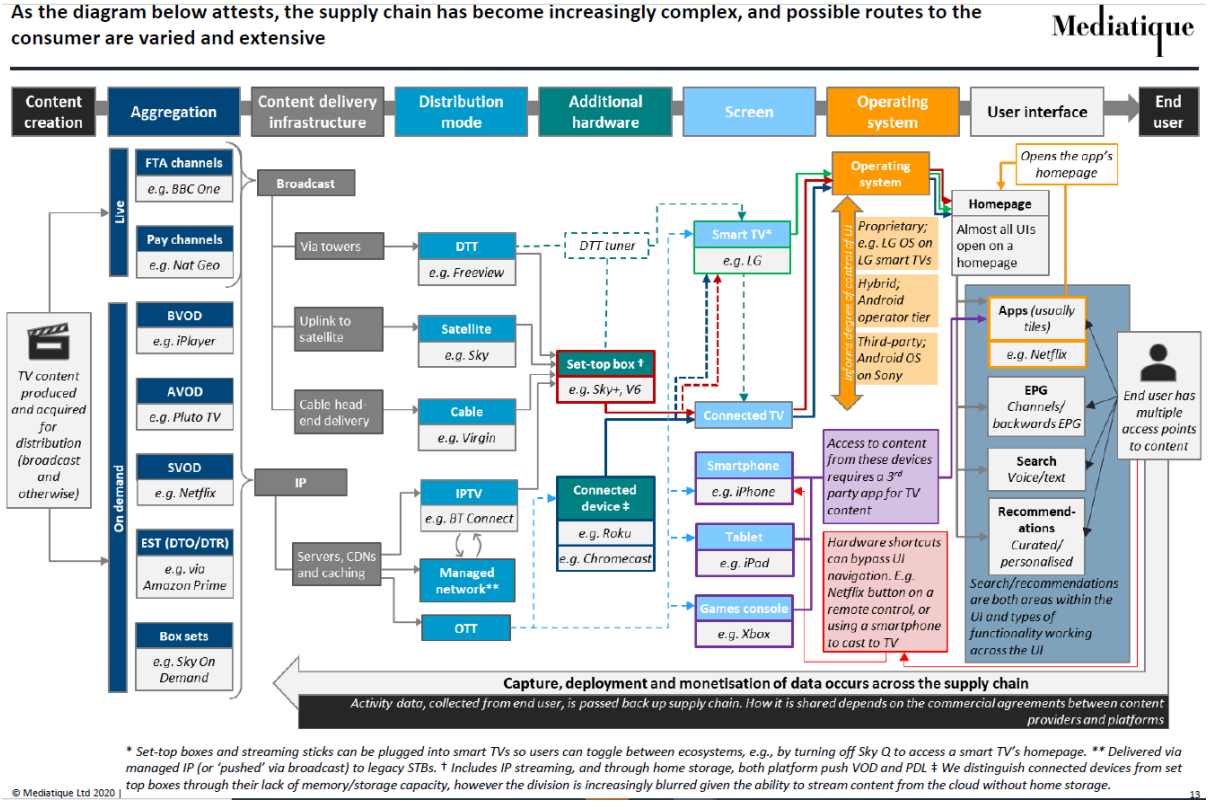
Prioritising content involves three key dimensions:

- Technical - which encompasses technical resources, strategies, and socio-technical criteria, thus prioritising content through intentional design and choice architecture.
- Market - involving commercial negotiations, carriage agreements, and business strategies, prioritising content through commercial arrangements.
- Regulatory – NRAs to implement measures ensuring future-proof rules.

With regard to the market dimension, the diagram below shows the numerous services users can access to consume content: linear to non-linear ones, accessible via TV sets or smartphones, available on demand or via live streams. The visibility of content within this ecosystem is achieved through commercial agreements between audiovisual media service

[9] Convention on the Rights of the Child, https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child.
[10] Framework Convention for the Protection of National Minorities, https://www.coe.int/en/web/minorities/at-a-glance.
[11] Convention on the Rights of Persons with Disabilities, https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities.

providers and technology manufacturers, distributors, and platform organisations. Negotiations involve securing prominence and discoverability, and diverse strategies and commercial tactics are deployed to attain visibility goals, often with limited transparency surrounding these negotiations and deals.



Source: Mediatique, Ofcom 2020 - https://www.ofcom.org.uk/__data/assets/pdf_file/0019/201493/connected-gateways.pdf

On the more technical side, the prioritisation of content varies across different devices. For instance, a smart TV presents a homepage brimming with various apps and content. On smart devices, two gateways can have an impact on how users access content:

- Hardware-based gateways - like remote controls and interoperable connected devices.
- Software-based gateways - a fusion of editorially-curated and automated prioritisation mechanisms.

These intrinsic gateways, inherent to either hardware or software components, facilitate access to services, apps or disaggregated content on various devices. For instance, a remote featuring a dedicated button to access a streaming platform, or a smart TV's software showcasing a curated array of media services upon activation. These built-in gateways can shape users' browsing tendencies, but users can to some extent retain the freedom to personalise them through various means..

Eleonora Mazzoli concluded her presentation by recalling that today's content is shown in a rapidly evolving digital landscape where prioritisation occurs across continually evolving digital services, each shaped by its unique business interests. Regulatory bodies must

implement measures that ensure future-proofing, balancing user safety with commercial interests — a delicate equilibrium to maintain.

3.3. The point of view of the public service media

Jenny Weinand (EBU), addressed the need to ensure the visibility of public service media.

Locating PSM content is a challenge for users as it often remains buried within app devices and smart TVs. This obscurity poses a risk of losing the PSM audience and, subsequently, a weakening of the pivotal societal role they fulfil. Besides, PSM cannot afford to pay for prominent placements on main user interfaces. Therefore, targeted and proportionate regulatory intervention ensuring PSM content and services remain easy to access and find becomes imperative .

PSM serve as a vital platform for citizens to access diverse content, including trusted news and current affairs content. PSM are different from other audiovisual media services as they prioritise service to the public, operating within public service mandates designed for societal benefit. While individual countries define the public service remit of their PSM organisations, they broadly encompass the promotion of cultural diversity, social cohesion, and integration, promoting freedom of expression and citizens' active participation in society. Thus, public service media inherently qualify as providers of content serving the general interest.

Current market practices must be addressed as they jeopardise public values. Implementing prominence rules in favour of PSM aligns with pursuing general interest objectives like freedom of expression, access to trusted and reliable content, cultural diversity and media pluralism.

3.4. The point of view of the tech industry

Stuart Savage (LG and DVB Chair) explained how technical standards will need to be adopted and used to ensure content prioritisation.

The DVB Project was founded in 1993 and is an industry-led consortium working together to design open technical specifications for digital media delivery.[12] It gathers broadcasters (incl. PSMs) and content providers, consumer electronics manufacturers and technology providers, network operators and regulators. Together they collaborate to develop specifications for digital television systems which are turned into standards by international standards bodies, usually the ETSI.[13]

The standards are developed to anchor prominent technicalities into the service. In September 2021, the consortium reacted to Article 7a AVMSD, saying "*Devices cannot magically know how to implement such conditions – they must be explicitly told what to do via signalling,*

[12] https://dvb.org/.
[13] https://www.etsi.org/

metadata, or, if immutably fixed, possibly by hard coding. But, as we know, such aspects are rarely, if ever, permanent and unmodifiable, so a signalling/metadata-based solution is most likely required in order to be able to realize the requirements of the AVMSD."[14]

The wording of Article 7a caused problems for the standards makers as it failed to align with the intended meaning. Implementation of Article 7a has initially been implemented by giving prominence to content appearing in textual lists. However, this technique is not reliable or robust due to the fast-evolving structure of the TV networks (e.g. "Phoenix" cannot be found as "Phoenix HD" when using a textual standard). Metadata is more reliable in an evolving market to ensure visibility.

In 2020, DVB designed a technical specification that was turned into a standard by the ETSI: *ETSI TS 103 770 - Service discovery and programme metadata for digital video broadcasting*".[15] In 2023, DVB published the specification for service information in DVB systems (ETSI EN 300 468).[16] According to its notice (p. 146), "*the service prominence descriptor offers a solution for compliance with Article 7a of Directive (EU) 2018/1808 and allows signalling of Services of General Interest (SOGI). The descriptor may be used to list all SOGI within the transport stream descriptor loop in the NIT [network information table] or the BAT [bouquet association table], or to signal an individual service as a SOGI within the descriptor loop of the SDT [service description table] for the service*".

This technical specification gives the content leeway to present itself as having priority, but it must present itself to the manufacturers to be prioritised on devices. In the same way, manufacturers do not know what content should be prioritised and cannot do so alone if they are not informed. All services in the value chain must be regulated to ensure the prominence, and not only parts of the value chain.

3.5. Discussion

The presentations were followed by a discussion addressing metadata sourcing to ensure content prominence. The broadcasters agreed their content is often lost on smart devices. However, device manufacturers build their products for an intended EU audience, but national rules may not implement Article 7a in the same way, or simply give prominence to the same [national] content. If manufacturers must individualise their devices for each national market (instead of the EU market), the result will be more expensive solutions for consumers. On the other hand, decisions on which programmes should have a prominence status must remain national decisions.

[14] DVB Scene – Issue 58, September 2021, p. 13: https://dvb.org/wp-content/uploads/2021/09/dvbscene-58.pdf
[15] https://www.etsi.org/deliver/etsi_ts/103700_103799/103770/01.01.01_60/ts_103770v010101p.pdf
[16] https://dvb.org/wp-content/uploads/2022/11/A038r16_Specification-for-Service-Information-SI-in-DVB-Systems_Interim-draft_EN_300-468-v1-18-1_Apr-2023.pdf.

3.5.1. Sourcing metadata

Regarding the origin of metadata, it was reported that broadcasters possess the most precise metadata to distribute among network operators, enabling them to highlight content. However, presently, there exists a gap in the information exchange between these two stakeholders.

As to the Internet providers and the online environment, DVBI is the consortium looking at Internet standards, and it usually replicates what is being done for broadcasters.[17] It shares the same finding as the broadcaster market: there is a need for metadata.

On the origin of metadata, the main conclusion from the tech industry is that all stakeholders interested in prominence must play a role in sharing and implementing a metadata solution.

3.5.2. NRAs promoting prominence discussions

Some NRAs are tasked with facilitating discussions among stakeholders to designate prominent services. While crystallising this designation might pose challenges, there is a unanimous acknowledgment of the paramount importance of prominence, and viable technical methods exist to achieve it. However, implementing these specifics at the level of the technical devices is costly, particularly in terms of testing changes to network metadata to ensure device reliability; both time and financial resources are required.

3.5.3. Findability on non-linear services and smart devices

Most public service media offer both linear and non-linear services, with the latter recognised as the future of media consumption. For instance, consumers utilising smart-TV devices predominantly engage with broadcasters' non-linear services. When transitioning to smart-TVs, the presence of tech giants like GAFAs becomes apparent. In Germany, a study revealed that consumers rarely modify the default settings on their smart TVs, meaning that if content is not immediately visible upon accessing the TV, it often remains unnoticed. The initial setup of a smart TV plays a pivotal role in user engagement due to these default settings.

Manufacturers suggest a resurgence of linear television, with some streamers even exploring the possibility of launching their own broadcasting channels. Moreover, it is crucial not to underestimate consumers — they possess the means to seek out content and can easily do so at their discretion.

[17] https://dvb-i.tv/.

3.5.4. The pivotal role of public action

To conclude this discussion, PSM representatives highlighted the fact that visibility is crucial for certain audiovisual media services to maintain their relevance; otherwise, their brand presence might diminish. When metadata plays a vital role in gaining visibility but proves costly to acquire and evaluate, public funding could play a role in supporting public service media in the form of financial assistance.

It was additionally noted that access to reliable content is crucial for a robust democracy, as it shapes our society and delivers vital information amid the overwhelming volume of data. In a landscape where fake news and disinformation are a reality, ensuring discoverability of stories that hold societal value becomes paramount. This is where prominence plays a pivotal role – showing us stories that truly matter. We cannot expect young individuals to independently discern truth amidst the deluge of content they encounter online. As they navigate websites inundated with varied content, it is imperative that we take responsibility for securing a democratic future by prioritising the accessibility of factual information.

3.5.5. The Council of Europe approach

The Council of Europe (CoE) utilises soft law standards, allowing a broader and more comprehensive approach to specific themes. It develops overarching principles and suggestions, often in the form of checklists that outline governance necessities. Recently, it delved into the matter of content prioritisation and released a report titled "Prioritisation uncovered – The discoverability of public interest content online"[18] along with a "Guidance Note on the prioritisation of public interest content online".[19] It is worth noting the importance of accountability in relation to prominence regimes, which have the potential to operate as propaganda and private censorship. Users and content providers should therefore be able to opt out of such regimes.

Beyond solely focusing on audiovisual content or services, the CoE extends its concern to encompass all types of content. The CoE is giving thought to the definition of content that serves the broader public interest. One area where the CoE may face a gap is data — specifically, detailed insights into techniques for achieving prominence.

[18] https://rm.coe.int/publication-content-prioritisation-report/1680a07a57.
[19] https://rm.coe.int/cdmsi-2021-009-guidance-note-on-the-prioritisation-of-pi-content-e-ado/1680a524c4.

4. Session 2 – Prominence of services of general interest in the AVMSD

The second session of the workshop was chaired and introduced by Maja Cappello, Head of the Department for Legal Information at the EAO.

Session 2 delved into the details of Article 7a AVMSD. Indeed, while this article refers to "services" of general interest, the related Recital 25 refers to "content" of general interest, causing some confusion. In addition, Article 7a is not a mandatory provision, but a so-called "may" provision, and only 10 member states have decided to make use of this opportunity, with varying strategies and results (PL, IT, FR, BE, DE, BG, CY, GR, IE, PT, RO). Session 2 therefore provided an opportunity to look at what is happening at national level with the transposition of this article of the AVMSD.

Overview of transposition of Article 7a AVMSD and evaluation of the framework

Michèle Ledger (University of Namur) addressed Article 7a AVMSD and its implementation across the EU, noting that this is one of the shortest articles of the Directive and merely provides member states with the possibility of taking measures to ensure the appropriate prominence of audiovisual media services of general interest. Fortunately, Recital 25 provides a few more indications, notably on the concept of "general interest", with references to media pluralism, freedom of speech and cultural diversity. It should also be noted that such measures should only be imposed where necessary, which requires assessment and, if member states decide to do so, they should only impose proportionate obligations. While these are helpful indications for the transposition, the Recital is of course non-legally binding.

To this day, 10 member states and the UK have a framework on prominence in place, although it is not necessarily complete or applicable. Some member states leave it to NRAs to impose obligations, and certain countries, such as Ireland, have not exercised this option yet. In other countries, by contrast, the government can impose rules directly, as in the Flemish Community of Belgium. It may be recalled that the Flemish Community already had rules obliging distributors to carry linear and non-linear services of public service broadcasting before the introduction of Article 7a in the revised 2018 AVMSD.

The second session was an opportunity to provide further details on the legal frameworks and measures introduced in a selection of five countries with particularly interesting models: the UK, France, Germany, Italy and Belgium.

- The **UK** already has rules on the prominence of linear public service content in electronic programme guides (EPGs) and is introducing new rules in the Online Media Bill.

- In **France**, a combination of different legal instruments is used: legislation, an implementing decree adopted by the government and the laying down of more detailed rules, as well as the involvement of the NRA (Arcom). Although Article 7a does not mention upon whom the rules should be imposed, France has set a threshold, targeting the biggest and most significant platforms (150 000 user interfaces of devices sold in France, or 3 million unique visitors per month). Arcom published a list of the platforms falling under this scope, which includes app stores, game consoles, streaming devices, connected TVs and speakers…). The French law provides that services of general interest shall cover at least public service broadcasting (which, it should be noted, covers not only audiovisual content, but also audio content - radio), but the French NRA may also, after a public consultation, extend the scope of services of general interest to other services.

- In **Germany**, the rules are laid down in the Interstate Media Treaty, but some details, such as the proportion of accessible offers or European productions, have to be determined by the media authorities. In Germany, the rules on prominence cover a wide range of services, including the public service broadcasters (ARD, ZDF, Deutschland Radio), but also commercial broadcasters, as long as they make significant contributions to diversity of opinion. Public value content is defined in the Interstate Media Treaty and the criteria to meet this include the time devoted to political and historical events, the ratio of in-house productions and programmes produced by third parties, the proportion of accessible offers, offers for young people and European productions. The media authorities issued a public tender and selected a large number of commercial linear TV providers, but also non-linear and radio services, as falling under this obligation. Three lists have been published. For platforms, the threshold is 10 000 connected households or monthly users, or 20 000 monthly users for open Internet platforms. It should also be noted that Germany extends the scope of these measures to the car industry (Audi, BMW and Tesla), adding an additional layer of internal market issues.

- **Italy** has transposed Article 7a by law, requiring the NRA (AGCOM) to set the details.[20] AGCOM was therefore required to define the criteria more precisely. It organised a consultation and is to adopt guidelines. The proposed guidelines[21] cover audiovisual and radio media services distributed free of charge by the public service broadcaster, by national audiovisual and radio commercial services on the digital terrestrial network, via satellite and online, including local audiovisual and radio commercial services distributed on digital terrestrial television, with generalist, semi-generalist and thematic "information" programming genres. The guidelines further cover commercial

[20] Article 29 of Legislative Decree N° 208 of 8 November 2021. The article also covers the automatic numbering of digital terrestrial channels, Decreto legislativo 8 novembre 2021, n. 208 https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:DECRETO.LEGISLATIVO:2021-11-08;208!vig=.

[21] Resolution No. 14/23/CONS, Guidelines on the prominence of audiovisual and radio media services of general interest, https://www.agcom.it/documents/10179/29174719/Allegato+10-2-2023+1676020191062/a3037de0-2a8f-4f51-a063-fb12616897e4?version=1.0

audiovisual and local radio services broadcast on digital terrestrial and commercial radio services broadcast on DAB+, which contribute to ensuring media pluralism and cultural and opinion diversity. Among the requirements for prominence are references to immediately visible icons and introducing the idea of a maximum of two clicks to access content. A technical working group will also be set up. The draft guidelines were notified by AGCOM to the European Commission, which reacted with a detailed opinion[22] for the following reasons: It considered in particular that "at least some of the services under the scope of the notified measures would qualify as information society services under [...] the e-Commerce Directive [...]. This is particularly the case of user interfaces and the software of Internet-connected TVs. [...] The obligations set out in [...] the notified draft would apply to information society services established outside of the Italian territory". "Against this background, the Commission's view is that the obligations set out in the notified measure constitute a restriction to the cross-border provision of information society services, within the meaning of Article 3(2) of the e-Commerce Directive, in as much as they would apply to providers of information society services established in other Member States which provide their services in Italy.

- In **Belgium,** in Flanders, the government can impose rules directly and has just launched a tender to help it analyse the situation. In the French-speaking Community, obligations were already in place for distributors of linear and non-linear services of the public service broadcaster (RTBF), and local media and international services in which the RTBF has a stake.

Using these examples, Michèle Ledger underlined the incredible difficulty of finding a balance between EU and national initiatives. Not much guidance is given to member states and the question remains as to what constitutes an audiovisual service of general interest. This would need to be precisely defined in the law, bearing in mind that things evolve over time, and that a review of the process would therefore also be needed. One can also see that different levels of general interest exist at national level.

One of the underlying concerns is that the wording is not consistent throughout the Directive (*service* vs *content*). Many people watch audiovisual content on online platforms. The prominent display of individual items of programming should therefore also be ensured. In addition, the bridge between must-carry and must-offer, and therefore between service providers and distributors, is missing.

The inherent technical aspects of the prominence requirement have also raised other concerns, as national implementation may have raised internal market issues. Indeed, France, Italy and Germany sent their draft rules to the European Commission to check compatibility with the E-Commerce Directive. The Commission however replied that the application of national prominence rules to information society services not established in their member state would be contrary to the E-Commerce Directive.

[22] European Commission, Detailed opinion on Italian public consultation on the prominence of audiovisual and radio media services of general interest and accessibility of the automatic numbering system for digital terrestrial television channels, https://technical-regulation-information-system.ec.europa.eu/en/notification/23157/message/104778/EN.

Another interesting issue to be addressed in this context is the relationship between the rules on prominence and the possibility for users to customise the offer, as laid down in Article 19 EMFA proposal. The provision states that the possibility to customise is without prejudice to national measures implementing Article 7a of the AVMSD.

The future will show if reform may be needed at EU level, including with regard to verification systems, reporting obligations, stakeholder dialogue, the role of regulators, and funding. Another fundamental question raised was whether the AVMSD is the right instrument to address these issues, as it is difficult to impose obligations on a concept that is not defined.

4.2. Rules in practice in France

The second presentation of this session was by Danielle Sartori (French regulator Arcom), who took the opportunity to highlight some of the specificities of the French model, as laid down in Article 20-7 of Law no. 86-1067 of 30 September 1986 on freedom of communication (*Loi Léotard*).[23]

It should be noted that the services of eight public service broadcasters have so far been identified as services of general interest, according to French law. Arcom may also decide, after a public consultation, to extend the scope of services of general interest to other services. In June 2023, the French NRA launched a one-month public consultation on the possible extension of the scope of services of general interest to also cover other types of services.

In addition, France has introduced a system of thresholds through Articles 2 and 3 of Decree n° 2022-1541 of 7 December 2022,[24] based on the economic size of the operators and to avoid placing a disproportionate burden on players that do not have the economic capacity to meet the obligation. The two thresholds are as follows:

- over 150,000 user interfaces marketed, made available under a subscription contract or rented during the previous calendar year in France. User interfaces must be understood as any device installed on a television set or on equipment intended to be connected to the television set, or installed on a connected loudspeaker,
- over 3 million unique visitors per month in France for each user interface, based on the previous calendar year. User interfaces must be understood as devices made available by a service distributor or made available in an application shop.

Following publication of the Decree, Arcom published a first list of user interfaces subject to the prominence obligation on 14 March 2023.[25] The list will be published annually and updated with the user interfaces that go beyond the thresholds.

[23] https://www.legifrance.gouv.fr/loda/article_lc/LEGIARTI000044259647
[24] https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000046711767#:~:text=%2D1067%20...-,D%C3%A9cret%20n%C2%B0%202022%2D1541%20du%207%20d%C3%A9cembre%202022%20pris,des%20services%20d%27int%C3%A9r%C3%AAt%20g%C3%A9n%C3%A9ral.
[25] https://www.arcom.fr/sites/default/files/2023-03/Liste%20des%20interfaces%20assujetties%20aux%20obligations%20de%20l%27article%2020-

In addition, Arcom is also responsible for determining appropriate visibility measures to be imposed on operators. The authority submitted its draft considerations on this issue for public consultation on 14 March 2023 and published a summary of the contributions received in June 2023.[26]

Since September, Arcom has held various discussions with the European Commission, broadcasters, operators' representatives and with other regulators, in order to exchange experiences with countries in a similar situation.

4.3. Rules in practice in Ireland

Liam Boyle (Irish regulator CNAM) provided an insight into the Irish landscape. The new provisions envisaged in the Irish legislation are "possible or intended approaches".

Ireland currently has basic must-carry and must-offer obligations, which apply to specific services: i.e. the two main public service media (RTE and TG4), some commercial services with specific licenses, and two community TV services. These obligations apply only to linear-TV services.

The new provisions of the Online Safety and Media Regulation Act 2022[27] are part of a wider amendment to the 2009 Broadcasting Act,[28] which includes the transposition of the AVMSD, and the inclusion of on-demand and online safety legislation. A new definition of public service provider is provided in the Act, sections of which are yet to be commenced by the Government. The new provisions also include a formal designation process for providers, which will apply in particular to public service media and commercial providers, with a caveat that the regulator may extend such a designation process to other providers, subject to ministerial approval. In contrast, there is no designation process for platforms or platform providers, nor is there a threshold in the legislation.

The CNAM will have new investigation and sanction powers in this area, subject to Part 8b of the OSMR Act 2022. That being said, the focus is rather on the regulator facilitating discussions and relationships. The dispute resolution system that was part of the old legislation has been retained as a last resort.

The law provides for the regulator to develop codes and rules. The CNAM aims to develop codes and rules with the participation of all stakeholders, thus bringing the discussion into a wider context. Indeed, the Irish NRA was very supportive of the idea of a working group such as the one set up in Italy. One of the main concerns is not to repeat the mistakes of the past, for example when the technical regulation on EPGs was outdated as soon as it came into force.

7%20de%20la%20loi%20du%2030%20septembre%201986%20et%20du%20d%C3%A9cret%20du%207%20d%C3%A9cembre%202022.pdf.

[26] https://www.arcom.fr/sites/default/files/2023-06/Synthese_contributions_consultation_publique_relative_aux_mesures_de_visibilite_appropriee_des_services_interet_general-Arcom.pdf.

[27] https://data.oireachtas.ie/ie/oireachtas/act/2022/41/eng/enacted/a4122.pdf.

[28] https://data.oireachtas.ie/ie/oireachtas/act/2009/18/gle/enacted/a1809i.pdf.

Regarding the definition of general interest, it was emphasised that there are very obvious notions of what general interest content can be, but this can become more controversial depending on the political nature of the government.

The main identified challenges relate to:

- the must-carry and must-offer concepts, which are still alien to some stakeholders,
- algorithms, which should not be commercially driven,
- the introduction of powers of sanction ,
- the management of expectations, and what can be achieved.

Opportunities include in particular:

- widening access to content for all audiences and encouraging growth with younger audiences,
- addressing the commercial arrangements and terms of trade between platform providers and broadcasters: codes of fair trading will be reviewed,
- slowing the decline of PSM,
- ensuring that the legislation is flexible enough to be future-proof,
- taking account of EMFA and DSA issues.

4.4. Discussion

4.4.1. Action at EU level

Francesca Pellicanò (Italian regulator AGCOM) opened the discussion by illustrating the opinion of the European Commission addressed to Italy on the draft guidelines ensuring prominence of services of general interest as notified by AGCOM. The main points addressed by the Commission cover the Article transposing Article 7a AVMSD in the Italian law. According to the Commission, some services within the scope of the notified measures would qualify as information society services under the e-commerce directive (e.g.: some elements of the user interfaces and connected TV), and the measures would notably apply to service providers established outside the Italian territory. The notified drafts would consequently constitute a restriction to the cross-border provision of information society services, within the meaning of Article 3(2) of the e-commerce Directive. During the discussion it was emphasised that if the prominence measures were applied to services established in Italy only, they would be useless. This issue therefore requires much more harmonisation.

The issue highlighted by the Commission certainly allows identification of certain elements that still need to be clarified, including:

- a common understanding of what services of general interest are,
- what regulators can and cannot do.

It was also recalled that the European Parliament has mentioned ERGA in the drafting of guidelines in relation to Article 7a.[29] Doubts were formulated as to ERGA being the right candidate for this task, since it involves primary legislation and a non-mandatory provision. In general, a lot of harmonisation seems to be needed and if the European Commission so requests, the future Board of Media Regulators would have to look into it.

Eleonora Mazzoli added that Ofcom is closely monitoring what is happening in the EU because it deals with global companies, providers and distributors that are present across different markets. There therefore needs to be dialogue between stakeholders but also between regulators, beyond the EU-27. The guidelines that might be produced by ERGA, may address how to define platforms, general interest and other relevant terms.

4.4.2. The view of NRAs and implementation at national level

Tania Soares (Portuguese regulator ERC) explained that Portugal had already got a reinforced set of rules providing the ERC with the criteria for relevance and “prioritisation" of content and services of general interest. Due to this, the legislator did not see the need for direct transposition by including the term 'prominence'. Indeed, several articles of the law already include the term “prioritise” and several articles further define “general interest” in terms of scope (national, regional, local), of cultural impact (prominence given to the Portuguese language and to the diaspora and culture) of format (journalistic, political, cultural format specifically targeting children and young people) and in terms of protection of constitutional values such as the public's right to quality, impartial and truthful information, guarantees of pluralism and diversity or public service. The ERC is currently following developments in the implementation of Article 7a in other member states through ERGA and is seeking to adapt and harmonise monitoring methods and models. In addition to the legal provisions, the ERC considers that it can be a challenge to introduce new rules without them being perceived as discriminatory between programmes or programme services or being judged as unduly interfering with the autonomy and freedom of operators. One important question is how to provide users with the content they may not know they want.

With regard to the relation between Article 7a AVMSD and VSPs, it was noted that while no rule is currently established in Ireland on this matter, already existing processes could be used for VSPs, including the designation process used for VOD services. This would however lead to questions related to the principle of country of origin: the dichotomy being whether one should look at services targeting the state or at the jurisdiction criteria.

As recalled by Olav Nyhus (NRK), not even the best possible content has any value until it reaches the audience. The core question that remains is how to restrict the number of service providers that should be covered. A new dimension to this topic also relates to the proportion of audiovisual content, specifically news, that should be provided. A new problem arises: the biggest and most serious newspaper providers in Norway already feel that traditional broadcasters are given preference on certain platforms for their apps, and others may follow.

[29] REPORT on the implementation of the revised Audiovisual Media Services Directive - (2022/2038(INI)), Recital 22 and 23, https://www.europarl.europa.eu/doceo/document/A-9-2023-0139_EN.html.

Renate Dörr, from the German public service broadcaster ZDF), took the opportunity to share the first experiences related to the implementation of Article 7a AVMSD in Germany. According to German law, the public service broadcaster benefits from so-called "findability". In parallel, regulatory authorities held a tender allowing providers to submit applications for inclusion in a list of general interest services.[30] A total of 325 channels applied and most of them were selected. However, if every channel is a priority channel this diminishes the value of "priority". In addition, the German findability rules do not address the question of remote controls. Increasingly, remote controls have specific Netflix and Amazon buttons, but no button for public service and public value content.

4.4.3. The risk of cherry-picking and disaggregated content

Another issue raised was the risk that unless the whole service falls under the findability rule, IPTV providers would be allowed to pick and choose programmes they would like to offer solely because of their commercial interest. Zoe Pellegrini (Mediaset) highlighted in particular the danger of letting global operators cherry-pick content rather than retransmitting the whole services, which would undermine the integrity and the commercial value of the latter.

It was also mentioned that the scope of Art 7a AVMSD in light of its Recital 25 was not limited but, on the contrary, extended to content produced for instance by PSM or general interest services which is not merely audiovisual content but disaggregated content. In this regard, a specificity of German law was mentioned, whereby media platforms are defined as entities putting together different media offerings as well as offering their own services. In this scenario, social media platforms are not media platforms under German law but intermediaries.

Nathalie Léger (France Télévisions) further emphasised the importance of giving prominence to services of general interest as a whole and to disaggregated content, which should be prioritised on all interfaces.

[30] *Satzung zur Durchführung der Vorschriften gemäß § 84 Abs. 8 Medienstaatsvertrag zur leichten Auffindbarkeit von privaten Angeboten*, https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Satzungen_Geschaefts_Verfahrensordnungen/Public_Value_Satzung.pdf.

5. Session 3 – Prominence in the digital space

The session was co-chaired by Maja Cappello, Head of Department for Legal Information (EAO), and Francisco Cabrera, Senior Legal Analyst (EAO).

To introduce the discussions, Francisco went back over some of the key takes that had transpired from the discussions of Sessions 1 and 2. Among those key takes was the notion that audiovisual content comprises both economic and cultural goods, which implies that the prominence of audiovisual content also becomes a matter of cultural diversity. Broadcasters, device manufacturers and the other actors of the media landscape all have their take on the matter. The one take that had been largely left out of the discussion up until this point was that of the users. Although their interest was at the heart of the exchanges, their involvement in defining what should be deemed to constitute content of general interest had not been discussed.

The proposal for a European Media Freedom Act introduces a right for users to customise the media offer on devices and interfaces enabling users to change the default settings to reflect their preferences, without however affecting the provisions from Article 7a AVMSD.

The Digital Services Act also imposes on platforms the explanation of how their recommendation systems work in order to provide users with more content that fits their tastes. It also requires platforms to provide users with an alternative recommendation system not based on user profiling.

5.1. Overview of the regulatory links with DSA, DMA and EMFA

Elda Brogi (European University Institute) opened the session by providing an overview of the links between the notion of prominence in the digital space and the DSA's take on the transparency of recommendation systems, the DMA and self-preferencing, and the EMFA and the right of customisation given to users.

The presentation focused in particular on the issues linked to the EMFA and Article 7a AVMSD and on the new rationale on prominence within the DSA and DMA, and how it links with media pluralism and media freedom as key principles also to be fulfilled in the digital sphere.

The following links between Articles from the EMFA proposal and Article 7a AVMSD were highlighted:

- **Article 6** appears to coordinate with Article 7a AVMSD, by stressing the importance of some media services and selecting media services to be seen as being of particular interest (news and current affairs content);
- **Article 15** establishes the role of the European Commission to produce guidelines on media regulation matters, including regarding Article 7a AVMSD, prompting negative reactions and questions regarding the impact those guidelines could have on member states – the rationale behind it may be to define rules to help the functioning of the internal market to achieve legal certainty in the field;
- **Article 19** establishes the users' right of customisation, allowing them to easily change the default setting to manage access to audiovisual media services based on their interests. This article slightly changed after recent trilogue discussions, with "audiovisual media services" being replaced by "media services" and inclusion of the fact that the provisions shall not affect national measures implementing Article 7a and 7b AVMSD.

In the DSA, several articles deal with the need to empower users and impose accountability on how recommender systems should work, and what kind of recommendation they should provide:

- **Article 27** requires transparency of recommender systems, and that recipients of the service be appropriately informed about how the system impacts the way the information is displayed and can influence the presentation of the information;
- **Article 38** establishes that VLOPs and VLSEs must provide at least one option not based on profiling;
- **Article 34** deals with risk assessment: providers of VLOPs and VLSEs shall diligently analyse and assess any systemic risk stemming from the design or functioning of their services, including algorithmic systems;
- **Article 35** deals with risk mitigation: platforms must put measures in place to avoid foreseeable negative effects on media freedom, pluralism and freedom of expression, civic discourse, electoral processes and public security.

The DSA also asks for the implementation of a code of conduct in order to list, explain and commit to behaviours from the platforms to limit these risks. The Code of Practice on Disinformation[31] is very likely to be adapted and converted into said code of conduct, including its commitments 18 and 22 on prominence and trustworthiness, requiring recommender systems to be designed to improve the prominence of authoritative information and reduce the prominence of disinformation based on clear and transparent methods and criteria, and provide users with tools to assess the trustworthiness of information sources and indicators of trustworthiness, developed by independent third parties.

[31] The 2022 Code of Practice on Disinformation: https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation#:~:text=The%20Code%20will%20strengthen%20the,challenges%20related%20to%20such%20techniques.

Additional noteworthy articles in the DSA:

- **Article 17** also contributes to creating the so-called "media privilege" (on top of the implementation of Articles 34 and 35) by establishing that the provider of a VLOP should communicate to the media service provider upon deciding to suspend the provision of its online intermediation service in relation to content provided by a so-declared media service provider based on terms and conditions without that content contributing to a systemic risk. While it is more linked with the liability regime of VLOPs, this provision can be seen as a very important element justifying possible conflicts between the VLOPs' interests and those of the media service providers. Ultimately, the question of giving prominence to certain content goes further than media pluralism and media freedom; it is also a question of economic matters.
- **Article 14** on terms and conditions is also relevant in this discussion. Providers of intermediary services should take into account the rights and legitimate interests of the involved parties in their terms and conditions, including freedom of expression and media pluralism.
- **Article 25** on online interface design establishes that platform providers shall not design or operate interfaces in a way that deceives the recipients of their services or that impairs their ability to make free and informed decisions.

In the DMA, Article 6(5) bans self-preferencing, as it distorts the competitive process by unduly promoting the product and services of the platforms, resulting in the exclusion of rivals. The gatekeeper shall not treat services it offers more favourably in ranking and indexing than its competitors. Also, it should not limit similar products promoted by third parties.

5.2. Evaluation of the framework

Following Elda Brogi's general overview of the rules, Joan Barata (Stanford University), delved deeper into their implications.

Discussing the digital environment in the present context is strictly connected to the role of online intermediaries and, more in general, of the distribution systems that go beyond audiovisual services. Some rules, such as the ones included in the EMFA proposal, are still in the making, while others have still-unknown consequences, as with the DSA, as they are still to be properly enforced at the moment. The rules discussed extensively over the course of the morning are legacies from the world of "scarcity", with fewer options to be heard and to access content. Fewer actors means a different impact on the formation of public opinion. Nowadays, for better or worse, the situation has changed.

New media actors have emerged, as foreseen in early documents by the Council of Europe on a new notion of media, more than 10 years ago. General comment No. 34[32] (2011) of

[32] Human Rights Committee, General comment No. 34 (2011) - Article 19 Freedoms of opinion and expression | European Union Agency for Fundamental Rights (europa.eu): https://fra.europa.eu/en/law-reference/human-rights-committee-general-comment-no-34-2011-article-19-freedoms-opinion-and

the Human Rights Committee said that citizens, journalists, bloggers and those who use alternative means to communicate ideas and opinions could serve the public interest in the same way – if not better – than traditional media and would deserve to be treated and protected the same way. In other words, we now live in a world where new speakers can potentially be as impactful and professional ethically speaking and contribute to pluralism just as much as professionals.

It is particularly telling in authoritarian regimes, but it applies everywhere. In Cuba, official media will provide little information on what is going on on the island, while unauthorised, unlicensed media may prove to be a more reliable source of information. Matters of public interest and content that forms the public opinion deserve to be protected. What is less obvious is: how do we define the scope of this content and how do we decide to protect it?

Categorisation based on the type of service or speakers may not be appropriate anymore, as categories are not very clear anymore, and it poses the risk of missing out on other actors that serve the public interest.

It would be complicated to decide service by service. Some bloggers fit that category, but not all bloggers do. The same goes for television channels. We have to assess based on content, which leads to another question: how do we define *ex ante* the content that serves the public interest and deserves some form of protection? A definition that would be too general would endanger legal certainty. On the opposite side of the spectrum would be a definition that would be too specific. The only regimes doing that are authoritarian regimes.

Should it be the role of the state to decide what is good and bad for users? The platforms? The users?

We have the "intuition" that there is an issue with findability, but is it even the same issue with all platforms? And does it stem from the terms of service, the design, the business model or the algorithm? Making a proper assessment and figuring out what measures would, in a proportional manner, address the issues is complicated, in part because platforms are not transparent on these matters but also because there are different forms of platforms. Findability measures could very well alter the business model of a platform to the point of making it irrelevant for investors or users.

Relevant to that question as well is the notion of intermediary. Nowadays, people use gaming applications for news, and they are not usually considered to be online intermediaries. There is also the example of Telegram, an application that is at the crossroads between the private and public spheres. Are we going to be able to define a regulatory tool addressing this diversity and complexity?

We need to accept that the monopoly in being intermediaries and in defining public interest is not in the hands of the public service media anymore. Public interest is served by media services that go beyond what we typically understand to be media services. Those services deserve the same type of protection, as long as they support pluralism.

Additionally, the notion of "public interest" should not be used in vain, as the question of prominence sometimes can also be addressed from the point of view of competition law, unfair practices, and abuse of dominant position.

The role of the users also has to be recognised. Their powers have radically changed. Studying how content moderation works, it becomes obvious that the final outcome is way

more complicated than promoting bad things because that is how platforms earn the most money. Clear assessments on the impact of certain types of distribution of content are still unclear, with some reports on the topics reaching completely contradictory conclusions.

The new tools offered by EU legislation on the level of design, processes, rights of users (algorithmic transparency, assessment of risk, pluralism when moderating content and establishing terms and conditions) have barely been explored. Some media companies also need to reflect on the kind of content they offer and determine if it is adapted to the users of a platform.

In conclusion, the problem is not as simple as before, and we do not know to what extent it is a problem, or how to address it. Optimistically, we can remember Erasmus of Rotterdam who, in 1525, referring to the printing press, said "Printers fill the world with pamphlets and books foolish, ignorant, malignant, libellous, mad, impious and subversive."

Technology has changed, but the language is the same. If technology can change, regulation can adapt.

5.3. Policy approaches in the UK

Eleonora Mazzoli (UK regulator Ofcom) gave an overview of the regulatory approach in the UK. The UK approach builds on European law but it adds a particular approach when it comes to prominence rules.

When the UK transposed parts of the AVMSD in 2020, the prominence rule from Article 7a AVMSD was not part of the transposition because the UK already had rules to address prominence in the linear world. In the UK, the prominence of the PSB traditional, linear channels within electronic programme guides (EPGs) is protected by rules set out in Ofcom's EPG Code[33]. With changes in the media environment and EPG not being the main access point to content anymore, thus, as part of the review[34] of the EPG Code in 2019[35] and subsequently as part of the 2020 PSM review, Ofcom suggested a set of recommendations to safeguard PSB prominence in a connected TV world. Since then, the UK Government has proposed and laid out a new Media Bill,[36] which among other things, also introduces a new prominence regime. This legislative process is still ongoing. Subsequently, all elements discussed are based on the content of the latest version of the bill available in November 2023. It is now going through the Parliament, so details might change.

The Media Bill covers a wide range of relevant areas for broadcasting and media regulation in the UK,, as it includes a new framework for public service broadcasters, provides a bit more flexibility on how the public service broadcasters can meet their quotas, introduces new obligations for Channel 4 for instance and sets new rules for on-demand services (and the

[33] https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/epg-code
[34] https://www.ofcom.org.uk/consultations-and-statements/category-1/epg-code-prominence-regime
[35] https://www.ofcom.org.uk/consultations-and-statements/category-1/epg-code-prominence-regime
[36] https://bills.parliament.uk/bills/3505
https://www.ofcom.org.uk/consultations-and-statements/category-1/epg-code-prominence-regime

potential for Ofcom to draft a code similar to the Broadcasting Code, but for VOD), radio and audio.[37]

The new prominence regime introduced in the bill is underpinned by key statutory objectives. The current text states that the new prominence regime is meant to facilitate carriage deals between public service broadcasters and TV platforms and ensure that TV platforms give appropriate prominence to public service broadcasters' online services without affecting the PSB's ability to deliver their remit online and also without involving disproportionate restriction of the TV platforms' innovation and the consumers' choices, with two core provisions for that:

- A must-offer requirement for the designated online services (the public service broadcasters, which are defined as "internet programme services");
- A must-carry and prominence requirement for the regulated TV platforms (called "television selection services")

In short, the public service broadcasters need to offer their content and the platforms need to carry.

We are still far from the implementation phase, as royal assent could take up to a year. Ofcom's new role then will be to advise the Secretary of State on what platforms are to be included within the scope of regulation. There are a few criteria that Ofcom will have to advise on, for instance the notion of "significant number of UK users" and the threshold for this. Ofcom will only be advising, as the decision will be taken by the Secretary of State and platforms will then have to notify Ofcom if they meet those criteria.

- On the other side of the equation, if their online services are to benefit from the new rules, UK commercial PSBs such as Channel 4 and ITV must apply to Ofcom for designation of their on-demand players. To designate, Ofcom will need to consider these applications against criteria specified in the Bill, including whether the player is capable of making "a significant contribution to the fulfilment of the PSB remit, and whether PSB remit content included within the online service is readily discoverable/promoted. There then is a separate process for the BBC iPlayer.

Providers failing to demonstrate that they meet the above criteria may be de-designated in the future.

- After the designation process, Ofcom must issue two Codes of Practice giving recommendations on how to comply respectively with the new prominence and availability requirements, and with the accessibility requirements.[38]

Guidance will also be drafted to ensure that the carriage deals are made in a fair way and in compliance with the new regime. Ofcom will also have dispute resolution functions when parties cannot agree, hopefully as a backstop only.

[37] https://www.ofcom.org.uk/news-centre/2024/what-is-the-media-bill-and-what-does-it-mean-for-ofcom

[38] For the latest update on these developments, see: https://www.ofcom.org.uk/tv-radio-and-on-demand/information-for-industry/media-bill-roadmap-to-regulation

5.4. Case study – SKY

Jack van den Berg (SKY) presented the case of SKY, which will be subject to the new rules introduced in the UK.

SKY has 23 million customers and runs on a pay-TV business model but also a platform model. Its products are divided between more traditional boxes and IPTV. It is important for SKY to be a global tech platform, so they have opted to build their own operating system.

SKY can see that public interest content is popular among its customers, so making this content prominent makes sense from the business perspective, with no need for regulatory intervention to promote this content. They would however welcome resources to bring on board public interest content from other sources, as they are convinced of the interest in such an approach, but the cost is not negligible.

SKY's platform offers many features: a voice control button on their remote can directly open apps. Among the customisation options given to the user, and particularly interesting with regards to Article 19 EMFA (and the users' right to customisation), are favourite lists that can be created and made easily accessible for individual pieces of content and channels. The most recently watched content can be accessed with a single click, meaning that services that users access regularly are easy to re-access. SKY believes that these types of solutions should not be overlooked when discussing measures to comply with rules on prominence. While SKY is not a particular target of prominence rules, they are always looking for solutions to make content adapted to users easier to access.

These rules are starting to encroach on existing partnerships and this overprescription is becoming a problem, especially the focus on clicks and tiles (visual blocks on which specific content or services can be put forward, on a platform's homepage for instance). In Germany for instance, SKY is beginning to receive feedback from customers who are asking what the criteria for "public value" are, and in some cases requesting that the prominence given to it be removed, which SKY cannot do.

SKY has always promoted the "principled" approach. As seen in the UK, this is an approach where every provider can interpret how they see fit for the customer base.

5.5. Case study – Media for Europe

Zoe Pellegrini introduced Media for Europe, the new holding comprising Mediaset in Italy and Spain and with a significant share in ProSieben in Germany. For Media for Europe, the difficulty lies in finding out how to access content, with modern TVs being a lot more complex than standard TV sets. The industry is moving from service logic to content logic.

She underlined that there is a problem with remote controls: only global OTT services have dedicated remote buttons and such displays steer users towards their own content, while competitors remain several clicks behind and are very difficult to find. Numeric pads are also disappearing from remote controls, with the effect that they remove direct access to some broadcasting services from the remote control.

With graphic user interfaces, another issue is that some apps (such as YouTube, for instance) are preloaded on them, while national AVMS apps are not. Only "featured" content selected by the TV set operating system is prominent, with no option to remove it at the user's level. Users must sign in with the operating system to download specific AVMS providers' apps.

Possible solutions are numerous, they include:

- For remote controls:
  - Making linear TV channels always just one click away; Numeric keys must be available and always active to ensure direct access and the logical channel numbering must be preserved,
  - Granting local digital services at least the same space and visibility granted to global ones.
- For graphic UI:
  - Giving live TV channels a very visible presence in the TV operating system's user interface respecting the national channel ordering,
  - Giving the AVMS provider the prerogative to select and highlight its featured content to be shown on the basis of the service ordering,
  - Removing the obligation for users to sign in with their operating systems to download and access AVMS.

According to MFE, Article 19 of the EMFA proposal strikes a good balance between the users' desires and public value as defined by the different member states.

MFE has been actively involved in Italy in the discussions regarding DVB. MFE considers it to be a strong instrument to support harmonisation.

Possible ways forwards based on examples and inspirations observed in Europe and beyond include:

- Reserving some of the remote-control keys for local editors, or allowing users to customise all or some of these keys to access services of their choice and reserving a section of interfaces' home screens for European publishers (the French "*Mission « flash » sur la configuration des télécommandes et des écrans d'accueil des équipements audiovisuels*");[39]
- The British example of Freely,[40] a new free TV service that will deliver live TV over broadband. The service will help ensure the availability of PSB services and complement the new provisions for on-demand and streaming prominence, set out in the draft Media Bill;
- The Australian Communications Legislation Amendment (Prominence and Anti-siphoning) Bill[41] which recognises the vital role that free-to-air television broadcasting services play in reflecting Australian culture and supporting the democratic processes

[39] *Note de synthèse - Mission « flash » sur la configuration des télécommandes et des écrans d'accueil des équipements audiovisuels »* : https://www2.assemblee-nationale.fr/content/download/462021/4508256/version/1/file/Note+de+synth%C3%A8se+-+T%C3%A9l%C3%A9commandes.pdf.
[40] http://www.freely.co.uk/.
[41] https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7132.

by providing local news, current affairs, emergency broadcasting, sport, entertainment and events of public significance to all Australians and for free. The new prominence framework will ensure consumers can easily find and access free television broadcasting services and broadcasting video-on-demand services on connected television devices.

5.6. Discussion

The discussions started with reaction to Joan Barata's presentation and more specifically the role of platforms. The suggestion was made that while it is a difficult question, defining their role should neither be up to the government nor the platforms themselves, and not exclusively up to the users either. The public service broadcasters' content is already regulated at EU and national level; hence it should be considered absolutely legal, and adequate for young people. In this context, platforms should not be given the right to control this content a second time. This is precisely the role of the regulatory authority. This is precisely the role of the regulatory authority. And if platforms and broadcasters disagree, who better than the NRA – and in the last instance a court - to settle the matter?

On the other hand, it was noted that if platforms have the possibility to moderate content, this must comply with EU law. For that reason, it is only normal that they should treat all content the same way, as they also regulate what their users say.

It was also remarked that Meta used to have separate news tabs in the UK and Germany for instance but decided to remove them. This appears an interesting way to achieve prominence. Unfortunately, according to Meta, users were not interested in news content, as only 3% of Meta's content is news.

However, in spite of Meta's assessment of its users' interest in news, a growing proportion of people take news from the platform instead of "real" news sources. It also seems to highlight the fact that different actors appear to have a different understanding of what constitutes news. TikTok for instance does not recognise any value in news content and even when the users show interest, TikTok's algorithm will not show them more news.

Those elements raise a question: should VLOPs adapt their strategies? YouTube recently announced that it will implement a feature to give more prominence to news. But which news will that be? Most likely only that of big actors, it was said.

A prerequisite, according to a PSB representative, would be to first define the "key" general interest content and sort out the "key" platforms. Once regulators have dealt with those questions, the rest should follow, and nuances can be defined at a later time.

A parallel was drawn with similar questions in the past relating to commercial broadcasters instead of platforms. While the actors are new, the discussions are not. Could obligations be imposed through licenses? It was deemed good for the public service media at the time, because it differentiated them from the commercial media. Now, however, public service and commercial media have banded together against new media.

As a reaction to the assertion that new voices would deserve privileges with regards to prominence, the question arose as to whether this implied that public service and commercial media should cease having this privilege.

The discussion was closed with a reminder about the basis of the privilege in question, this being the idea of certain types of media fulfilling a role of public interest. By this logic, it could be interesting to question, whether there are new actors in the media sphere that also play this role. If this is the case, those voices deserve to be heard the same way.

6. Session 4 – World café

Maja Cappello, Head of the Department for Legal Information (EAO), as Chair of this panel, invited the participants to engage in group discussions inspired by a "world café" approach. It should be noted that the content expressed does not represent an agreed consensus of all participants, but rather a variety of possible viewpoints. Groups were organised as follows:

AVMS providers	**Table host**: Richard Burnley
Platforms & tech	**Table host**: Francesca Pellicanò
Academia & NGOs	**Table host**: Krisztina Rozgonyi
Media regulators	**Table host**: Emmanuelle Machet

The teams consisted of individuals *acting as* members of these groups for the purpose of the exercise, rather than as official representatives.

At the end of the brainstorming session, the table host for each group summarised the main points of discussion.

The following table provides an idea of the main tools and remedies that exist and that were identified during the discussion and a record of what each stakeholder who participated in the brainstorming exercise deems possible (the blue cells with "Can/Cannot do") and what they expect from each of the others (the white cells – to be read horizontally):

	AVMS providers	Platforms & tech	Academia & NGOs	Media regulators
AVMS providers Tools are not perfect remedies. If quality content attracts, it might have prominence anyway, BUT platforms compete with broadcasters. With full spectrum of content not really a solution. Not enough tools or solutions across Europe. Not sufficient tools available to be sustainable in the future.	**Can do** Try negotiating with platforms (failure so far). Edit content in an attempt to ensure it is found more easily (not the full service, which is not what AVMS providers should be doing). Try advocacy (the louder voice will prevail). **Cannot do** Understand the algorithms of the systems. Ensure findability across the broadcasting service via hardware or UI. Ensure continuity of European broadcasting	**Expectations** Be more open to collaboration. Understand that platforms and tech cannot be totally transparent, BUT at a minimum expect access to own data on trends. For local broadcasting services to be on the first page of the interface. Have a button on the hardware. Fair play abiding by the law. For platforms and tech not to regulate already regulated content.	**Expectations** Unconditional support. NGOs: be objective in reports that are material to the process, including on transparency of financing.	**Expectations** Revise the interpretation of the e-commerce directive. Be bold, take the decisions they need to take and bring in prominence rules. Ask the EU to make these rules mandatory. Not treat vloggers as regulated content. See a commitment to dialogue, open consultation of all stakeholders. Be mindful of the practicability of how to implement the rules, as they must be applicable. Take a balanced approach, proportionate solutions.

	AVMS providers	Platforms & tech	Academia & NGOs	Media regulators
	without help.			
Platforms & tech Tools are not incisive enough to guarantee prominence. Issue of the size of platforms. Risk that proportions and responsibilities and commitments of platforms being biased due to their size: smaller platforms also matter.	**Expectations** Support technical standards. Give better quality of metadata to organise better content and services.	**Can do** Give representative data, proportionate to the purpose and goal of the regulation. Be ready to be transparent and provide data. **Cannot do** Give full disclosure of algorithms. Support costs to elaborate data, as it would be too expensive.	**Expectations** Come up with methodology and risk assessment to have future-proof regulations.	**Expectations** Provide consistent legal framework, legal certainty. Provide legislation that is not disruptive to our businesses.
Academia & NGOs Limited tools. Advocacy, strategic litigation not really applicable to public interest	**Expectations** Work towards the culture of prominence: proactively invest in research and development of new formats, technical solutions, applications, user interfaces	**Expectations** Embed prominence in business models, find a way to live with it. Reflect and adapt to changing social and political contexts, especially in times of crisis, war, contexts where	**Can do** Produce applied research, which however presents its own challenges: what happens to basic research, problems of funding, access to data (DSA requirement on	**Expectations** Take independence seriously. Invest heavily in professional capacity (training, new hiring, evolving inhouse capacities, learning and adapting).

	AVMS providers	Platforms & tech	Academia & NGOs	Media regulators
content. Research, reports. Opportunity of representing public interest in policy making	which could deserve prominence. Heavily invest in quality content deserving prominence (children's programming, for instance). Presumption of eligible funding of this content (stable and substantial). Keep continued dialogue, be open to acceptable solutions.	prominence of public and general interest content plays an important role. Heavily invest in understanding how platforms are used and misused, especially in conflictual contexts (investment in research, risk assessment and mitigation). Implement transparent risk mitigation. Invest in linguistic capacities and competences.	vetted researchers and limited conditions). DSA applies to certain research activities and obligations of open access publications, which is usually not given to academics. Be vigilant, constantly monitor and propose revisions. Be more transparent about funding (sponsorships). Focus on media literacy as a matter for uptake of public interest content (important role for NGOs). **Cannot do** Risk of capture and two-speed Europe for academia depending on financing. Applies to academia and society.	Play active mediation role between AVMS providers and platforms, be proactive and facilitate negotiations and discussions. Proactively and consensually produce public guidelines, codes and standards (like Ofcom does). Properly enforce the legislation. For those administering public subsidies, use these schemes for online and digital prominence objectives. Revise guidelines and propose amendments to allow these subsidies to be used for prominence.

	AVMS providers	Platforms & tech	Academia & NGOs	Media regulators
(1) Media regulators Tools and remedies: must-carry and must-offer, extended to non-linear. Engage and organise structured dialogue between relevant stakeholders, technical WG, that would be representative and inclusive in its composition (regarding the public and audiences).	**Expectations** Form a technical alliance between public and private broadcasters, team up to have better approach and power vis-a-vis big players. Not have too-high expectations on the public service broadcasters' part that prominence may solve everything.	**Expectations** Ensure proper transparency and access to data. Cooperate without discrimination against smaller nations (as platforms are more interested in bigger nations).	**Expectations** Continue to provide long-term, visionary research. If possible, sometimes move beyond the dichotomy that all public service media are good and all platforms are bad.	**Can do** Ensure a balance in prominence not being too prescriptive nor generic, and apt to innovation. Cooperate with other regulators and self-regulatory organisations. In addition to implementing legislation, also accompany it with soft law tools. Focus on the audience, as it is difficult to have its view represented. Problem of representativity of users and audiences. Engage with media literacy. **Cannot do** The limit to prominence is the right to personalisation. Public interest implies also to take wishes of the public into

	AVMS providers	Platforms & tech	Academia & NGOs	Media regulators
				account.

7. Closing of the workshop

Susanne Nikoltchev, Executive Director of the EAO, closed the workshop by thanking all participants for their active participation. She also appreciated that the workshop had stimulated very rich discussions and allowed participants to delve into a topic that urgently needs to be discussed. This subject is indeed particularly important for our democracies and nevertheless still lacks harmonisation. Many questions and uncertainties remain. The most important question being: Who decides what?

One of the difficulties around this topic probably remains the technological environment in which it is embedded, making it difficult to understand and a moving target. In the past, the Council of Europe had already discussed the new notion of media. In this context, it turned out that everything was not that new after all and that solutions already partly existed. The Council of Europe should therefore be an interesting entity to rely on.

Ms. Nikoltchev said she had learned a lot from the workshop, including about the difficulty in changing hardware default settings. There also remains a tension between the need for more transparency and the fact that stakeholders are in competition. One way to resolve this is through communication, and the workshop was a good example of this, including the roundtable, which also allowed participants to put themselves in each others' shoes for a while. The Observatory will try to pursue this path and, as it has done in the past, involve platforms in its work.

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