Prominence of European works and of services of general interest

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Prominence of European works and of services of general interest

Mark D. Cole (editorial coordination) with Elsa Costa e Silva, Jérôme Dheur, Christina Etteldorf, Olha Hruba, Catalina Iordache Pascal Kamina, Tanja Kerševan Smokvina, Michèle Ledger, Eleonora Maria Mazzoli, Nelly Ognyanova, Francesca Pellicanò, Jörg Ukrow, Sebastian Zeitzmann

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Foreword

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.

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) has introduced so-called prominence obligations. The term "prominence" came to the fore when it was first introduced in Article 13 of the 2010 AVMSD regarding the promotion of European works. The revised 2018 AVMSD reinforced this prominence obligation and further introduced for member states the possibility to take measures to ensure the appropriate prominence of audiovisual media services of general interest.

This *IRIS Special* is devoted to the notion of "prominence" and its regulatory implementation. The publication is structured as follows: It provides insight into the various approaches and concepts in the context of findability and discoverability of audiovisual content (chapter 2) and more specifically prominence of European works and of audiovisual media services of general interest (3), while also discussing monitoring efforts concerning these obligations. Different approaches in a number of EU member states (Belgium, Bulgaria, Germany, France, Italy, Portugal, Romania, and Slovenia) as well as in the United Kingdom are presented in a chapter dedicated to respective country reports (4). A comparative analysis of the reports (5) and brief conclusion (6) complete this *IRIS Special*.

This *IRIS Special* is the result of our cooperation with the Institute of European Media Law (EMR), under the scientific coordination of Prof. Mark D. Cole. A pool of national experts allowed for the country reports. I would like to thank them all.

Strasbourg, December 2022
Maja Cappello
IRIS Coordinator
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1 Introduction

Mark D. Cole, Professor for Media and Telecommunication Law, University of Luxembourg, and Director for Academic Affairs, Institute of European Media Law (EMR)

When television broadcasting began in Europe and for many decades thereafter, the available offering was narrowly confined. There was one way of distribution of television services, often there was only one or at least fewer than a handful of channels, and the content offered was limited in scope and duration, as for example night-time television viewing remained an exception for a long time. If the schedule of television channels was not already clear from the limited offering of programmes, it was sufficient to have a brief look at a section in the newspapers that would provide readers with a programme overview. Gradually, longer scheduling and more diverse content found its way onto the TV screen, more actors, increasingly commercial in addition to the predominantly public service providers, appeared, signal distribution was possible not only via terrestrial but also via cable network and satellite dissemination, and an increasing amount of content was available to fill more channels and more hours. Since the mid 1980s this process has accelerated and the multiplication of channels with 24/7 broadcasting along with technological advances has changed the market for audiovisual content brought to viewers by media service providers.

While this development was initially gradual, the last two decades have seen a proliferation of audiovisual content available to viewers in a multitude of ways, at any time, covering every topic imaginable and originating from all kinds of content producers, which are not necessarily professional media.

Accordingly, the regulatory landscape in the European Union has changed in reaction to these developments. In a first step, a minimum harmonisation in response to a limited number of issues concerning television broadcasting was created by the Television without Frontiers Directive (TwFD) in 1989.[1] After this had been amended once[2] it was later

[1] Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, OJ L 298, 17.10.1989, p. 23–30.

[2] Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 202, 30.7.1997, p. 60–70.

extended in scope to become the Audiovisual Media Services (AVMS) Directive in 2007[3] which would include – as addressed in the legislation – "television-like" services, namely video-on-demand (VOD) services that resembled television channels in form and range of content, but with non-linear distribution at the individual request and time chosen by the viewer. The success of these VOD services and the "changing market realities" as referred to by the amending AVMS Directive (EU) 2018/1808[4] led to a further alignment of the rules for television and VOD services and an inclusion of video-sharing platforms in the scope of the Directive, the latter having contributed to a reality in which viewers have a seemingly endless amount of audiovisual content to choose from that they can constantly access online.

However, the multiplication of services and content on offer comes with a potential downside: the more content there is to choose from, the more difficult it is to find or discover a specific type of content or an individual media service. Both member states and the European Union therefore addressed this issue in legislation. The TwFD and later the AVMSD have the goal of promoting European works as one specific category of content that was identified as needing to be strengthened on the European market. The promotion for television broadcasting was regarded to be sufficiently achievable by introducing quota obligations reserving the majority of transmission time for providers under the jurisdiction of an EU member state for such content. However, the extension of promotion tools also to non-linear dissemination on VOD services required new approaches. Initially, these providers were in general terms addressed in a newly inserted provision in Amending Directive 2007/65/EC, according to which member states had to ensure that the services of these providers promote "the production of and access to European works". It was with Article 13, paragraph 1 in the numbering of the codified version of the Directive (2010/13/EU[5], AVMSD) that the EU legislator introduced the notion of "prominence" by explaining further that the promotion "could relate […] to the share and/or prominence of European works in the catalogue of programmes". This option became an obligation for VOD service providers when Article 13 was significantly amended by Directive (EU) 2018/1808. In this current version of the provision member states have to ensure not only that a 30 % share of the catalogue is reserved for European works, but that these are given prominence.

The latest revision of the AVMSD with Directive (EU) 2018/1808 went a step further in addressing the (potential) need for the orientation of viewers in the jungle of available services and content. Because not only European works may deserve privileged treatment on the way from production to consumption by the viewers, some states have started

[3] Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 332, 18.12.2007, p. 27–45.

[4] Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, OJ L 303, 28.11.2018, p. 69–92.

[5] 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 (Audiovisual Media Services Directive), OJ L 95, 15.4.2010, p. 1–24.

introducing rules that require all kinds of services, such as electronic programme guides or user interfaces, to give prominence to certain types of audiovisual media services, namely those of general interest or public value. The AVMSD, without including such an obligation, picks this development up by stating in clear terms in the newly inserted Article 7a that member states may take measures to ensure "appropriate prominence of audiovisual media services of general interest".

It is the notion of "prominence" and its regulatory implementation that this IRIS Special is devoted to. It will explore the different understandings of elements that serve prominence as well as the underlying justification for such rules. While Recital 35 of Directive (EU) 2018/1808 mentions that "Prominence involves promoting European works through facilitating access to such works", other terms used are findability and easy accessibility or discoverability, sometimes also "must-be-found" in relating to the notion of "must-carry". Recital 25 of that same Directive explains why prominence rules – in the context of general interest services – can be justified in view of the aim to foster media pluralism, freedom of speech and cultural diversity. Along these two approaches to prominence in the AVMSD, this IRIS Special will explain commonalities and differences and show approaches chosen in EU member states as well as states that are member of the Council of Europe. It will explore the difference in wording of Article 7a (referring to services) and Recital 25 (referring to content).[6] Because the introduction of such prominence rules for all kinds of audiovisual media services is an option for member states under Article 7a, in contrast to the mandatory transposition of the prominence obligation for European works in VOD catalogues under Article 13, there are fewer examples that can be presented for the first category.

Prominence requirements can also be seen as a response to the increasing market dominance of big online platforms, with major VOD service providers and intermediaries that facilitate the "finding" of content and services by providing for example search functions. Where VOD services offer a certain content, the visibility of that content, in a potentially very large catalogue without prominence rules, may be such that it will not disappear from the catalogue but escape the attention of the viewers and ultimately be marginalised to the point that it is no longer findable. Similarly, algorithm-driven selection criteria may not draw attention to content that is regarded as important (because of e.g. its quality and impartiality when it comes to news content) and rather put forward content that has proven popular with other viewers. It would therefore not come as a surprise if the notion of "prominence" as it is presented in this IRIS Special were to remain on the table as a regulatory approach to be further pursued in the future.

[6] Cf. in this sense also ERGA 2020 SG 3, Deliverable 1, p. 4 (at fn. 1), https://erga-online.eu/wp-content/uploads/2021/01/ERGA_SG3_2020_Report_Art.7a_final.pdf.

2 Findability and discoverability of audiovisual media content

Dr. Jörg Ukrow, Executive Board Member, Institute of European Media Law (EMR) and Deputy Director, Saarland Media Authority (LMS)

Even though the notion of prominence has gained increasing relevance with Articles 7a, 13 AVMSD and the corresponding Recital 69 of the original AVMSD of 2010 and Recitals 25 and 35 of the amended AVMSD of 2018, it is not an entirely new concept. Changing audiovisual landscapes and market realities with an impact on how different types of audiovisual content are visible for consumers have been the topic of media policy on the European level ever since the creation of the Television without Frontiers Directive of the European Union (then European (Economic) Community) and the European Convention on Transfrontier Television of the Council of Europe (ECTT) in 1989.[7] Explicitly the concept of "prominence", which is the focus of this study, was inserted in the EU AVMSD in 2007 (see below 1.3). In this section the underlying objectives of introducing rules to give prominence to certain content are presented and put in the context of these European approaches.

2.1 Objectives and fundamental rights aspects of promoting specific content

In the development of the audiovisual media services regulatory framework of the EU, different concepts granting in various ways a "privileged" position with regard to certain types of audiovisual content in order to ensure the underlying objective of safeguarding a pluralistic media and information landscape can be observed. The objective of achieving this pluralism is also the basis of the Council of Europe's efforts in relation to media regulation.[8] The principle of media pluralism (the terms "media pluralism", 'media plurality'

[7] European Convention on Transfrontier Television (ETS No. 132), https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=132. Revised by Protocol amending the European Convention on Transfrontier Television (ETS No. 171), https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=171.

[8] An overview of the work of the Council of Europe in this domain can be found at https://www.coe.int/en/web/freedom-expression/media; a recent Recommendation summarises and develops further the framework which the Council of Europe recommends its members consider in their national legislation, cf. Recommendation CM/Rec(2022)11 of the Committee of Ministers to member States on principles for media and communication governance, adopted on 6 April 2022, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a61712.

and “media diversity” are typically used interchangeably) became the cornerstone of the rebuilding of media landscapes in European democracies after World War II.[9]

Ensuring a pluralistic media and information landscape is an objective of the EU deriving from several provisions already in primary law. Thus, according to Article 2 sentence 2 of the Treaty on the European Union (TEU),[10] the fundamental values of the EU mentioned in sentence 1 of that provision are values common to all member states in a society characterised, among other elements, by pluralism. Pluralism in this sense is a notion that extends also to media pluralism. According to Article 3, paragraph 3 subparagraph 4 TEU, the EU shall respect the richness of its cultural diversity, which includes the diversity of the media in the different member states as media is also a cultural phenomenon. The diversity-related objectives of the EU are even clearer in Article 167, paragraph 1 of the Treaty on the Functioning of the European Union (TFEU)[11] on Culture, according to which the EU "shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity". According to the horizontal cultural policy clause of Article 167, paragraph 4 TFEU, which is also to be understood as a cross-cutting clause relating to media policy diversity in the member states, the Union must take cultural aspects into account in all of its activities on the basis of other provisions of the TEU and the TFEU, "in particular in order to respect and to promote the diversity of its cultures”. The so-called Amsterdam Protocol (No. 29) on the system of public broadcasting in the member states attached to the Treaties and thereby part of primary law of the EU, ties in with this objective, since it was adopted in the consideration that “the system of public broadcasting in the member states is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism".

The principle of media pluralism is also part of the Charter of Fundamental Rights of the EU,[12] following the constitutional traditions of many of the member states. Article 11 of the Charter explicitly refers to the principle of media pluralism and links it to fundamental rights by referring in the same clause to freedom of the media that is to be respected. Article 11 of the Charter corresponds to Article 10 of the European Convention on Human Rights (ECHR),[13] at least concerning its first paragraph, which lays down the substantive protection of freedom of expression. Pursuant to Article 52, paragraph 3 of the Charter, in such cases, the meaning and scope of the concerned rights are the same as those

[9] See e.g. the relevance in Recommendations of the Committee of Ministers that repeatedly refer to pluralism, accessible at https://www.coe.int/en/web/freedom-expression/committee-of-ministers-adopted-texts/; see specifically Recommendation CM/Rec(2018)1 of the Committee of Ministers to member States on media pluralism and transparency of media ownership, adopted by the Committee of Ministers on 7 March 2018, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680790e13. Cf. also ERGA, Internal Media Plurality in Audiovisual Media Services in the EU: Rules & Practices, 2018, p. 16 (https://erga-online.eu/wp-content/uploads/2019/01/ERGA-2018-07-SG1-Report-on-internal-plurality-LQ.pdf) with reference to Hardy, Jonathan (2008): Western Media Systems, London, Routledge.

[10] Consolidated version of the Treaty of the European Union, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT.

[11] Treaty on the Functioning of the European Union, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT.

[12] Charter of Fundamental Rights of the European Union, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT.

[13] European Convention on Human Rights, https://www.echr.coe.int/Pages/home.aspx?p=basictexts/convention.

guaranteed by the ECHR which includes the interpretation of the corresponding provision by the European Court of Human Rights (ECtHR). This includes also the limitations that can be imposed on the fundamental right, which is why the provision of Article 10, paragraph 2 ECHR needs to be considered for limitations under the Charter right. Article 11, paragraph 2 of the Charter does not have a corresponding mention in the ECHR, but it spells out the consequences of paragraph 1 regarding freedom of the media as they have been developed by the ECtHR in its case law. The goal of media pluralism in the context of freedom of expression and the media have shaped the case law of the ECtHR[14] and the Court of Justice of the EU (CJEU).[15] In that interpretation, measures safeguarding pluralism can justify restrictions to the rights as granted by Article 10 ECHR and Article 11 of the Charter. Although until now questions of prominence of content or rules on this have not yet explicitly been the subject of cases decided by these two courts, the argument of prominence rules supporting a meaningful media pluralism and therefore being able to limit the use of fundamental rights might be followed by the courts in the future.

Rules that were created in the EU with the AVMSD but also with the ECTT of the Council of Europe rely on pluralism as a regulatory goal. The preamble of the Convention states in that regard that the signatories are "affirming the importance of broadcasting for the development of culture and the free formation of opinions in conditions safeguarding pluralism and equality of opportunity among all democratic groups and political parties". Rules on prominence can strengthen media pluralism by supporting and promoting for example the production of specific content, namely, in our context, of European content or services of general interest, by ensuring that these are prominently displayed to the viewers and therefore likely to be discovered. Additional aims that prominence rules for general interest content can achieve by promoting the quality of media content that benefits from such prominence have been highlighted by national regulatory authorities (NRA): "The prominence of general interest content is an essential part of tackling the issue of disinformation, especially in times of crisis when people are seeking factually correct information"[16] as well as the function of incentivising investment in quality media and journalism, if there is a guarantee of prominent placing of that content to the viewers.[17]

In view of the fundamental rights dimension and the different aims that prominence rules can serve, numerous questions need to be answered when introducing such rules. As the rules impose obligations on private actors and determine certain choices made by these actors, the question of who may be addressed by prominence rules in light of the principle of proportionality is an important aspect. The conditions in which prominence has to be granted by the addressees need to be spelled out, whether, for example, the obligation only

[14] For European Court of Human Rights see e.g. *Informationsverein Lentia and Others v. Austria* (Application nos. 13914/88, 15041/89, 15717/89, 15779/89, 17207/90), Centro Europa 7 S.r.l. and *Di Stefano v. Italy* (Application no. 38433/09).

[15] For Court of Justice of the EU see e.g. ECJ, Case 148/91., *Veronica* [1993] ECR I-00487 ECJ, Case 23/93, *TV10 SA*,. [1994],], ECJ, Case 288/89, *Gouda* [1991] ECR I-04007 ECR I-04795.

[16] ERGA, Subgroup 3 - Ensuring Prominence and Access of Audiovisual Media Content to all Platforms (Findability). Deliverable 1: Overview document in relation to Article 7a of the Audiovisual Media Services Directive, p. 4.

[17] ERGA, Subgroup 3 - Ensuring Prominence and Access of Audiovisual Media Content to all Platforms (Findability). Deliverable 1: Overview document in relation to Article 7a of the Audiovisual Media Services Directive, p. 4 et seq.

exists at certain times or for certain parts of a service that offers (also) content of general interest. Equally important is that the way in which prominence is granted must again consider the fundamental rights impact and ensure for example that the neutrality of opinion is maintained in principle.

2.2 The different notions and legal frameworks relating to prominence rules

Terms or approaches used in the context of giving a special status to certain type of content do not only address prominence but also issues of exposure, visibility, accessibility, findability and discoverability. Some of these terms are also used in other contexts, such as the question of accessibility of viewers or listeners with impairments. There are various means with which these notions concerning content can be implemented, including quotas, must-carry rules or prescriptive standards of design of a service. If such measures are introduced, as is the case with the quotas or shares for European works in audiovisual media in the AVMSD, then it is a closely connected next step to consider that such content is not only included in a specific amount but that it is at least brought to the (prominent) attention of viewers. In the context of linear services, as will be shown in more detail below, the simple requirement to dedicate the majority of airtime to European works was regarded as sufficient by the EU legislators, while for non-linear services the individual choice from within a catalogue was not seen as sufficient and an obligation for prominence was introduced to accompany the share obligation.

Approaches used in the context of giving a special status to a certain type of content can be found not only in the media-related framework of the EU, but also in national media law (both transposing AVMSD provisions or going beyond). In addition, concerning specific services one can see a kind of equivalence to prominence rules in the must-carry obligations that are regularly contained in the laws on electronic communications networks and services and result in certain services having to be transported in the distribution channels. Also certain aspects in competition law relying on an approach similar to that drawing on the "essential facilities" logic can be seen as comparable to those related to prominence rules. Specifically in EU law, with a view to safeguarding media pluralism, the must-carry obligations clause in Article 114 of the European Electronic Communication Code (EECC)[18] deserves particular attention. It provides:

> *1. Member States may impose reasonable 'must carry' obligations for the transmission of specified radio and television broadcast channels and related complementary services, in particular accessibility services to enable appropriate access for end-users with disabilities and data supporting connected television services and EPGs, on undertakings under their jurisdiction providing electronic communications networks and services used for the distribution of radio or television broadcast channels to the public, where a significant number of end-users of such networks and services use them as their principal means to receive radio and television broadcast channels. Such obligations shall be imposed only*

[18] Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the Electronic Communications Code (Recast), OJ L 321, 17.12.2018, p. 36.

where they are necessary to meet general interest objectives as clearly defined by each Member State and shall be proportionate and transparent.

This rule of the EECC can serve as a model when it comes to requirements that prominence rules should take into account. The obligation to give prominence to certain services is comparable to having to carry them in a service – although it goes beyond such an obligation – which is why considerations of proportionality and transparency, regular reviews of the continued need for the rules but also the question of possible remuneration (as it is addressed by Article 114, paragraph 3 EECC) as a counterpart to the obligation, are relevant.

Furthermore, in practice and not as a result of specific legal requirements, various methods that give certain content or services more findability or visibility have been developed, thus making them more prominent than other content or services. Such methods include recommendations on the front page of a user interface and default settings in the hardware and software (such as the assignment of buttons for specific services on remote controls or channel assignments in electronic programme guides, visually highlighted dedicated areas e.g. for sponsored content, etc.). Which types of methods have been developed in the media systems of selected states will be examined in the national reports with a focus on the AVMSD-related solutions (below section 5).

2.3 Types of "prominence frameworks"

Prominence rules can be conceived in a very broad manner covering potentially many different types of services or content and the providers of it.

As a matter of principle, prominence rules may not only be applied to the benefit of audiovisual broadcast services but could also be applied for audio services, on-demand audiovisual or audio media services, video-sharing services as well as users of the Internet providing user-generated content.

Prominence can extend to the geographic origin of the service or content, whether at the European, national, regional or the local scale. It can also be based on other conditions or be neutral when it comes to the geographic orientation.

There is also no principal limitation as to which type of content could be covered, although in light of proportionality it would likely need to concern content (or services) for which it could be argued that theycontribute to some general interest, so a specific justification would be needed for extending the rule to services offering all categories of content such as information, education, advice and entertainment or only those that focus on one of these categories. Importantly, in the EU context, there is unlikely to be harmonization on the type of content concretely to be regarded as having public value or being of general interest as these are aspects closely linked to cultural and democratic traditions in the member states.

3 Prominence in practice

Dr. Jörg Ukrow, Executive Board Member, Institute of European Media Law (EMR) and deputy director, Saarland Media Authority (LMS)

3.1 Overview

With the shift of media and information to the online environment, search, discovery, and ranking functions have become powerful determinants of how consumers access content. Search providers, social networks, video user interfaces and app stores are increasingly seen as gatekeepers, gaining control of the online media environment, influencing which content is found and consumed online. The design features and algorithmic decisions of such platforms and other relevant Internet intermediaries[19] can promote content by making it more discoverable or prominent on a device or user interface.[20]

Practices of prioritisation of content are embedded in the search functions, recommender systems, newsfeeds, and other forms of content curation of these platforms and intermediaries. When specific content is prioritised and thereby made prominent and more discoverable, it gains reach, a potentially wider audience and/or is more likely to be used by a specific target group.[21]

Prominence schemes can be regarded as solutions with which rules are set that establish to what extent platforms and intermediaries have the option or obligation to prioritise certain forms of content over others, and under which conditions such as transparency, accountability or potential liability this has to happen.

Based on the general observations about the reasoning behind prominence frameworks (see above 2), this section will take a closer look at the specific approaches mainly in the context of the EU and, to a lesser extent, of the Council of Europe. Thereby, not only will this section cover the more recently introduced possibility for member states under the AVMSD to introduce or maintain prominence obligations that are addressed to providers disseminating specific services of general interest, but also the rules concerning prominence of one special category of content addressed, namely European works. Although the latter rules are to be seen as an element of the more general promotion obligations concerning such European works, they need to be taken into consideration as they were the first inclusion of prominence obligations in the AVMSD and in addition member states are obliged to ensure that providers under their jurisdiction comply with this obligation. In contrast, the provision dealing with prominence regimes concerning

[19] See Eleonora Mazzoli and Damian Tambini, Prioritisation Uncovered: The Discoverability of Public Interest Content Online, CoE 2020.
[20] See CoE, Guidance Note on the Prioritisation of Public Interest Content Online. Adopted by the Steering Committee for Media and Information Society (CDMSI) at its 20th plenary meeting, 1-3 December 2021, CDMSI(2021)00, No.s 1 & 2.
[21] See Eleonora Mazzoli and Damian Tambini, Prioritisation Uncovered: The Discoverability of Public Interest Content Online, CoE 2020.

general interest services does not contain a mandatory transposition task for the member states. Therefore, the two approaches will be presented separately here.

3.2 Regulatory approaches in the AVMSD

3.2.1 Historical development

3.2.1.1 Article 13 AVMSD

When the TwFD, which only concerned television broadcasting, was extended in its scope when it was turned into the AVMSD in 2007, the following new provision was inserted in the chapter applying only to on-demand services. This newly-introduced category of non-linear services involved a reduced set of obligations that member states in transposing the Directive had to ensure compliance with on the side of the providers. In the codified version of the AVMSD (Directive 2010/13/EU) Article 3(i) was renumbered Article 13 and reads as follows:

> *1. Member States shall ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction promote, where practicable and by appropriate means, the production of and access to European works. Such promotion could relate, inter alia, to the financial contribution made by such services to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes offered by the on-demand audiovisual media service.*
> *2. Member States shall report to the Commission no later than 19 December 2011 and every 4 years thereafter on the implementation of paragraph 1.*
> *3. The Commission shall, on the basis of the information provided by Member States and of an independent study, report to the European Parliament and to the Council on the application of paragraph 1, taking into account the market and technological developments and the objective of cultural diversity.*

Recital 69 of Directive 2010/13/EU explains further the reasoning behind the provision:

> *On-demand audiovisual media services have the potential to partially replace television broadcasting. Accordingly, they should, where practicable, promote the production and distribution of European works and thus contribute actively to the promotion of cultural diversity. Such support for European works might, for example, take the form of financial contributions by such services to the production of and acquisition of rights in European works, a minimum share of European works in video-on-demand catalogues, or the attractive presentation of European works in electronic programme guides. It is important to re-examine regularly the application of the provisions relating to the promotion of European works by audiovisual media services. Within the framework of the reports provided for under this Directive, Member States should also take into account, in particular, the financial contribution by such services to the production and rights acquisition of European works,*

the share of European works in the catalogue of audiovisual media services, and the actual consumption of European works offered by such services.

The purpose of Article 13 was and, in the current version of the Directive, continues to be to promote the production and distribution of European works and, thus, contribute actively to the promotion of cultural diversity. It is in essence the same goal as the aim of Articles 4 et seq. of the original TwFD and now the corresponding Articles 16 et seq. AVMSD respectively, which address linear service providers.[22] The new rule in the AVMSD was the logical next step, because for linear services it was sufficient from the point of a user-oriented regulation to rely on quotas while mere quotas – in the sense of shares in the provided catalogues – were not sufficient from this viewpoint for non-linear services. But a 'quota system for the Internet' was heavily contested in the legislative procedure introducing the AVMSD. Since a political agreement on the matter was difficult to obtain, it was decided to make the wording of Article 3 (i) flexible by giving a lot of leeway to the legislators of the EU member states on how to oblige non-linear service providers to comply.[23] Two concepts ('where practicable and by appropriate means'), which had already limited the mandatory obligations for quotas in television services as included in the TwFD (Articles 4 and 5), were integrated in the on-demand services quota system, and reinforce this leeway. The second sentence in Article 13 and Recital 69 mentions possible ways for the promotion of production and consumption of European works, inter alia by "the attractive presentation of European works in electronic programme guides". This alternative recognised that content for which there is no viewer interest or which is not findable constitutes only a theoretical contribution to diversity in the EU from the perspective of the media industry or the users of on-demand audiovisual media services.[24]

With the major revision of the AVMSD by Directive (EU) 2018/1808, Article 13 AVMSD was completely reworded and the obligations for on-demand services made stricter. It also combined the obligation to cover a certain share of European works in the catalogues with the additional obligation of ensuring prominence, which will be presented in more detail below. The provision of Article 13 AVMSD now reads as follows:

1. Member States shall ensure that media service providers of on-demand audiovisual media services under their jurisdiction secure at least a 30 % share of European works in their catalogues and ensure prominence of those works.

6. The obligation imposed pursuant to paragraph 1 and the requirement on media service providers targeting audiences in other Member States set out in paragraph 2 shall not apply to media service providers with a low turnover or a low audience. Member States may also

[22] See Oliver Castendyk, Article 3i AVMSD, para. (1), in: Oliver Castendyk/Egbert Dommering/Alexander Scheuer (Eds.), European Media Law, 2008, p. 924.
[23] See Oliver Castendyk, Article 3i AVMSD, para. (4), in: Oliver Castendyk/Egbert Dommering/Alexander Scheuer (Eds.), European Media Law, 2008, p. 924.
[24] See Oliver Castendyk, Article 3i AVMSD, para. (8), in: Oliver Castendyk/Egbert Dommering/Alexander Scheuer (Eds.), European Media Law, 2008, p. 925.

waive such obligations or requirements where they would be impracticable or unjustified by reason of the nature or theme of the audiovisual media services.[25]

Recital 35 of Directive (EU) 2018/1808, which relates to this Article, details further what different approaches can be chosen to achieve prominence:

Providers of on-demand audiovisual media services should promote the production and distribution of European works by ensuring that their catalogues contain a minimum share of European works and that they are given sufficient prominence. The labelling in metadata of audiovisual content that qualifies as a European work should be encouraged so that such metadata are available to media service providers. Prominence involves promoting European works through facilitating access to such works. Prominence can be ensured through various means such as a dedicated section for European works that is accessible from the service homepage, the possibility to search for European works in the search tool available as part of that service, the use of European works in campaigns of that service or a minimum percentage of European works promoted from that service's catalogue, for example by using banners or similar tools.

3.2.1.2 Article 7a AVMSD

In contrast to the promotion of European works, neither the original TwFD nor the 2010 AVMSD addressed services or content of general interest. "General interest" was addressed in the the 2010 Directive only to the extent that it was referred to in various parts of the recitals of that Directive in the sense of overriding legitimate policy goals that can justify exceptions to the freedoms granted by the Directive or other EU legislation.[26] The meaning

[25] In July 2020, the European Commission published its Guidelines pursuant to Article 13(7) of the Directive on the calculation of the share of European works in on-demand catalogues and on the definition of low audience and low turnover. They provide insights on how to calculate the 30% share of European works, addressing the calculation per title, what constitutes a title and the temporal dimension of the compliance control. The document also provides insights on what constitutes a "significant presence on the market" and which on-demand audiovisual media service providers should not be subject to the requirements of Art. 13(1).

[26] These mentions were in Recital 18: "Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (15) according to its Article 1(3) is without prejudice to measures taken at Union or national level to pursue general interest objectives, in particular relating to content regulation and audiovisual policy.";
Recital 50: "It is necessary to make arrangements within a Union framework, in order to avoid potential legal uncertainty and market distortions and to reconcile the free circulation of television services with the need to prevent the possibility of circumvention of national measures protecting a legitimate general interest.";
Recital 81: "Commercial and technological developments give users increased choice and responsibility in their use of audiovisual media services. In order to remain proportionate with the goals of general interest, regulation should allow a certain degree of flexibility with regard to television broadcasting.";
Recital 104: "Since the objectives of this Directive, namely the creation of an area without internal frontiers for audiovisual media services whilst ensuring at the same time a high level of protection of objectives of general interest, in particular the protection of minors and human dignity as well as promoting the rights of persons with disabilities, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Directive, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives."

was therefore different to the use of it when Directive (EU) 2018/1808 amended the AVMSD and inserted in Article 7a a possibility for member states to achieve prominence for services that qualify as "general interest" services:

> *Member States may take measures to ensure the appropriate prominence of audiovisual media services of general interest.*

While the provision itself mentions services of general interest, the accompanying Recital 25 states the member states' ability to impose obligations in view of content of general interest:

> *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. Such obligations should only be imposed where they are necessary to meet general interest objectives clearly defined by Member States in accordance with Union law. Where Member States decide to impose rules on appropriate prominence, they should only impose proportionate obligations on undertakings in the interests of legitimate public policy considerations.*

3.2.2 Scope ratione personae

3.2.2.1 Article 13 AVMSD

According to its wording, Article 13 AVMSD shall only apply to media service providers of on-demand audiovisual media services under the jurisdiction of an EU member state and is therefore not part of the general provisions for all audiovisual media services. Article 13 does not apply to television broadcasters nor to video-sharing platform providers which were included in the scope of the AVMSD by amending Directive (EU) 2018/1808. The jurisdiction of an EU member state within the meaning of Article 13 is determined by Article 2, paragraphs (2) to (4) AVMSD. Therefore, Article 13 also does not apply to providers under the jurisdiction of a third country which is not a member of the EU, even if an on-demand audiovisual media service of such a provider is directed at the population of a member state.

3.2.2.2 Article 7a AVMSD

According to its wording and because of its positioning in Chapter III, which concerns provisions applicable to all audiovisual media services, Article 7a AVMSD does not exclude any type of audiovisual media services (such as television broadcasts, on-demand audiovisual media services) or their providers from its scope of application. It is therefore possible for the member states to set regulations on the appropriate prominence for providers of all audiovisual media services. Beyond the providers otherwise covered by the

Directive, it appears that distributors of audiovisual media services seem to be the main potential addressees of measures taken under Article 7a AVMSD.[27]

In this context, as mentioned, it is remarkable that Article 7a AVMSD refers to the appropriate prominence of "audiovisual media services" of general interest, while Recital 25 of Directive (EU) 2018/1808 stipulates that the AVMSD is without prejudice to the ability of member states to impose obligations to ensure the appropriate prominence of "content" of general interest. It can be left open, however, whether the AVMSD in the provision on prominence for general interest phenomena, according to its wording, has services or, according to its justification, content in mind as the connecting factor. Since this provision is about the possibility of the member states to impose additional obligations which do not necessarily follow from the inclusion in the AVMSD as the provision lacks a transposition order, a broad potential scope of application of this provision could be assumed.

In this context, it should also be noted that Article 7a AVMSD cannot be understood in such a way that member states are only permitted to introduce regulations on prominence of general interest content within the scope of application of the AVMSD. For audio media services or for press publications, which are also addressed in the recent proposal for a European Media Freedom Act (EMFA) Regulation,[28] corresponding member state regulations are not barred by the AVMSD.

3.2.3 Scope ratione materiae

3.2.3.1 European Works (Article 13 AVMSD)

The notion "European works" as it is relevant for Article 13 AVMSD (as well as the corresponding quota provisions for linear services in Articles 16 and 17) is defined in Article 1, paragraph (2) (n) AVMSD:

> *(i) works originating in Member States;*
> *(ii) works originating in European third States party to the European Convention on Transfrontier Television of the Council of Europe and fulfilling the conditions of paragraph 3;*[29]

[27] ERGA, Subgroup 3 - Ensuring Prominence and Access of Audiovisual Media Content to all Platforms (Findability). Deliverable 1: Overview document in relation to Article 7a of the Audiovisual Media Services Directive, p. 6.

[28] 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:52022PC0457

[29] According to this paragraph, the works referred to in points (n)(i) and (ii) of paragraph 1 are works mainly made with authors and workers residing in one or more of the states referred to in those provisions provided that they comply with one of the following three conditions: (i) they are made by one or more producers established in one or more of those states; (ii) the production of the works is supervised and actually controlled by one or more producers established in one or more of those states; (iii) the contribution of co-producers of those states to the total co-production costs is preponderant and the co-production is not controlled by one or more producers established outside those states.

(iii) works co-produced within the framework of agreements related to the audiovisual sector concluded between the Union and third countries and fulfilling the conditions defined in each of those agreements.[30]

Works that are not European works within the meaning of point (n) of paragraph 1 but that are produced within the framework of bilateral co-production agreements concluded between member states and third countries shall be deemed to be European works provided that the co-producers from the Union supply a majority share of the total cost of production and that the production is not controlled by one or more producers established outside the territory of the member states.[31]

3.2.3.2 Services of General Interest (Article 7a AVMSD)

It is up to the member states to decide what they classify as audiovisual media services of general interest, sometimes also referred to as public value or public interest content.[32] In doing so, they have a wide margin of assessment, which is, however, limited by fundamental rights and freedoms. Member states must ensure that general interest regulation is proportionate and coherent, and in particular may not discriminate directly or indirectly between content produced in the member state itself and content produced in other EU or EEA member states.

The legislation of the member states has to take into account the constitutionally protected rights of the providers which may be concerned by prominence obligations. It should be borne in mind that rules which are too prescriptive or constraining could lead to providers disappearing from the market because they do not have enough resources to comply with the obligations, which is why a careful proportionality assessment has to be made to justify the obligations in light of the aim pursued. In order to protect media pluralism, a negative effect on the market should be avoided, while the public interest objectives of Article 7a AVMSD can tip the balance in favour of prominence obligations.[33]

Moreover, the legislators of the member states are not obliged to define the content of general interest in a rigid and detailed manner. From the perspective of EU law, the rules in statutory law can be limited to a framework containing certain rather general requirements, which are subsequently fleshed out by the respective national regulatory authorities and/or by self-regulation of the concerned providers. This allows flexibility in dealing with new challenges to democratic stability and media diversity and plurality as objectives of Article 7a AVMSD.

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[30] According to Article 1 para (2), the application of the provisions of points (n)(ii) and (iii) of paragraph 1 shall be conditional on works originating in member states not being the subject of discriminatory measures in the third country concerned.
[31] Article 1 para (4) AVMSD.
[32] ERGA, Subgroup 3 - Ensuring Prominence and Access of Audiovisual Media Content to all Platforms (Findability). Deliverable 1: Overview document in relation to Article 7a of the Audiovisual Media Services Directive, p. 7.
[33] ERGA, Subgroup 3 - Ensuring Prominence and Access of Audiovisual Media Content to all Platforms (Findability). Deliverable 1: Overview document in relation to Article 7a of the Audiovisual Media Services Directive, p. 7.

3.2.4 (Appropriate) Prominence

3.2.4.1 Article 13 AVMSD

Although the obligation for on-demand service providers to ensure prominence for European works in the AVMSD is no longer limited by the clause "where practicable and by appropriate means" but has become a binding element of the provision, the aspect of proportionality that motivated this original limitation still needs to be taken into account. The proportionality of the obligation is now ensured by the provisions of paragraph 6 of this article which foresees mandatory and optional exceptions to the prominence obligations for certain types and categories of on-demand audiovisual media service providers.

According to sentence 1 of paragraph 6, the obligation to ensure prominence for European works imposed pursuant to paragraph 1 shall not apply to media service providers with a low turnover or a low audience. According to sentence 2 of this paragraph, member states may also waive the aforementioned obligation where it would be impracticable or unjustified by reason of the nature or theme of an audiovisual media service.

On the basis of Article 13 (7) AVMSD, the European Commission has issued guidelines regarding the definition of low audience and low turnover with the aim of achieving a comparable understanding of the concepts in the member states' application of Article 13.[34]

3.2.4.2 Article 7a AVMSD

Obligations with respect to prominence are only appropriate ones and should therefore only be imposed where they are necessary to meet general interest objectives such as media pluralism, freedom of speech and cultural diversity clearly defined by member states in accordance with Union and national constitutional law. Where member states decide to impose rules on appropriate prominence, they should only impose proportionate obligations on undertakings in the interests of legitimate public policy considerations.[35]

The concept of "appropriate prominence" presupposes some kind of separation or highlighting of certain services. Approaches to implementation could consist of direct access to the service or content through for example a button on the remote control or in the virtual user interface, easy findability in individual menus or categories or a targeted and prioritised display.[36]

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[34] Communication from the Commission. Guidelines pursuant to Article 13(7) of the Audiovisual Media Services Directive on the calculation of the share of European works in on-demand catalogues and on the definition of low audience and low turnover (2020/C 223/03), OJ C 223, 7.7.2020, p. 10.
[35] See Recital 25 of Directive (EU) 2018/1808.
[36] ERGA, Subgroup 3 - Ensuring Prominence and Access of Audiovisual Media Content to all Platforms (Findability). Deliverable 1: Overview document in relation to Article 7a of the Audiovisual Media Services Directive, p. 6.

Again, the provision leaves the way such prominence obligations would be included in national frameworks to the member states. Therefore, neither the legislators nor the national regulatory authorities have to decide in detail on how to achieve appropriate prominence, but this can be left to providers within a framework set by the law or authority. Audiovisual media services are received via a range of delivery mechanisms which are constantly changing. In view of the large number of different types of media content delivery systems, it is unlikely that a one-size-fits-all solution is feasible. As developments in recent years have shown, it is not possible to anticipate all possible future ways of media distribution. Having too detailed a regulation would lead to a constant need for change and improvement, which is why the provision in the AVMSD refrains from laying out any details of such a framework besides recalling in the Recital the principles to be observed when creating such regimes. If and when member states implement Article 7a AVMSD, these principles suggest that the regulation can be kept principle-based and should be as technologically neutral as possible to remain future-proof, not least because of the rapid development of the market for audiovisual media content distribution.[37]

The appropriateness of the prominence for general interest service can be considered to be achieved if the service in question is easy to find or discover (e.g. on the first level of the user interface).[38] Again, there are no further indications of what constitutes an appropriate level of prominence in the Directive itself.

3.3 Similar approaches in the Convention on Transfrontier Television and relevant work of the Council of Europe

In its first and original version, the ECTT did not contain any rules on prominence of European works or media services of general interest, while the scope of the ECTT is anyway still limited to television only.

In the first revision of the ECTT, a new Article 10 was incorporated into the ECTT by the Protocol amending the ECTT (ETS No. 171) in 1998 with entry into force in 2002, which reads as follows:

> *1 Each transmitting Party shall ensure, where practicable and by appropriate means, that a broadcaster within its jurisdiction reserves for European works a majority proportion of its transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and tele-shopping. This proportion, having regard to the broadcaster's informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria.*
> *2 In case of disagreement between a receiving Party and a transmitting Party on the application of the preceding paragraph, recourse may be had, at the request of one of the Parties, to the Standing Committee with a view to its formulating an advisory opinion on*

[37] ERGA, Subgroup 3 - Ensuring Prominence and Access of Audiovisual Media Content to all Platforms (Findability). Deliverable 1: Overview document in relation to Article 7a of the Audiovisual Media Services Directive, p. 7.
[38] EBU, PSM and Prominence. Finding PSM in the Digital Space, p. 3.

the subject. Such a disagreement shall not be submitted to the arbitration procedure provided for in Article 26.
3 The Parties undertake to look together for the most appropriate instruments and procedures to support, without discrimination between broadcasters, the activity and development of European production, particularly in countries with a low audiovisual production capacity or restricted language area.
[…]

The parallels between this provision and Article 13 AVMSD, if not in terms of wording, then at least in terms of substance, are just as obvious as the lack of a prominence clause.

In paragraph 3, particular reference is made to those Parties with a low audiovisual production capacity or restricted language area, highlighting thereby the perceived need to sustain and promote the distinctive and diverse features of Europe's cultural identity in this respect. According to the Explanatory Report to the ECTT,[39] reference can be made insofar to the Committee of Ministers Recommendation No. R (93) 5 containing principles aimed at promoting the distribution and broadcasting of audiovisual works originating in countries or regions with a low audiovisual output or a limited geographic or linguistic coverage on the European television markets.[40] However, there are no references to the prominence of such works in this recommendation either.

Whether the ECTT and its potential adaptation to bring it in line again with the AVMSD framework will regain importance in the medium and long term, remains an open question in terms of media law and European policy. For the time being, via the connection to the ECTT, the rules on European works in accordance with Article 1 (2) AVMSD will continue to apply to works originating in the UK – which is of relevance to prominence under Article 13 AVMSD.

Moreover, it cannot be ruled out that the EU or its member states base their regulation of prominence on models or best practices of states that are not member states of the EU. In that context it is worth noting that the UK model, as described in detail in a study published by the Council of Europe,[41] was also referred to as a basis in the context of the "Guidance Note on the Prioritisation of Public Interest Content Online" which was adopted by the Steering Committee for Media and Information Society (CDMSI) at its 20th plenary meeting on 1-3 December 2021.[42]

In this Guidance Note, the Council of Europe experts underline that platforms, intermediaries and states are establishing 'regimes of prominence' which determine who sees which content online. According to the Guidance Note, these regimes have a potential for promoting trusted news and authoritative information, as well as for widening the diversity of content consumed online. They can, however, also be abused for censorship or propaganda purposes, which is why they have implications for democracy and human rights.

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[39] https://rm.coe.int/16800cb348, para. 199.
[40] https://rm.coe.int/09000016804fa0c7.
[41] Eleonora Mazzoli and Damian Tambini, "Prioritisation Uncovered: The Discoverability of Public Interest Content Online", Council of Europe study DGI(2020)19, https://rm.coe.int/publication-content-prioritisation-report/1680a07a57.
[42] CDMSI(2021)009, https://rm.coe.int/cdmsi-2021-009-guidance-note-on-the-prioritisation-of-pi-content-e-ado/1680a524c4.

The Guidance Note recommends that states should act to make public interest content more prominent, including by introducing new obligations for platforms and intermediaries, and also to impose minimum standards such as transparency in that regard.

3.4 Monitoring of Prominence Obligations

Besides the actual provisions concerning prominence, their application in practice and moreover the way compliance is monitored are other important aspects. In addition to the approaches presented in the context of the legal frameworks of the EU and the Council of Europe, an overview will therefore be given concerning monitoring, in the following part. Because this task typically lies with the national regulatory authorities supervising providers, the following will focus on the applications of the rules created in the transposition of the AVMSD and the perspective of regulatory authorities on the implementation of prominence rules. The monitoring is especially challenging if the way prominence has to be ensured by the addressees of a provision is not detailed, which makes a compliance assessment more difficult. In the following section, monitoring efforts will be briefly presented with a focus on the way the prominence obligation of Article 13 AVMSD is supervised, as this provision is mandatory for the member states in view of providers under their jurisdiction. Nonetheless, lessons from monitoring prominence in that field could also be learnt with regard to the way other prominence regimes concerning services or content of general interest could be supervised.

3.4.1 Monitoring Systems set up under the AVMSD

It is for every EU member state to set up an efficient mechanism of monitoring obligations arising from the AVMSD. The establishment of national regulatory authorities and their tasks is within the powers of the member states, but has to be used in a way that allows effective implementation of the AVMSD and, with it, the compliance of the providers that fall under the AVMSD and the national frameworks in the member states having jurisdiction (Article 30, paragraph 1 and Article 2, paragraph 1 AVMSD). In the member states these regulatory authorities regularly also monitor compliance with rules about prominence.

Although Article 13, paragraph 1 AVMSD addressed the member states that have to ensure that VOD providers under their jurisdiction comply with the prominence obligations and have the reporting obligation under paragraph 4 of that provision towards the Commission, in practice member states charge the independent regulatory authorities with these tasks. As has been extensively explained, this prominence rule is obligatory for all member states, while prominence regimes for services of general interest are just an option for member states. Therefore, monitoring questions can only arise concerning the latter where such substantive provisions are in place.

Concerning prominence of European works, it is worth noting that beyond the general reporting obligation on how promotion of such works was aimed for by the VOD providers under the less strict provision before the amendment in 2018, the application of

the new mandatory prominence rule is still in its infancy and the information about approaches is only being reported by the providers and collected by the national regulatory authorities for the first time. Therefore, it is not unlikely that in the future there will be a further evolution of the reporting which is an important part of the monitoring. The service providers typically have to report on their efforts concerning prominence jointly with their quota obligations for European works on a periodic basis.[43] The assessment is usually carried out on a yearly basis with corresponding reporting obligations. In some member states, the reporting periods are different: Whereas Germany provides for biannual reports, in other member states there are such obligations only every two (Netherlands) to four (Luxembourg) years. In Malta and Slovakia, compliance is not assessed on a periodic basis but rather on an ad hoc one when there is a suspicion that an on-demand audiovisual media service provider does not comply with these obligations.

Since, in most member states, AVMS providers are free to use any means they find appropriate to ensure prominence of European works,[44] the respective wide margin of appreciation is mirrored in the modes of monitoring, which have a clear focus so far on the objectively measurable criteria enshrined in the AVMSD and domestic law such as the qualification of European works and the level of quotas. In part, the effectiveness of technical solutions to ensure prominence are difficult to measure.[45] Therefore, the monitoring relies to a wide extent on the collection of the information about which instruments are being used by the providers. These are asked to declare for example the percentage of European works on the main page, the percentage of works where the country of origin is identified, the percentage of trailers promoting European works, whether the possibility to search for the country of origin of a work exists, whether there are sections in the catalogue for the European works or specific tools to find European works, and which marketing campaigns are being carried out in the context of European works, but also the average time of display of European works in the catalogue or on the main page.

It is for the regulatory authorities to subsequently assess whether the information provided is correct and whether the measures taken – as mentioned in the AVMSD and domestic legislation or requirements of the regulatory authorities themselves or of self-regulatory or co-regulatory bodies – actually ensure prominence or fail to do so. The authorities also monitor whether the information provided is complete and – as will be shown in more detail in the comparative analysis of the country reports (see 1.5.) – determine how they respond if this information is incomplete or otherwise incorrect. Such reactions can, for example, begin with the request for additional documents and extend to the withdrawal of a licence or the prohibition of a service, whereby the latter can only be considered as ultima ratio in view of the principle of proportionality. The extent of control exercised and analysis of the data and information provided varies widely from member state to member state, also based on the regulatory authorities' resources. Particularly limited resources and the small size of a regulatory authority may render impossible

[43] See ERGA, 2021 SG 1, p. 13 et seq., https://erga-online.eu/wp-content/uploads/2021/12/ERGA-SG1-2021-Report-Article-13_1.pdf.
[44] ERGA, 2021 SG 1, p. 10, https://erga-online.eu/wp-content/uploads/2021/12/ERGA-SG1-2021-Report-Article-13_1.pdf.
[45] See ERGA, 2020 SG 3, p. 12, https://erga-online.eu/wp-content/uploads/2021/01/ERGA_SG3_2020_Report_Art.131_final.pdf.

proactive measures such as the option of monitoring whether viewers can search specifically for European works within services' catalogues. Failure to address information requests or to observe rules on prominence can also result in financial penalties imposed on the service providers.

The first report on the application of Article 13, paragraph 1 AVMSD was due by 19 December 2021, but the independent study on member states' implementation is ongoing[46] and the report of the Commission to the European Parliament and to the Council based on the information provided by the member states will only be published afterwards. This report will add further insights on the results of the first round of monitoring concerning the prominence obligation for VOD providers.

In contrast to the monitoring of the application of prominence rules concerning European works, there is no systematic information available concerning the way national regulatory authorities assess the compliance of providers with rules (where applicable) that ensure prominence of services of general interest. This is partly due to the only-recent introduction of such rules in some of the member states and the continued inexistence of such prominence regimes in others. It also has to do with the lack of an obligation to report systematically on such rules to the European Commission, although it is possible that, in future implementation reports of the AVMSD, attention will be given to where such rules exist, how they are applied and which monitoring takes place. Lastly, additional prominence obligations in view of Article 7a AVMSD are in many cases even less detailed in the statutory provisions than the Article 13 AVMSD transpositions, which is why monitoring of the efforts in practice may be more limited, although this could change in the future as the regulatory authorities are increasingly discussing the prominence regimes in their international cooperation fora (see below).

3.4.2 The Background Work of Regulatory Authorities

Especially the work of the European Regulators Group for Audiovisual Media Services (ERGA) is of relevance in the context of prominence and the application of the AVMSD in practice. In 2020, a Subgroup 3 on Ensuring Prominence and Access of Audiovisual Media Content to all Platforms (Findability) was established within ERGA.[47] The purpose of the 2020 Subgroup 3 was to obtain knowledge about national rules that already existed in the area of prominence and findability and planned initiatives on the basis of Article 7a AVMSD by means of which different aspects that required further discussions were to be defined. A special focus was put on the scope of Article 7a AVMSD, that is to say, the type of services covered and the criteria to determine what constitutes audiovisual media services of general interest, on appropriate measures guaranteeing that audiovisual media services of general interest are given appropriate prominence, and finally on the type of regulatory approaches member states may take. Subgroup 3 published two reports in the form of

[46] An ongoing study (No. VIGIE-2021-0509 under Framework Contract SMART 2019/0024) will, for the 2020-21 reporting period, report how member states or the providers under their jurisdiction have made use of the different possibilities.

[47] See ERGA Work Programme 2020, in particular p. 4 f., https://erga-online.eu/wp-content/uploads/2020/01/ERGA_2019_WorkProgramme-2020.pdf.

overview documents in relation not only to Article 7a AVMSD,[48] but also to the prominence approaches in connection with European works in Article 13, paragraph 1 AVMSD.[49]

The second report aimed at identifying the various measures that member states could adopt in the implementation of the new Article 13 (1) of the AVMSD. The main objective of the report was to enable the development of a best practices approach in order to strive for the highest possible degree of consistency when implementing such measures in the member states. In practical terms, the report brought together the views expressed by a number of the NRAs as well as VOD providers.[50] From a general point of view, the report highlighted the need to enhance the common understanding of the meaning of "prominence", because the AVMSD does not provide a definition of prominence, but limits itself to mentioning a non-exhaustive list of possible measures through which it can be achieved. One of the findings of the report is that regulatory authorities preferred qualitative solutions taken by on-demand service providers to quantitative ones. The most used and appreciated tools at the time included search means, the organisation of a dedicated section for European works, and labelling or any other tool to distinguish European and non-European works and promotional initiatives.

Furthermore, in 2021 the Subgroup 1 on Consistent implementation and enforcement of the new Audiovisual Media Services Directive framework published another report on "Transposition and implementation of Article 13(1) of the new AVMSD – Ensuring prominence of European works in the catalogues of on-demand audiovisual media services".[51]

Beyond ERGA, the regulatory authorities which are members of the European Platform of Regulatory Authorities (EPRA) have been discussing issues of prominence. A part of EPRA's 2019 work programme was the establishment of a Working Group focusing on "European Works and Prominence".[52] One of EPRA's more recent issue papers dealt with the applicability of artificial intelligence and machine learning "in such a way that the visibility and findability of content that is desirable for society and relevant for democracy is increased".[53]

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[48] https://erga-online.eu/wp-content/uploads/2021/01/ERGA_SG3_2020_Report_Art.7a_final.pdf.
[49] https://erga-online.eu/wp-content/uploads/2021/01/ERGA_SG3_2020_Report_Art.131_final.pdf.
[50] See ERGA, Subgroup 1 - Consistent implementation and enforcement of the new Audiovisual Media Services Directive framework, Workstream 2 - Technical expertise: Interpreting and providing guidance on the most complex new provisions. Report: Transposition and implementation of Article 13(1) of the new AVMSD - Ensuring prominence of European works in the catalogues of on-demand audiovisual media services, 2021, p. 4 (https://erga-online.eu/wp-content/uploads/2021/12/ERGA-SG1-2021-Report-Article-13_1.pdf).
[51] https://erga-online.eu/wp-content/uploads/2021/12/ERGA-SG1-2021-Report-Article-13_1.pdf.
[52] See EPRA's Work Programme for 2019, p. 7 f., https://cdn.epra.org/attachments/files/3454/original/EPRA_WORK__PROGRAMME_2019_EN_final.pdf?1551284378.
[53] See 50th EPRA meeting, Athens, 23-25 October 2019, Plenary Session 2 – Artificial Intelligence & Machine Learning Background document, p. 15, available at https://cdn.epra.org/attachments/files/3610/original/plenary_2_artificial_intelligence__background_paper_final.pdf?1576260914.

4 Country reports

4.1 BE - Belgium

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4.1.1 Introduction

In the federal state of Belgium, the competence for audiovisual matters is split between various linguistic regions. Four distinct legislative and regulatory frameworks apply and are enforced by separate regulatory authorities: one for Flanders (the Flemish-speaking community, "BE (VL)")); one for the Wallonia-Brussels Federation (the French-speaking community, "BE (FR)"); one for the German-speaking community; and one for the bilingual Brussels-Capital Region. This country report focuses on the French-speaking and Flemish-speaking communities as this is from where most of the services are regulated.

4.1.2 Prominence of European works

4.1.2.1 Rules on prominence of European works for VOD services

In BE (VL), under the Flemish Media Decree,[54] providers of VOD media services (including those provided by public service broadcasters) must dedicate at least 30% of their catalogue to EU works, a substantial proportion of which must be Dutch-language European productions. These works must be given a prominent place in the catalogues of VOD services.[55] In this way the Flemish legislator proactively implemented Article 13 of the new AVMSD. No guidance has been provided yet by the Flemish media regulator (Vlaamse Regulator voor de Media – VRM) on how to achieve prominence.

Service providers must also ensure that works are given special prominence in their catalogues. In BE (FR), like in BE (VL), the decree does not specify how prominence must be reached but the preparatory works[56] state that prominence can be ensured through different

[54] The new rules were introduced by the The Decree of the Flemish Government from 29 June 2018 amending the Media Decree, https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=2018062913
[55] Media Decree, Art. 157(1)
[56] Ibid., p. 24

means, including those listed in the AVMSD[57] and those already mentioned in the preparatory works of the decree of 26 March 2009.[58]

A ruling from the authorisation and control committee of the CSA still needs to be adopted to determine how service providers must comply with the rules, and how the CSA will control compliance with the rules. These modalities will have to take into account the European Commission's guidelines adopted in application of Article 13, paragraph 7 AVMSD[59].

BE (VL) and BE (FR) both exempt certain services from the obligations. In BE (VL), services with a small audience or a low turnover (less than EUR 500 000 annual turnover) and small and microenterprises are excluded from the rules on quota and prominence, and from the obligation to invest in Flemish productions (see below).[60] In BE (FR), quota and prominence rules do not apply to service providers with an annual turnover below EUR 300 000 (amount indexed annually) or to providers which "by nature" offer exclusively or mainly (i.e. at least 80% of their catalogue) non-EU works. These cover for example services specifically dedicated to cartoons or to American sports retransmissions.

4.1.2.2 Reporting on the prominence obligations

In BE (VL) and BE (FR), providers of VOD services must report each year to their respective regulatory authorities on how they met the requirements on quota and prominence.[61] In BE (VL), providers must complete a table (which is available on the VRM's website) where they have to specify the "prominence methods"[62] they used, for instance making EU works available on the homepage, with regard to the search function, and promoting EU works through trailers or banners, etc.

4.1.2.3 Powers and competences of the media regulator

In BE (VL), the VRM is tasked with monitoring the implementation of the rules on prominence and their enforcement.[63] The VRM can impose administrative fines of up to

[57] Audiovisual Media Services Directive 2018/1018 of 14 November 2018, recital 35: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32018L1808

[58] SMA decree, article 46: "(…) ensure special emphasis of the European works included in their catalogue, including original works by authors from the French Community, by highlighting, through an attractive presentation, the list of available European works."

[59] Communication from the Commission Guidelines pursuant to Article 13(7) of the AVMS Directive on the calculation of the share of European works in on-demand catalogues and on the definition of low audience and low turnover 2020/C 223/03: https://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=uriserv:OJ.C_.2020.223.01.0010.01.ENG&toc=OJ:C:2020:223:TOC.

[60] Media Decree, Art. 157(1) and (3).

[61] Media Decree, Art. 157(3).

[62] See website of the Flemish media regulator, VRM, https://www.vlaamseregulatormedia.be/nl/nieuws/2022/quotaverslagen-niet-lineaire-televisiediensten-indienen-tegen-31-maart-2022.

[63] Media Decree 2009, Art. 218.

EUR 125 000, issue warnings with an obligation to comply and revoke authorisations.[64] The VRM reports annually to the parliament and the government on its activities and sends a copy of its decisions to the Flemish Minister for Brussels, Sports, and Media.[65] As a function of its monitoring powers, the VRM can request information and documents (including financial) from individuals and legal entities that fall under the scope of the media decree.[66] Such individuals or legal entities must cooperate with the VRM.[67]

In the BE (FR), the CSA (authorisation and control committee) supervises the application of the rules and provides an opinion on how the obligations are being met. The CSA can take a range of sanctions (from a warning to the suspension/withdrawal of the service or authorisation, etc.), and can impose fines from a minimum EUR 250 to a maximum 3% of providers' annual turnover.[68] In case of repeated offences within five years, this amount is increased to 5%. Further, sanctions can be accompanied by a periodic penalty payment which per month cannot exceed 1% of annual turnover.

4.1.3 Other national rules on prominence concerning general interest services

In BE (VL), according to the Media Decree as amended by the decree from 19 March 2021 implementing the AVMSD,[69] the government can, with a view to ensuring pluralism in the media, freedom of expression and cultural diversity, lay down criteria and impose measures on companies to ensure that appropriate attention is paid to, and visibility and findability are guaranteed for, television services of general interest.[70]

This article transposes article 7a of the revised AVMSD (due prominence) and is in force since 9 May 2021.[71] The government has not set implementing measures yet[72] but according to the explanatory statement to the draft law implementing the directive, a system of co-regulation will be considered[73].

Also, since 2019 distributors[74] are obliged to give access to at least one paid VOD service (as specified) at the request of the VOD service provider, so that end-users can have direct access to this service. This VOD service can be offered either by the Flemish PSB or

[64] Media Decree 2009, Art. 228.
[65] Media Decree 2009, Art. 218(5) and 218(6).
[66] Media Decree 2009, Art. 234.
[67] Media Decree 2009, Art. 234.
[68] WBF government decree of 4 February 2021, Art. 9.2.2-1.
[69] The Decree of the Flemish Government from 19 March 2021, https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=2021031918. The decree has been in force since 9 May 2021.
[70] Media Decree 2009, Art. 155/1.
[71] The Decree of the Flemish government from 19 March 2021, https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=2021031918
[72] Media Decree 2009, Art. 155/1.
[73] The draft law implementing the AVMSD and amending the Media Decree 2009, p.44, https://docs.vlaamsparlement.be/pfile?id=1659775.
[74] Distributors (dienstverdelers) are defined as "any legal entity that provides one or more broadcasting services (linear or on-demand) of third parties to the public through electronic communication networks".

by a commercial broadcaster established in Flanders and must contain a significant portion of Dutch-spoken EU productions with a prominent place in the catalogue.[75]

In BE (FR)**,** a number of rules akin to article 7a of the AVMSD existed prior to the implementation of the directive. In particular, distributors[76] must comply with must-carry obligations[77] to ensure access to non-linear services of general interest. They must guarantee the distribution on a cable network of a basic offering which includes (in addition to some linear services) at least the non-linear services of:

- the public service broadcaster (RTBF, designated by the government);
- local media in their coverage area (designated by the government); and
- international services in which the RTBF has a stake (e.g. TV5).

On other networks (e.g. IPTV and satellite) this obligation only applies to non-linear services of the RTBF and those of international services in which the RTBF has a stake.[78]

Distributors that use a user interface including an electronic programme guide (EPG) and that offer to end-users functionalities to select, organise, present and/or recommend certain programmes or applications of AVMS providers, must inform AVMS providers within a reasonable period of time before they are deployed.[79]

They must also guarantee the transparency and neutrality of the recommendation algorithms used to promote content in their user interfaces, notwithstanding the fact that European audiovisual works (including those stemming from French-speaking Belgian initiatives) may benefit from a particular emphasis in the results of these recommendations.[80]

To ensure that end users have access to all digital audiovisual media services available in the WBF, the CSA (control and authorisation committee) can impose a number of obligations (to be approved by the government), including relating to the installation, access and presentation of EPGs used by distributors. These obligations can for example require the inclusion of an EPG in the application programme interfaces which is able to search for a given audiovisual media service across all available audiovisual media services without discrimination. They can also require compliance with pluralism requirements with regard to the presentation of distributors' offerings and of audiovisual media services available through EPGs.[81]

[75] Media Decree 2009, Art. 184/0.
[76] WBF government decree of 4 February 2021, Art. 1.3-1 (12): defined as "any legal person who makes one or more audiovisual media services available to the public by any means, in particular a terrestrial broadcasting, a satellite or a cable network" .
[77] WBF government decree of 4 February 2021, Art. 7.2.2.
[78] WBF government decree of 4 February 2021, Art. 7.4.1.
[79] WBF government decree of 4 February 2021, Art. 8.3.2.1.
[80] WBF government decree of 4 February 2021, Art. 8.3.2.1 §2.
[81] WBF government decree of 4 February 2021, Art. 8.3.2.1 §4.

4.1.4 Key findings on the prominence rules and other developments

In BE (VL), in the annual report for 2021, the VRM points out that "it proved no easy task to compile an exhaustive list of VOD services that could possibly fall under the scope of article 157 [quota and financial obligations for VOD services, including obligations on prominence] of the Media Decree.[82] VRT, the Flemish PSB, underscores discoverability and prominence of its content on online platforms as one of the challenges for the coming years.[83] In BE (FR), the CSA has not published its annual report for 2021 and there are no further indications of legislative changes.

4.2 BG - Bulgaria

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4.2.1 Prominence as principle deriving from national constitutional law

The Constitution of the Republic of Bulgaria[84] does not contain provisions concerning prominence as a principle.

The interpretative decision of the Constitutional Court No 7/1996[85] provides that "with regard to the content, funding and management of the public service media, a variety of decisions is possible and the Constitutional Court is not in a position to recommend one or another model". However, "the European Court of Human Rights (ECtHR) apparently draws a direct link between the right to express an opinion and participation in the democratic process. The duty of the media to release information and ideas relevant to matters of public interest is based on this link; the duty arises from the right of the public to obtain such information and ideas as a way to shape its opinion on the standpoints of the major political stakeholders". This is the general constitutional framework which must be taken into account in the implementation of statutory law on prominence.

[82] Annual report 2021, VRM, p. 47: https://www.vlaamseregulatormedia.be/sites/default/files/pdfversions/jaarverslag_2021_vlaamse_regulator_voor_de_media_-_vrm.pdf.
[83] Vision statement in preparation of the 2021-2025 management agreement, https://www.vrt.be/content/dam/vrtbe/2019/Visietekst%202021-2025.pdf.
[84] Constitution of Bulgaria, "*КОНСТИТУЦИЯ*", https://www.parliament.bg/en/const
[85] Judgement of 4 June 1996, https://constcourt-bg.translate.goog/bg/Cases/Details/225?_x_tr_sl=auto&_x_tr_tl=en&_x_tr_hl=en-US&_x_tr_pto=wapp

4.2.2 Rules on prominence in national law

4.2.2.1 Overview

The legal basis of Bulgarian media law is the Radio and Television Law (RTL),[86] adopted in 1998 and last amended in 2020. The RTL introduces into Bulgarian law the Audiovisual Media Services Directive and its revisions. The question of due prominence in the RTL is raised in two ways: in relation to promotion and prominence of European audiovisual works in media services and in relation to exposure of content of general interest.

4.2.2.2 Rules on prominence of European works in media services

European works are defined in the RTL (Art.1, point 7) in compliance with the AVMSD. The RTL addresses European works only in terms of quantity - at least 50% of the total annual qualified programming time of television programming services must be devoted to European works where practicable. The production and transmission of European works in radio programmes are encouraged. There is no provision concerning findability and positioning of European works in linear media services.

Regarding European works in non-linear media services, Article 13 AVMSD was transposed into Article 19 RTL. Providers of on-demand audiovisual media services ensure that their catalogues contain a share of European works of at least 30% and ensure that such works are given prominence (Art. 19(1) RTL).

Prominence involves presenting European works in an attractive and accessible manner, for example through a dedicated section for European works that is accessible from the service homepage, the possibility to search for European works in the search tool available as part of that service, the use of European works in campaigns of that service or a minimum percentage of European works promoted from that service's catalogue, for example by using banners or similar tools (Art. 19(2) RTL).

Quota and prominence obligations do not apply to providers that are micro-enterprises within the meaning of the Commission's Recommendation of 6 May 2003 on the definition of micro-enterprises, small and medium-sized enterprises[87] as well as to providers with an audit share that is less than 1% of the total audience of all on-demand audio-visual media services offered on the territory of the Republic of Bulgaria. The obligations also do not apply in cases where they would be inapplicable in practice or unreasonable due to the nature or subject matter of the audiovisual media services.

The Council for Electronic Media (CEM), the national media regulator in Bulgaria in charge of implementation of the EU media legal framework, prepares annual reports on European works in on-demand services and publishes them as part of its annual report. The

[86] Radio and Television Act, Promulgated, State Gazette No. 138/24.11.1998 with latest amendments in State Gazette No. 8/28.01.2022, effective 1.01.2022, https://www.cem.bg/files/1651646128_zrt_eng.pdf.
[87] Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, C(2003) 1422, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:124:0036:0041:en:PDF.

CEM also reports to the European Commission on the implementation of the measures taken to ensure quotas and prominence.

The CEM drafts annual reports on European works in linear audiovisual media services and publishes them as part of its overall annual report.

For violations of quota and prominence obligations, the providers of linear services may be subject to a sanction of BGN 3 000 to 20 000 (about EUR 1 530 to 10 220). According to Art. 126 RTL, the sanction is doubled in cases of repetition.

The RTL does not provide for differentiation of the requirements for a European quota according to the type of media service provider (public or commercial). The quantitative requirements for European works in public and commercial media services providers are equal.

4.2.2.3 Rules on prominence of services of general interest

There is no definition of audiovisual media services of general interest in the Bulgarian RTL. General interest services are considered as services aimed at achieving the public interest objectives of Art. 7a AVMSD and Art. 8b RTL, respectively.

Prior to the introduction of prominence rules, in the Bulgarian legal framework there were provisions guaranteeing that certain media services of general interest were made available. First, in 1998, such a must-carry rule for cable and satellite networks was introduced, followed by a digital must-carry rule for DTB network operators in 2010. With the amendment in 2020, Art. 7a AVMSD was transposed into Bulgarian law by changing the RTL accordingly. As in the past, must-carry obligations for conveying the program service BNT1 of the Bulgarian National Television free of charge apply to all three types of operators. Following the procedure defined in the Radio and Television Law, the Electronic Media Council determines other program services of general interest that must be transmitted over the DTB networks.

After the latest revision of the AVMSD (Directive 2018/1808), the provision of Art. 7a AVMSD was transposed into the revised RTL by adding a new Art. 8b. The Directive explicitly provides that member states may take measures to ensure due prominence of audiovisual media services of general interest in compliance with objectives of common interest such as media pluralism, freedom of speech and cultural diversity. The RTL also explicitly declares general interest objectives by mentioning media pluralism, freedom of speech and cultural diversity. In the scope of Art. 7a AVMSD are mainly the distributors: cable, satellite and terrestrial networks. Measures guaranteeing appropriate prominence could include easy findability, prioritised presentation, and/or a prominent place on the homepage/user interface. Bulgarian legislation does not provide for the financial parameters of the obligations to ensure the visibility of public interest content. There are no specific references to prominence obligations for VOD services, like in some other member states. Neither does Bulgarian legislation provide for an obligation to periodically review the measures under Art. 7a AVMSD. Bulgarian legislation also does not envisage sanctions for violation of Art. 8b RTL as regards services of general interest because this new provision is dispositive and still optional for member states. There are no specific

reports concerning the implementation of Art. 7a. No mention of the subject has been found until now in the annual reports of the Electronic Media Council.

4.2.3 Key findings on prominence rules and other developments

The measures taken regarding due prominence of European works and general interest services can be of significant importance in developing a more pluralistic media landscape. Bulgaria is among the member states that are still lagging behind in the modernisation of their media ecosystem, in which prioritisation of content is an important factor.

In this context, the provision of Art. 15 para 2 of the proposal for a European Media Freedom Act, which envisages elaboration of guidelines as regards in particular the appropriate prominence of audiovisual media services of general interest under Article 7a AVMSD, is seen as an opportunity by observers in Bulgaria to enhance the framework to safeguard pluralism.

4.3 DE - Germany

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4.3.1 Prominence as a principle deriving from national constitutional law

In the German constitutional context, prominence (of content relevant for the formation of public opinion) is primarily considered an aspect of safeguarding media pluralism and diversity of opinion. Pluralism is a guiding principle in the constitutional jurisprudence of the Federal Constitutional Court (*Bundesverfassungsgericht, BVerfG*). This applies first and foremost to broadcasting, for which there is a long tradition of very distinct case law on the question of what guarantees are to be derived from the fundamental right of freedom of broadcasting laid down in Art. 5 para. 1 sentence 2 of the Basic Law.[88]

Describing a very complex and detailed case law in brief, the BVerfG derives from the fundamental rights guarantees linked to the assertion that high-quality and diverse broadcasting are essential for the formation of public opinion and thus for the democratic system.[89] Therefore, it is the task of the legislator to create legal framework conditions that

[88] Basic Law for the Federal Republic of Germany as last amended by Article 1 of the Act of 29 September 2020 (Federal Law Gazette I p. 2048), https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html.

[89] See on this and the following BVerfG, judgement of 20 July 2021, 1 BvR 2756/20, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2021/07/rs20210720_1bvr275620.html, with further references to the case law of the BVerfG.

ensure a diverse overall programme offering in Germany for which the BVerfG has on several occasions derived concrete conclusions regarding the organisation and structure of the media, their independence and financing, and their plurality, as well as the need to prevent the emergence of a dominant power of opinion. Particularly relevant in the present context are the BVerfG's observations on the significance of public service broadcasting in the changing media landscape: The mere existence of a broader offering of private broadcasting and a more intense diversity of providers, in particular the rise of communication technology and information dissemination via the Internet, do not ensure the quality and diversity in broadcasting as required by fundamental rights. The digitisation of media and especially the network and platform economy of the Internet have even fuelled concentration and monopolisation tendencies among providers, distributors and intermediaries. Emphasis is put on the danger that – *inter alia* by means of algorithms - content is specifically tailored to the interests and inclinations of users, which in turn leads to an agglomeration of similar opinions. Such offerings are not aimed at diversity of opinion, but are determined by one-sided interests or the economic rationality of a business model. This leads to more difficulty regarding separating facts from opinion, and content from advertising, as well as new uncertainties regarding the credibility of sources and evaluations. In view of these developments, the BVerfG highlights (once more) the essential importance of the task incumbent on public broadcasting of providing authentic, carefully investigated information and of providing a counterbalance that ensures diversity and offers guidance.[90] From these considerations, which, due to the subject matter of the proceedings, are focused on public service broadcasting, it can also be deduced in general that the existence and accessibility of high-quality content relevant to opinion-forming is considered to be of particular constitutional importance from the point of view of pluralism.

4.3.2 Rules on prominence in national law

4.3.2.1 Overview

The comprehensive reform of the former Interstate Broadcasting Treaty into an Interstate Media Treaty (MStV)[91] in 2020 not only involved the implementation of the 2018 amended AVMSD, but also a comprehensive modernisation of German media law, which now also addresses "new" media players such as media platforms, user interfaces and media intermediaries. In the implemention of Art. 13(1) AVMSD, this initially concerned the

[90] BVerfG, 1 BvR 1675/16, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2018/07/rs20180718_1bvr167516.html, para. 79.

[91] Interstate Media Treaty (Medienstaatsvertrag) in the version of 14/28 April 2020, unofficial English version available at at https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Gesetze_Staatsvertraege/Interstate_Media_Treaty_en.pdf. However, the version currently in force is already that of the second Interstate Media Amendment Treaty of 27 December 2021, which has been in force since 30 June 2022, available at https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Gesetze_Staatsvertraege/Interstate_Media_Treaty_en.pdf.

creation of new obligations for providers of "television-like telemedia" (the German equivalent of on-demand audiovisual media services) in the area of promoting European works, which join the already existing obligation to support the German film industry by paying a levy under the Film Funding Act (Filmfördergesetz, FFG),[92] as well as similar obligations addressing television providers. In addition, however, this also included the creation of new rules requiring findability of (public value) services and content in user interfaces which are to be read in light of Art. 7a AVMSD.

4.3.2.2 Rules on prominence of European works

4.3.2.2.1 Rules for TV providers

Apart from their obligation to reserve the majority of their broadcasting time for European works (i.e. at least 50%; Art. 15(2) MStV), there is no specific obligation for television providers to also ensure prominence of these works in their programmes. Art. 15(1) MStV merely states more generally that they should contribute to safeguarding German and European film and television productions as cultural assets and as part of the audiovisual heritage, but does not specify how this should be done. In addition, television broadcasters must promote the production of European works via financial tools (i.e. paying levies to the national film promotion fund).

The monitoring of compliance with the aforementioned rules of the MStV is subject to the general supervision and sanction regime of the MStV, that is to say, it is carried out for private (i.e. commercial broadcasting by the German state media authorities and for public service broadcasting by internal control bodies).

4.3.2.2.2 Rules for VOD providers

The situation is different in the VOD sector: §77 MStV, in addition to the obligation to ensure a European works share of 30% in their catalogues, contains the requirement that such works be made prominent. This applies to providers of television-like telemedia, in other words, electronic information and communication services excluding broadcasting, telecommunication services and telecommunication-based services with content similar in form and design to television and made available from a catalogue defined by a provider for individual retrieval at a time chosen by the user (on-demand audiovisual media services). Such content includes, in particular, radio plays, feature films, series, reports, documentaries, entertainment, information or children's programmes.[93] More detailed criteria are not initially provided by law - but the explanatory memorandum to the MStV,[94] referring to recital 35 of Directive (EU) 2018/1808, points to various means appropriate for ensuring prominence (presence on the main page, search tools, campaigns, separately

[92] Art. 146 et seq. Film Funding Act 2022, https://www.ffa.de/download.php?f=b42448716bb10a569e952fe042ffb7a0&target=0.
[93] Art. 2(1) and (13) MStV.
[94] Explanatory Memorandum on the Interstate Treaty on the Modernisation of the Media Order in Germany, https://www.rlp.de/fileadmin/rlp-stk/pdf-Dateien/Medienpolitik/Medienstaatsvertrag_Begru__ndung.pdf, p. 38.

advertised minimum share). For the definition of "European works", reference is made to the AVMSD. However, §77 sentence 4 contains a statutory mandate afforded the state media authorities to regulate details, which was exercised with the Statute on European productions pursuant to §77 MStV (hereinafter: EP Statute) and put into force on 1 July 2021.[95]

In addition to specifications on the calculation of the share and the exceptions for providers with low turnover and audience shares, the EP Statute also contains legally binding and concretising provisions on prominence. This concerns in particular the implementation of definitions for the terms "catalogue"[96], "film and television production"[97], "European works" (reflecting essentially the one laid down in the AVMSD) and "titles"[98] (§1) as well as more detailed provisions on how to ensure appropriate prominence (§7). Accordingly, European works must be appropriately highlighted in the German language, which means providers must foster facilitated access. The assessment of appropriateness is based on all measures taken by the provider. In particular, the EP Statute identifies as appropriate the creation of a separate area that is easily perceptible, immediately accessible and permanently available from the main page of the service, in combination with either the possibility of retrieving European works via a search tool or a 30%-share of European works on the main page of the service in categories that serve to guide the user, such as "new releases", "current highlights", "the best films/series", "recommendations", "popular", etc.

Monitoring compliance of VOD services with their obligations regarding the promotion of European works is done as a part of the general programme monitoring of the German state media authorities. In particular, the standard sanctioning instruments of §109 MStV are available as supervisory measures in the case of violations of the law, that is to say, notice of objection, prohibition or blocking of services. It should be noted that the Commission for Licensing and Supervision (*Kommission für Zulassung und Aufsicht*, ZAK), as the central body of the 14 German state media authorities, is responsible for supervisory

[95] Statute on European productions pursuant to §77 MStV as of 15 March 2021, in force since 1 July 2021, https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Satzungen_Geschaefts_Verfahrensordnungen/EU-Quoten_Satzung.pdf.

[96] Catalogue means an overall offering of telemedia in the form of a sequence of moving images with or without sound, defined by a provider, irrespective of their respective length, insofar as it is not a media platform within the meaning of §2(2) no.14 MStV. The content of a catalogue may in particular be feature films, television plays, series, news, reports, documentaries, entertainment, information, educational, advisory, sports or children's programmes and comparable productions. No catalogues in this sense are such services where audiovisual content is published only in connection with corresponding text reporting by electronic press or in the case of a video channel of a provider on which only short promotional videos for goods or services of this provider can be retrieved.

[97] Film and television production means any structured sequence of moving images with or without sound, captured for the purpose of reproduction, which, when viewed, creates the impression of movement, irrespective of the technical recording, storage or reproduction process chosen, including news, sports reports, game shows, advertising services.

[98] Title in a catalogue means each film and television production, in the case of feature films and television films, each film in a catalogue, whereby different films in a franchise constitute a different title in a catalogue, and in the case of television series or other formats presented in serial form, i.e. episode by episode, the series or serial format, whereby this may be deviated from upon justified application by a provider through the competent state media authority by the Commission for Licensing and Supervision (ZAK), in particular if an episode is comparable to a television film in terms of duration or production costs.

measures in the context of §77 against state-wide providers. In addition, the EP Statute contains further specifications in a section 4 on procedural principles. §8 of the EP Statute contains the right to information, including the possibility to order a provider to respond to questions. The competent state media authority, acting through the ZAK, may in particular request the following information from providers:

- on the catalogue as well as the type and subject of the service, in particular a list of works classified by nationality which were available in the catalogue during a half-year;
- on the titles made available in the catalogue in question for European and non-European film and television productions during each half-year;
- on the turnover and revenue of the provider;
- on the number of viewers as well as the viewing figures for European and non-European film and television productions;
- on the way in which European works are made prominent.

§9 of the EP Statute regulates supervisory measures, and in doing so contains concretisations on the sanctions regime normally applicable under §109: If a provider violates §77 MStV or the EP Statute, the competent state media authority, acting through the ZAK, can first give the provider the opportunity to rectify the situation, setting a reasonable deadline. Only if the violation continues shall the necessary measures be taken pursuant to §109 MStV. However, prohibition or blocking may not take place if the measure is disproportionate to the importance of the service for the provider, and only if its purpose cannot be achieved in any other way. As far as possible, the prohibition or blocking shall be limited to certain types and parts of services or be limited in time.

4.3.2.3 Other national rules on prominence including general interest services

The MStV contains various rules that aim to ensure the pluralism of the media landscape in Germany following different regulatory approaches. One of these approaches involves must-carry rules for certain services to be represented in/on certain other services / distribution channels. For example, broadcasting time must be granted to so-called regional window programmes in the two private full television programmes with the widest coverage nationwide, and an obligation to grant broadcasting time to independent third parties can be imposed on private television broadcasters as a measure to safeguard pluralism due to existing dangers of dominant opinion power. Infrastructure-bound media platforms are subject to special provisions on their capacity allocation, whereby capacities are to be granted in particular for the nationwide programs of the public service broadcasters and the private broadcasters that broadcast regional windows. They must not unreasonably impede media services (broadcasting, broadcast-like telemedia or journalistic-editorial telemedia) in their access to the media platform and must treat them in a non-discriminatory manner.

Of particular relevance against the background of “prominence” as addressed by Art. 7a AVMSD, however, is §84 MStV, which follows a must-be-found approach for media services in user interfaces “in order to tackle potential threats and to positively ensure

pluralism"[99]. The provision applies insofar as user interfaces depict or acoustically convey broadcasting, broadcast-like or press-like telemedia, parts thereof or software-based applications which essentially serve to directly navigate to such services. §84(2) MStV contains a prohibition of discrimination: Similar media services may not be treated differently in terms of findability (in particular sorting, arrangement or presentation) in user interfaces without an objectively justified reason[100] and may not be unfairly impeded. All services must be findable without discrimination by means of a search function. In addition, according to §84(3), programmes of the public service broadcasters, of the private broadcasters that broadcast regional windows and of other private broadcasters that contribute in a special way to the diversity of opinion and services must be easy to find[101] within user interfaces. The same applies to corresponding telemedia offerings in user interfaces according to §84(4) MStV. Which private programmes / telemedia offerings make such a special contribution to pluralism is determined by the German state media authorities for a period of three years and published in a list. Regarding the question of which criteria are to be taken into account when assessing a service as of "public value", the law mentions, among other things, the proportions of news, regional and local information, in-house and third-party productions, barrier-free services and European works. Here, too, a mandate is given to the state media authorities to regulate details in a statute, which was taken up with the Public Value Statute that came into force on 1 September 2021.[102] In addition to the details of the procedure for inclusion in the Public Value List, this Statute also specifies the evaluation criteria. For European works it takes up references to the EP Statute mentioned above.

4.3.3 Key findings on the prominence rules and other developments

Whereas for broadcasting in Germany there is a quota system that has long been anchored in law and is therefore well-rehearsed in practice, both for the promotion of European works and for ensuring diversity, the rules presented for VOD services and user interfaces, including their specification in statutes, are new. Therefore, their practical viability is yet to be proven. The state media authorities, for example, just successfully completed the public value assessment procedure in June 2022. In this context, however, the importance of a subsequent stakeholder dialogue together with the public broadcasters and the associations of the private providers on the results of the determination procedure was underlined, in which in particular the further concrete implementation of the provisions of

[99] Explanatory Memorandum on the Interstate Treaty on the Modernisation of the Media Order in Germany, https://www.rlp.de/fileadmin/rlp-stk/pdf-Dateien/Medienpolitik/Medienstaatsvertrag_Begru__ndung.pdf, p. 45.
[100] Such justified reasons may be with regard to the sorting criteria alphabet, genres or reach of use.
[101] It should be noted that §84 only refers to the findability of services and does not contain an obligation to include such offerings on a user interface. This question is solely answered by the access rules addressed above.
[102] Statute of the State Media Authorities for the Implementation of the Provisions Pursuant to Section 84 (8) of the Interstate Media Treaty on the Easy Findability of Private Services as of 24 June 2021, in force since 1 September 2021, https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Satzungen_Geschaefts_Verfahrensordnungen/Public_Value_Satzung.pdf.

easy findability of public value services will be addressed.[103] The importance of a close exchange with stakeholders was again emphasised at the end of September in the course of the publication of the final list[104] of public value services that user interfaces, smart TVs in particular, will have to make findable in the future.[105] Besides, the list was also accompanied by a recommendation from the state media authorities on how the services to be made findable should be listed (i.e.: ordered/sorted).[106]

4.4 FR - France

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4.4.1 Prominence as principle deriving from national constitutional law

The French Constitutional Council (Conseil constitutionnel) has so far not ruled on the question of the constitutionality of the rules on prominence of works or contents on linear and non-linear services. Moreover, the constitutional principle of "media pluralism", consecrated by the Constitutional Council,[107] is restricted to the "pluralism of currents of socio-cultural expression", or more precisely, to "political pluralism", and does not cover a constitutional principle of "cultural pluralism".

However, the French broadcasting authority (Autorité de régulation de la communication audiovisuelle et numérique, ARCOM) is entrusted by Article 3-1 of the Law of 30 September 1986 (Broadcasting Act)[108] with the mission of ensuring "the quality and diversity of programs". The Act also contains provisions that indirectly promote a diversity of programmes, in particular through the obligation to contribute to independent audiovisual production. The rules on quotas for European works can also be associated, at least in part, with this objective.

[103] See press release 14/2022, https://www.die-medienanstalten.de/service/pressemitteilungen/meldung?tx_news_pi1%5Bnews%5D=5038&cHash=77139b5e6e3d3171b40579f861e05d9b.
[104] https://www.die-medienanstalten.de/fileadmin/user_upload/die_medienanstalten/Themen/Public_Value/Gesamtliste_Public-Value-Angebote_final.pdf.
[105] See press release 22/2022, https://www.die-medienanstalten.de/service/pressemitteilungen/meldung/qualitaetspraedikat-public-value.
[106] https://www.die-medienanstalten.de/fileadmin/user_upload/die_medienanstalten/Themen/Public_Value/Empfehlungen_Public-Value-Listungen_final.pdf.
[107] Decision No 86-217 DC of 18 September 1986 (paragraph 11): https://www.conseil-constitutionnel.fr/decision/1986/86217DC.htm
[108] Law n° 86-1067 of 30 September 1986 on freedom of communication (Loi Léotard), https://www.legifrance.gouv.fr/loda/id/LEGITEXT000006068930.

4.4.2 Rules on prominence in national law

4.4.2.1 Overview

French law implements prominence obligations for on-demand audiovisual media services only. These obligations stem from the implementation of Article 13 AVMS Directive. In addition, the Ordinance n° 2020-1642 of 21 December 2020[109] implemented a mechanism to ensure the appropriate prominence of audiovisual media services of general interest, in line with the provisions of Article 7a of the Directive.

4.4.2.2 Rules on prominence of European works

4.4.2.2.1 Linear services

Under French law, only on-demand audiovisual media services are subject to prominence obligations. However, the rules applicable to linear services and concerning broadcasting quotas for European works and original French-language works, laid down in Articles 27 and 33 of the Law of 30 September 1986 and Decree No. 90-66 of 17 January 1990,[110] as amended, provide that these quotas must be respected during prime time (peak viewing hours), or during significant viewing hours. Peak viewing hours are defined as hours between 8.30 p.m. and 10.30 p.m., except for cinema and pay-per-view services, for which these hours are set between 6 p.m. and 2 a.m. ARCOM may substitute significant viewing hours for these peak viewing hours, which it sets annually for each service, taking into account, in particular, the characteristics of its audience and programming and the importance and nature of its contribution to production.[111] No further "prominence" obligations, within or outside these hours, is specified.

4.4.2.2.2 Non-linear services

The principle of an obligation to ensure prominence of European works and works of French original expression in the catalogues of on-demand audiovisual media services is enshrined

[109] Ordinance No. 2020-1642 of December 21, 2020 transposing Directive (EU) 2018/1808 of the European Parliament and of the Council of November 14, 2018 amending Directive 2010/13/EU aimed at the coordination of certain legislative, regulatory and administrative measures of the Member States relating to the provision of audiovisual media services, taking into account the evolution of the realities of the market, and modifying the law of 30 September 1986 relating to the freedom of communication, the cinema and animated image code , as well as the deadlines relating to the exploitation of cinematographic works, https://www.legifrance.gouv.fr/loda/id/LEGIARTI000042724494/2020-12-24/.

[110] Decree n°90-66 of January 17, 1990 taken for the application of law n° 86-1067 of September 30, 1986 and fixing the general principles concerning the diffusion of cinematographic and audiovisual works by the editors of television services, https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000342173/

[111] Law of 30 September 1986, Art. 27 and 33 (Loi Léotard, mentioned in a footnote above in the document).

in Article 33-2 of the Law of 30 September 1986. The prominence obligations are now specified in Articles 27 and 29 of Decree No. 2021-793 of 22 June 2021.[112]

Prominence obligations are applicable to the following services, established in France or falling within the competence of France within the meaning of Article 43-2 of the Law of 30 September 1986:

- catch-up television services whose offering includes at least 10 long-form cinematographic works or 10 audiovisual works (compared to, respectively, 20 cinematographic works and 20 audiovisual works in the previous Decree);
- other on-demand audiovisual media services, other than those mainly devoted to pornographic and incitement-to-violence programmes, whose offering includes at least 10 long-form cinematographic works or 10 audiovisual works, which have a net annual turnover of more than 1 million euros and whose audience exceeds 0.1 % of the total audience in France of the category of on-demand audiovisual medial service to which they belong.[113]

Prominence obligations are set out in article 29 of the Decree, which provides that, under the conditions specified in the agreement (licence) with ARCOM, service publishers shall at any time reserve a substantial proportion of the works whose prominence is ensured otherwise than by the mere mention of the title, to European works or works of original French expression. The decree provides that, "taking into account the personalization capabilities of users", service publishers can ensure this prominence, in particular:

1 ° On their home page, in particular by the exhibition of visuals, the provision of trailers and specific sections;
2° In the recommendations of content, individualized or not, suggested by the publisher to its users;
3° In searches for programs initiated by the user;
4° Within the promotional campaigns of the service.

Non-compliance with the prominence obligations may result in the full range of administrative sanctions for non-compliance with broadcasting regulations:[114]

- A formal warning / cease and desist (formal notice)
- If the person subject to the formal notice does not comply with it, one of the following sanctions:

1° The suspension, for a maximum of one month, of the edition, broadcast or distribution of the service or services, a category of program, a part of the program or one or more advertising sequences;

[112] Décret n° 2021-793 du 22 juin 2021 relatif aux services de médias audiovisuels à la demande, https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043688681.
[113] Decree of 22 June 2021, Art. 27, mentioned in a previous foonote above in the document.
[114] Law No. 86-1067 of 30 September 1986, Articles 42 and 42-1, mentioned in a previous footnote above in the document.

2° The reduction of the duration of the authorisation or the agreement (licence) with ARCOM within the limit of one year;
3° A financial penalty possibly accompanied by a suspension of the edition or distribution of the service or services or part of the program; or
4° The withdrawal of the authorisation or the unilateral termination of the agreement (licence) with ARCOM.

In addition, ARCOM may decide, subject to the confidentiality protected by law, to publish, either in the Official Journal, or on a communication service to the public by electronic means published by it, or by these two means, the sanction it has imposed.

Lastly, the monitoring of the prominence obligation is on the basis of annual declarations by the relevant services. Providers must retain the relevant data and provide data on two dates on the previous exercise. ARCOM is considering an evolution of the system, by resorting to an external service.

4.4.2.3 Other national rules on prominence including services of general interest

France has chosen to implement the possibility offered by Article 7a of the AVSM Directive to adopt measures to ensure the appropriate prominence of audiovisual media services of general interest.

To that effect, Article 10 of Ordinance No. 2020-1642 of 21 December 2020 inserted a new Article 20-7 in the Law of 30 September 1986. This article provides that, as of 1 January 2022 operators that determine the modalities of presentation of services on user interfaces[115] whose number of users or units marketed on French territory exceeds a threshold set by decree shall ensure, within a period specified by the same decree, appropriate visibility of all or part of services of general interest under conditions specified by ARCOM.[116] This obligation does not apply to interfaces that exclusively offer services of the same publisher, a publisher and its subsidiaries, or a publisher and subsidiaries of the company that controls it.

Services of general interest are further defined as services published by public service media publishers (as mentioned in Title III of the Law of 30 September 1986) for the exercise of their public service missions. However, after public consultation, ARCOM may include, in a proportionate manner and having regard to their contribution to the pluralistic nature of currents and thought and opinion and cultural diversity, other audiovisual communication services. It shall make public the list of those services.[117]

[115] Ordinance No. 2020-1642 of 21 December 2020, referenced in a previous footnote above in the document. The article defines user interfaces as: "any device offering the user a choice among several audiovisual communication services or among programs derived from those services, which are: 1° Installed on a television set or equipment intended to be connected to the television;
2° Installed on a connected speaker; 3° Made available by a distributor of services; 4° Made available within an application store". Decree, Article 20-7, I.
[116] Loi Léotard, Article 20-7, II, previously mentioned in a footnote.
[117] Loi Léotard, Article 20-7, II, previously mentioned in a footnote.

Article 20-7 further provides that, "taking into account the personalization capabilities of users", appropriate visibility can be ensured in particular by highlighting: 1° On the home page or screen; 2° In recommendations to users; 3° In the results of user-initiated searches; or 4° On the devices of remote control of the equipment giving access to the services of audiovisual communication. The chosen form of presentation must also guarantee the identification of the publisher of the service promoted.[118]

Operators must report to ARCOM, in accordance with procedures determined by the latter, on the measures they implement for the application of these obligations. ARCOM publishes a periodic review of the application of these measures and their effectiveness.[119]

Lastly, in case of non-compliance with these obligations, ARCOM may give notice to the operator to comply within a certain period of time, and, when the operator subject to the formal notice does not comply with it, may impose a financial penalty (up to 3% of turnover excluding taxes, achieved during the last financial year closed, calculated over a period of 12 months, and up to 5% in the event of a further breach of the same obligation).[120]

While Article 20-7 (II) (Loi Léotard) lists prominence tools, it leaves the scope of application (*rationae personae*) to be detailed through a decree. Therefore, a draft decree implementing Article 20-7 of the Law (Loi Léotard) has been submitted for public consultation.[121] This draft decree provides for two minimum thresholds:

The first (Article 2(I) of the Draft Decree) applies to user interfaces (minimum threshold of 500 000), delivered directly from audiovisual equipment, whether acquired by the user at the time of purchase or provided as part of an offering of audiovisual services; which covers in particular televisions, video projectors, peripherals connected to televisions when they display a choice among several audiovisual media services (gateway multimedia, game consoles, etc.) and speakers providing voice assistants.[122] This threshold is set at 500 000 user interfaces in service on French territory.[123] It is calculated on the basis of the last calendar year.[124]

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[118] Ibid.
[119] Loi Léotard, Article 20-7, III, previously mentioned in a footnote.
[120] Loi Léotard, Article 20-7, IV, previously mentioned in a footnote.
[121] Public consultation on a draft decree implementing Article 20-7 of Law No. 86-1067 of 30 September 1986 on freedom of communication, setting the thresholds for the application of the obligations to highlight services of general interest on user interfaces,
https://www.culture.gouv.fr/Thematiques/Audiovisuel/Publications/decret-SIG-22102021.
The draft decree is available under Annex I:
https://www.culture.gouv.fr/fr/content/download/297804/pdf_file/2021.10.22%20Consultation%20publique%20de%CC%81cret%20visibilit%C3%A9%20SIG.pdf?version=2.
[122] Article 2-I of the draft decree implementing Article 20-7 of Loi Léotard.
[123] Article 2-I of the draft decree implementing Article 20-7 of Loi Léotard.
[124] Article 2-III of the draft decree implementing Article 20-7 of Loi Léotard. For the purposes of this threshold, user interfaces are considered to be a single user interface if they meet the three following conditions:
- they are made available by equipment of the same nature;
- they are made available by the same manufacturer or the same brand of said equipment;
- they are made available by the same operating system (Article 2-II).
However, when the equipment that makes the user interface available is provided as part of an offering of audiovisual communication services (IPTV box, certain SAT/IP decoders, etc.), user interfaces that are made available by equipment of the same nature and by the same service provider (Ibid) are considered to be a single user interface.

The second (Article 3 of the Draft Decree) applies to user interfaces (minimum threshold of 5 million unique visitors per month), provided by distributors of audiovisual services available online, or provided within application stores (user interfaces independent of the user's terminal). It is set at 5 million unique visitors per month for each user interface on French territory, and is calculated on the basis of the last calendar year.[125]

This draft decree was notified to the European Commission in accordance with Directive 2015/1535 9 September 2015 "laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society service".

In a communication of 7 July 2022, the European Commission considered that by providing for an application to operators established outside France, the French rules "are likely to constitute an unjustified restriction on the freedom to provide information society services within the internal market".[126]

The Commission also considers that the French rules could contravene the prohibition in Article 15 on imposing a general monitoring obligation on information society services:

> *an interpretation or practical application of obligations which, in order to ensure compliance with article 20 (7), would require the provider of user interfaces constituting an intermediate service to monitor generally or actively engage in information surveys for all or substantially all of the information provided through their services, might raise questions of compatibility with article 15, paragraph 1 of the E-Commerce Directive.*

So far no decree or draft decree has been adopted or released.

4.5 GB - United Kingdom

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4.5.1 Prominence as a principle deriving from national constitutional law

The prominence principle does not derive from national constitutional law. The next sections will further explain where the two types of prominence rules, respectively prominence of European works and of public service broadcasting (PSB), derive from in national law in the UK.

[125] Article 3 of the draft decree implementing Article 20-7 of Loi Léotard.
[126] Commission communication - TRIS/(2022) 02356, https://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search.detail&year=2022&num=194.

4.5.2 Rules on prominence in national law

4.5.2.1 Overview

In the UK, the question of prominence in a linear television industry was introduced in 1997 by the then media regulator, the Independent Television Commission (ITC), to deal with an abundance of offerings and to ensure access and distribution of diverse, pluralistic and quality programming. With this broader objective, two types of prominence rules were introduced in national law in the UK, respectively rules on prominence of European works, and rules on prominence of public service broadcasting (PSB).

The first type of measure derives from the transposition into national legislation of the Audiovisual Media Services Directive (AVMSD). Indeed, given Brexit and the fact that the UK was in its transition period with the EU at the time of the transposition of the revised AVMSD, the directive was also required to be transposed into UK law, through the 2020 Audiovisual Media Services (AVMS) Regulations. This regulation also included the revised rules on prominence of European works, as amendments to the 2003 Broadcasting Act.[127]

However, the 2018 AVMSD provisions on prominence for general interest services (Art. 7a) were not transposed in the 2020 AVMS Regulations. Prior to this revision, the UK already had another regulatory instrument to grant prominence to a specific category of public interest services, namely PSB content and services. These rules derive from the UK 2003 Communications Act, which required Ofcom[128] to develop a Code of Practice for electronic programme guides (EPGs) that included prominence rules for PSBs. This Code was recently revised by Ofcom in 2019 and should be part of the expected new Media Bill of the UK Government.

4.5.2.2 Rules on prominence of European works

With the amendment to section 368CB, the AVMS Regulations 2020 have literally transposed Art. 13 of the 2018 AVMSD by prescribing that (1) "a person providing an on-demand programme service must secure that, in each year, on average at least 30% of the programmes included in the service are European works" , and (2) that "a person providing an on-demand programme service must ensure the prominence of European works in the service".[129] The government then required Ofcom to provide further guidance on the implementation of these new rules, especially for the newly included VOD providers. Such guidelines were recently published in 2022 by Ofcom,[130] and they closely follow the Commission guidelines on European works.

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[127] UK Government (2020) Audiovisual Media Services Regulations 2020, No. 1062 available at: https://www.legislation.gov.uk/uksi/2020/1062/made.

[128] Ofcom is the independent media and communication regulatory authority. See: https://www.ofcom.org.uk/

[129] UK Government (2020) Audiovisual Media Services Regulations 2020, No. 1062 available at: https://www.legislation.gov.uk/uksi/2020/1062/made.

[130] Ofcom (2022) Guidance for ODPS providers on obligations relating to European works. Available at: https://www.ofcom.org.uk/__data/assets/pdf_file/0031/243769/ODPS-European-works-guidance.pdf.

When it comes to its material scope, the legal text clarifies that the definition of European works remains the same as the AVMSD one as it includes works that are deemed European works by Art. 1(4) of the same European Directive.[131] Given the definition laid down in the AVMSD, UK works continue to qualify as European works despite Brexit.

Regarding its scope of application, this new provision was extended to cover not only linear services but also VOD ones. The regulation therefore imposes requirements on VOD providers[132] to ensure that in each year, on average at least 30% of the programmes included in their services are European works and to make this content prominent. However, in alignment with the AVMSD, the text also sets out applicable exemptions where a service has a low turnover, a low audience, or where requirements are impracticable or unjustified because of the nature or theme of a service.[133]

When it comes to the definition of "prominence" and how it could or should be achieved, both the regulation and Ofcom's guidance do not set specific guidelines or additional requirements. Since in Ofcom's view, "there is no one-size-fits-all solution for securing prominence of European works",[134] this new requirement should be met in ways that are relevant to the nature of a service and its user interface. Ofcom therefore simply encourages providers "to be innovative in how they comply with this requirement, and to make use of new techniques and tools as they develop".[135] Even though Ofcom highlights the complexities of today's Internet-connected environment, arguing that numerous features of the user interface can make certain programmes more or less prominent, it does not prescribe any specific technical means that VOD providers can use to fulfil these new requirements, which are therefore free to implement them as they see fit.

Finally, Ofcom intends to take a proportionate approach to securing compliance, which is consistent with the approach it has been taking with regard to related obligations on linear broadcasters. Such an approach focuses on collecting data from providers on how they are meeting their requirements, while being prepared to use enforcement powers where necessary. The data that will be collected includes information on European works present on such services; how they are making them; and, where relevant, reasons for why exemptions apply.[136] If concerns around a possible contravention arise, Ofcom has the power to open an investigation, issue an enforcement notification, and where appropriate impose a financial penalty.[137]

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[132] More specifically, Ofcom defined them as on-demand programme services (ODPS) which are considered a category of VOD service regulated under Part 4A of the Communications Act 2003.

[133] UK Government (2020) Audiovisual Media Services Regulations 2020, No. 1062, Section 368CB-Quota for European works. Available at: https://www.legislation.gov.uk/uksi/2020/1062/regulation/30/made?view=plain.

[134] Ofcom (2022) Guidance for ODPS providers on obligations relating to European works, pp. 8. Available at: https://www.ofcom.org.uk/__data/assets/pdf_file/0031/243769/ODPS-European-works-guidance.pdf.

[135] Ibid. p. 9.

[136] Ibid. p.11.

[137] The penalty should be proportionate to the contravention and not exceeding 5% of annual turnover or GBP 250 000 (about EUR 285 000). If following investigation Ofcom then finds that a provider has "seriously, deliberately, repeatedly or recklessly breached" one of these requirements, the imposition of a statutory sanction will be considered, following Ofcom's standards procedures in this area. For more info see: Ofcom

4.5.2.3 Other national rules on prominence including services of general interest

The prominence provisions for general interest services (Art. 7a AVMSD) were not transposed into national legislation since the UK already has an existing regulatory instrument which partially fulfilled the objective of such European provisions. The 2003 Communications Act (Section 310(2))[138] required Ofcom to draft and maintain a Code of Practice for the provision of EPGs, which should have included "appropriate prominence" provisions for PSB channels and programmes.[139] Following this legislation, Ofcom published its EPG Code in 2010, setting out the practices to be followed by EPG providers, in order to ensure prominence on linear television of the main five PSB channels (BBC1, BBC2, Channel 3 services, Channel 4 and Channel 5).[140]

However, as online media consumption increased over the years, together with the take-up Internet-connected devices, in 2017, the Digital Economy Act introduced a new duty for Ofcom to review the EPG Code. The aim was therefore to revise a rather outdated regulatory framework and adapt to the rapid and significant changes that the audiovisual media industry has undergone throughout those years.

As part of the 2018 revision of the EPG Code, Ofcom proposed a set of recommendations to its government which aimed to provide a revision of the existing Code and the extension of EPG(-like) prominence measures, in order to maintain prominence of a broader range of PSBs channels and services, not only on linear, but also on on-demand services across a range of connected devices.[141] This report is based on such recommendations as well as on the high-level principles of this new legislative framework published by the UK Government.[142]

The primary policy objective of this new regime is to ensure PSBs remain available and prominent and to support their future sustainability.[143] The beneficiaries of these new prominence rules are therefore the five main PSB organisations, with the main difference

(2015) Procedures for the consideration of statutory sanctions arising in the context of on-demand programme services. Available at: https://www.ofcom.org.uk/__data/assets/pdf_file/0034/68794/revised_sanctions_procedures.pdf.

[138] UK Government (2003) Communication Act 2003. Available at: https://www.legislation.gov.uk/ukpga/2003/21/contents.

[139] UK Government (2003) Communication Act 2003, Part 3, Chapter 4, Section 210. Available at: https://www.legislation.gov.uk/ukpga/2003/21/notes/division/5/3/4/48.

[140] Ofcom (2010) Code of Practice on Electronic Programme Guides. United Kingdom. Available at: https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/epg-code.

[141] Ofcom (2019) Review of prominence for public service broadcasting. Recommendations to Government for a new framework to keep PSB TV prominent in an online world. London, Available at: https://www.ofcom.org.uk/consultations-and-statements/category-1/epg-code-prominence-regime.

[142] At the moment of writing, the final legislation has not been approved yet. Nevertheless, the upcoming UK Media Bill is expected to introduce a new prominence regime for on-demand television, as determined by Ofcom, to ensure that public service content is both available and easy to find on designated TV platforms, such as smart TVs, connected TVs, streaming sticks and set-up-boxes. UK Government DCMS, Department for Digital, Culture, Media and Sport (2022) Up next - the Government's vision for the broadcasting sector. 29 April. London. Available at: https://www.gov.uk/government/publications/up-next-the-governments-vision-for-the-broadcasting-sector/up-next-the-governments-vision-for-the-broadcasting-sector.

[143] Ofcom (2019) Review of prominence for public service broadcasting. Recommendations to Government for a new framework to keep PSB TV prominent in an online world. London, Available at: https://www.ofcom.org.uk/consultations-and-statements/category-1/epg-code-prominence-regime, p.1.

that not only their linear channels will be included but also their on-demand services and related apps (such as BBC iPlayer, All4, and ITV Hub), and their content which is distributed outside the player environment in this more disaggregated way.[144]

These prominence rules constitute a form of indirect subsidy that has been historically used in the UK media policy context to support PSBs, "in exchange" for their duties and obligations, which include, but are not limited to, the provision of universal, freely accessible, diverse and pluralistic offerings.[145] By achieving this public policy objective, Ofcom intends to foster media pluralism and diversity indirectly since UK PSBs have to respect their legal remits and fulfil their public interest missions by providing high-quality original programming that "informs, educates and entertains".[146]

When it comes to the scope of application, the UK Government has stated that the new prominence rules should apply to providers of designated TV platforms, intended as "those used by a significant number of UK viewers as a main way of watching television content on demand".[147] Based on the white paper and Ofcom's recommendations,[148] TV platform providers that are expected to be in scope include Smart TV manufacturers, pay TV operators, and global TV platform providers, which offer connected TV services and devices. However, to create more future-proof provisions, Ofcom suggested a regime that can be more easily and quickly adapted to technological changes and innovations, without however being too prescriptive.[149] To this end, the scope of application may be expanded and adapted in the future, but it should leave space to PSBs and TV platform providers to determine the adequate level of "appropriate prominence" and how it should be transposed to their services.

Finally, with regard to the implementation, this new regime is to be enforced by Ofcom, the UK independent regulator of the communication sector. In its role, Ofcom will be required to develop and maintain guidance on the new framework and will therefore act as an independent supervisory authority and monitoring body. However, at the moment of writing, due to the current political uncertainties, there are no further details on the

[144] Ibid.
[145] European Commission, Directorate-General for Communications Networks, Content and Technology, Parcu, P., Brogi, E., Verza, S., et al., Study on media plurality and diversity online: final report, Publications Office of the European Union, 2022, https://data.europa.eu/doi/10.2759/529019 pp. 133-134.
[146] Ofcom (2019) Review of prominence for public service broadcasting. Recommendations to Government for a new framework to keep PSB TV prominent in an online world. London, Available at: https://www.ofcom.org.uk/consultations-and-statements/category-1/epg-code-prominence-regime, p. 2.
[147] DCMS (2022) Up next - the Government's vision for the broadcasting sector. 29 April. London. Available at: https://www.gov.uk/government/publications/up-next-the-governments-vision-for-the-broadcasting-sector/up-next-the-governments-vision-for-the-broadcasting-sector (accessed 23 September 2022).
[148] Ofcom (2019) Review of prominence for public service broadcasting. Recommendations to Government for a new framework to keep PSB TV prominent in an online world. London. Available at: https://www.ofcom.org.uk/consultations-and-statements/category-1/epg-code-prominence-regime.
[149] DCMS (2022) Up next - the Government's vision for the broadcasting sector. 29 April. London. Available at: https://www.gov.uk/government/publications/up-next-the-governments-vision-for-the-broadcasting-sector/up-next-the-governments-vision-for-the-broadcasting-sector (accessed 23 September 2022).

expected guidance and related prominence measures that Ofcom will have to produce, nor on the related enforcement and monitoring framework.[150]

4.5.3 Key findings on the prominence rules and other developments

The report shows that while prominence rules for European works are aligned with the AVMSD transposition, the revision of PSBs' prominence rules represent an interesting case of the emergence of new prominence regimes online.

While the initial rationale for EPG prominence rules on linear TV was the equitable division of scarce transmission capacity, as the broadcasting market developed, interventions in this area became driven by the intent to safeguard public service broadcasting. If left unchecked, commercial broadcasters might have not served commercially unattractive groups and minorities, nor provided the desired diversity of content, universally accessible to all publics.[151] Prominence rules for PSBs can provide "important cultural and societal benefits"[152] as the driving public interest objectives of this framework is to enable these organisations to fulfil their public purposes and remit and ensure that their content can be easily accessed on both linear channels and Internet-connected services.

Electronic programme guides are not, however, the main access point for audiovisual media services anymore as users can consume such content on an ever-growing number of platforms and intermediary services online that all compete for audiences' time and attention. Creating new prominence regimes online that can adapt to these new forms of intermediation raises complex questions at the intersection between media pluralism, media freedom and freedom of expression.[153]

Within this context, the UK represents an example of how regulators and governments built on traditional regulatory instruments to address these questions through the extension of a traditional regulatory instrument with both a limited material scope and scope of application.

Compared to new prominence rules like the German ones,[154] due to the limited power of intervention of Ofcom, the proposed material scope of these prominence rules is

[150] Due to the recent change in Government, the new Media Bill which sets out also the revised prominence rules has been postponed. Even though the Bill is expected to pass by December 2022, it is still unclear whether parts of the proposal will be revised and when Ofcom's duties to draft the guidance will enter into force.
[151] See also: Mazzoli, Eleonora Maria. 2020. "Online Content Governance: Towards a Framework for Analysis for Prominence and Discoverability." Journal of Digital Media & Policy 11 (1); and Sloot, Bart Van Der. 2012. "Walking a Thin Line: The Regulation of EPGs." JIPITEC, 138–47. http://nbn-resolving.
[152] DCMS (2022) Up next - the Government's vision for the broadcasting sector. 29 April. London. Available at: https://www.gov.uk/government/publications/up-next-the-governments-vision-for-the-broadcasting-sector/up-next-the-governments-vision-for-the-broadcasting-sector.
[153] Mazzoli, Eleonora Maria, and Damian Tambini. 2020. "Prioritisation Uncovered. The Discoverability of Public Interest Content Online." Strasbourg. https://rm.coe.int/publication-content-prioritisation-report/1680a07a57.
[154] See the report above 1.5.3 for details.

narrower and limited only to PSB channels and content.[155] Nevertheless, this solution can still be suitable and beneficial for a country like the UK,[156] which has a diverse PSB system, with mixed-funding models and different public service remits. However, having a mandated prominence for PSB in countries with authoritative governments and/or in troubled democracies where PSBs are not independent from the state and from political interference could be problematic.[157]

Similarly to other types of prominence regime though, the proposed measures apply to a limited set of new Internet-connected devices offered by media platforms and their user interfaces, with the added possibility to be flexible and extend this in the future. However, the question of how this will look like in practice is still open. During the implementation phase, the regulator and industry stakeholders involved will have to strike a balance between the desired public policy outcomes without an excessively prescriptive approach, leaving sufficient freedom to innovate an effective working market.[158]

4.6 IT - Italy

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4.6.1 Prominence as principle deriving from national constitutional law

One possible link to the concept of prominence in general might be found in the Italian Republic Constitution[159] at Article 43, which states that, with the purposes of general utility, the law may originally reserve or transfer, by expropriation with compensation, to the state, public bodies or communities of workers or users, specific companies or categories of

[155] Ibid., and European Commission, Directorate-General for Communications Networks, Content and Technology, Parcu, P., Brogi, E., Verza, S., et al., Study on media plurality and diversity online: final report, Publications Office of the European Union, 2022, https://data.europa.eu/doi/10.2759/529019

[156] Mazzoli EM (2021) A Comparative Lens on Prominence Regulation and Its Implications for Media Pluralism. A Working Paper. In: TPRC49 - The research conference on Communications, information and internet policy, 2021, pp. 1–20. SSRN Electronic Journal. DOI: 10.2139/ssrn.3898474.
European Commission, Directorate-General for Communications Networks, Content and Technology, Parcu, P., Brogi, E., Verza, S., et al., Study on media plurality and diversity online: annexes, Publications Office of the European Union, 2022, https://data.europa.eu/doi/10.2759/150078, pp. 133-134.

[157] Mazzoli, Eleonora Maria. 2021. "A Comparative Lens on Prominence Regulation and Its Implications for Media Pluralism. A Working Paper." In TPRC49 - The Research Conference on Communications, Information and Internet Policy, 1–20. SSRN Electronic Journal. https://doi.org/10.2139/ssrn.3898474. p. 10.

[158] European Commission, Directorate-General for Communications Networks, Content and Technology, Parcu, P., Brogi, E., Verza, S., et al., Study on media plurality and diversity online: final report, Publications Office of the European Union, 2022, https://data.europa.eu/doi/10.2759/529019 p. 136-137.

[159] Italian Constitution, Costituzione Italiana, as last updated 7 November 2022, http://www.senato.it/sites/default/files/media-documents/ROSSA_Costituzione_testo%20vigente_agg_7_11_2022.pdf.

companies, which refer to essential public services or sources of energy or to situations of monopoly in the prominent public interest. This principle was used in the first decades of broadcasting activity in Italy, which was initially reserved to the State.

In fact, the Italian law had always recognised radio and television service of "general interest": for instance Law no. 103 of 14 April 1975[160] indicated that the broadcasting activities of radio and television programs constitute, pursuant to aforementioned Article 43 of the Constitution, an essential public service of a pre-eminent general interest, aimed at broadening the participation of citizens and contributing to social and cultural development of the country, in accordance with the principles enshrined in the Italian Constitution.

4.6.2 Rules on prominence in national law

4.6.2.1 Overview

Some references to prominence in general, in the Italian framework, can be found in the pre-eminent general interest qualification of the "broadcasting of radio or television programs, carried out by any technical means", confirmed by the law of 6 August 1990, n. 223, which also entitled private providers to carry out radio and television broadcasting activities.

Article 7 of the legislative decree of 31 July 2005, no. 177[161] (implementing the "old" AVMSD) qualified the activity of information on an audiovisual or a radio media service as "a service of general interest" and this principle was reaffirmed in article 6, paragraph 1, of the new Italian AVMS Code adopted in 2021 by legislative decree no 208.[162]

Moreover, the agreement[163] signed in 2017 between the Ministry of Economic Development and RAI, the Italian public service broadcaster, regarding the renewal of the concession of public service broadcasting, stated, in Article 1, that such a concession regards multimedia, radio and TV public service "to be intended as a service of general interest" consisting in the production and broadcasting on all distribution platforms of audiovisual and multimedia content, directed, also through the use of new technologies, to guarantee complete and impartial information, to promote education, civil growth, the ability of judgment and criticism, progress and social cohesion, promote the Italian

[160] Law of 14 April 1975 on radio and television broadcasting, https://www.gazzettaufficiale.it/eli/id/1975/04/17/075U0103/sg.

[161] Legislative Decree on radio and television, Decreto legislative 31 luglio 2005, n. 177. Testo unico della radiotelevisione, http://www.gazzettaufficiale.it/eli/gu/2005/09/07/208/so/150/sg/pdf.

[162] Legislative Decree of 8 November 2021 implementing the revised EU AVMSD, Decreto legislative 8 novembre 2021, n. 208, https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2021-11-08;208.

[163] The Italian framework regarding public service broadcasting foresees a contract between the State, represented by the Ministry of Economic Development (from 2022 Ministry of Enterprises and Made-in-Italy) and the subject operating as public service broadcaster. Within this contract are detailed the further obligations and goals that the PSB must guarantee by its activity.

language, culture, creativity and environmental education, safeguard national identity and ensure social benefits.

4.6.2.2 Rules on prominence of European works

AGCOM, the Italian regulatory authority, introduced prominence of European works for video on-demand services already in 2015,[164] when the old 2010 AVMSD was in force. The legal framework, at the time, listed three non-mandatory criteria for the promotion of European works on VOD services: a share in the catalogue, an investment quota and prominence. While the first two were traditionally adopted by AVMS providers as closer to the previous regime, applicable only to linear services, prominence was a complete novelty. AGCOM established a technical table, with representatives of all the involved stakeholders (AVMS providers, authors, producers), to elaborate in a co-regulatory initiative the possible criteria to ensure a common understanding of prominence, and the tools with which to actually do so.

To encourage the use of this criterion by VOD providers, the 2015 Regulation introduced a reward mechanism related to discounts with regard to the other quotas.

Since 2019, however, the legal framework has changed, reflecting the revised AVMSD, even though it hadn't been implemented yet. This means that Article 13 of the 2018 AVMSD was implemented in Italy before the rest of the Directive, and prominence became mandatory.

As a result, the AGCOM Regulation needed to be amended by deliberation no. 24/19/CONS (a public consultation on a revised regulation, pursuant to the 2022 AVMS Code, is about to be concluded with the adoption of a revised Regulation, however the provisions regarding prominence are not subject to any amendment).

In December 2021, the revised AVMSD was nationally transposed, by the legislative decree no. 208/2021 (AVMS Code). Article 55 is the main provision for obligations for VOD providers transposing the AVMSD requirement of Article 13, paragraph 1. The definition of "European works" also follows the one of the AVMSD and is laid down in the AVMS Code at Article 3, lett. cc).

The shift from establishment of prominence on a voluntary basis to a mandatory framework did not much affect the system as introduced in 2015, which consists in a list of adopted criteria. The main difference is the general approach of the regulation: the 2015 provisions introduced a reward system when a provider reached a certain score in terms of prominence criteria, while now, to respect the mandatory nature, each provider is required to achieve a minimum score.

[164] AGCOM Deliberation n. 149/15/CONS, "Approvazione del provvedimento di definizione dei criteri tecnici ed editoriali di messa in rilievo delle opere europee sui servizi di media audiovisivi a richiesta di cui all'art. 4-bis, comma 1-bis, del regolamento allegato alla delibera n. 66/09/CONS", https://www.agcom.it/documents/10179/1662856/Delibera+149-15-CONS/d0c0d696-179c-433a-9934-2544caabd368?version=1.1.

Providers may choose from the prominence criteria in order to reach a certain score in the two main categories: A) positioning in the catalogue and B) use of European works during commercials, subscriptions campaigns and promotion of the catalogue.

The 2015 provisions only mentioned "prominence" without providing a definition. Since the modification of 2019 and now in the latest AVMS Code, article 55, para 7, states:

> *(…) In particular, the Regulation (that will be adopted by AGCOM pursuant these articles, ndr), when defining the arrangements for the fulfilment of programming obligations, provides, irrespective of any methods, processes or algorithms used by providers of on-demand audiovisual media services for the customisation of user profiles, including the adoption of tools such as the provision of a dedicated section on the main access page or a specific category for searching for works in the catalogue and the use of a quota of European works in advertising or promotion campaigns for the services provided.*

This means the law enshrined the main principles of the system already created by AGCOM, which is quite a noteworthy result.

The criteria are:

- Positioning in the catalogue
  - Not less than 30% of "visible" works must be EU works. Visibility means providing information (titles, icons, trailers, etc.) concerning works.
  - Specific events (nearly 1 month long, once a year) promoting exclusively European works through social networks.
  - In each of the main sections of the catalogue (where applicable), not less than 20% of "visible" works must be EU works.
  - Not less than 20% of EU works featuring in a multiplatform promotional campaign.
  - Specific section, and/or a banner providing a link to such a section, that includes all EU works featuring in the catalogue.
  - Within multiplatform promotional campaigns (TV, radio, magazines, etc.) during a year, EU works shall be not less than 20% of the works promoted in such campaigns.
  - Keeping EU works in the catalogue for not less than 7 days (unless this is in contrast with the distribution rights)
- Use of European works in the promotion of the VOD service
  - Using trailers or visuals promoting EU works in the "première" section of the catalogue.
  - Providing possibilities to search for EU content.
  - No less than 20%of works featuring in the recommendations must be EU works.
  - Highlighting EU origin when describing the main features of a work.
  - "Theme operations" featuring both EU and non-EU works.
  - The share of EU works in commercial communications sent to users must be no less than 30%.
  - Usage of reviews, articles or other information related to EU works, including ratings for reception (critics and audience response).

Each criterion is assigned with a score. Providers are free to choose among the different criteria, however they need to reach a certain threshold, meaning they are required to implement multiple criteria.

In 2020, the first monitoring activity was carried out, proving that all VOD services under Italian jurisdiction had satisfied the prominence obligations. AGCOM sends a yearly request for the data regarding the obligations regarding European works directly to the AVMS providers, which are requested to reply by 30 September of each year by filling in the sent form, referred to as the QVOD. In case of missing answers or failure to report correct data, the providers may be fined with an administrative sanction up to EUR 100 000.

Moreover, AGCOM uses and processes the data regarding the monitoring of schedules and catalogues offered by AVMS providers, conducted by specialized institutes, the data contained in the communications transmitted by AVMS providers and independent producers pursuant to AGCOM's regulations, as well as the results of the assessment conducted each year, by sending a very detailed request for information to all involved AVMS providers (the aforementioned QVOD form).

AGCOM may also request from any subject the transmission of further documents, communications or documents deemed useful, including through requests for information addressed to independent producers that might have been indicated in the forms submitted by the AVMS provider.

AGCOM is also mandated by law with a general power of inspection and to conduct regular, even systematic, inspection programs.

It is worth highlighting that the law (article 67 of the AVMS Code) foresees very high sanctions for infringements of the provisions regarding the promotion of European works: from a minimum of EUR 100 000 up to EUR 5 000 000, or even up to 1% of yearly revenues when such a percentage is higher than EUR 5 000 000.

4.6.2.3 Other national rules on prominence including services of general interest

Italy is among the few countries which have transposed Article 7a AVMSD into their national legislation, given the non-mandatory nature of the proposal.

The provision is implemented by Article 29 of the AVMS Code, para 1 of which states that media services of general interest "provided via any means of reception or access and through any platform" have to be given "adequate prominence" in order to "guarantee to the widest possible audience pluralism, freedom of expression, cultural diversity and the effectiveness of the information".

Para 2 of the same article foresees that AGCOM, the Italian NRA, will adopt guidelines to determine how to qualify a service as of "of general interest" and to identify the criteria the following subjects have to comply with to ensure compliance with this provision:

- the manufacturers of equipment suitable for the reception of television or radio signals
- the providers of services for indexing, aggregation or research of audiovisual content

- the providers who determine how the content is presented to the users on user interfaces

Pursuant to Article 29, AGCOM, in June 2022, adopted Deliberation no. 149/22/CONS,[165] launching a proceeding, currently ongoing, which will be followed by a public consultation on the draft guidelines. In the deliberation, AGCOM took into consideration also the intent of the legislator to preserve the availability and the accessibility of content via the digital terrestrial platform and to ensure that the related ancillary services - such as the EPG and user interfaces, as well as the application programming interfaces (API) - are accessible, with a view to simplification and user-friendliness, in order to improve the associated experience. In addition, AGCOM considers that the increasing use of devices connected to the Internet, such as smart TVs and the latest generation of decoders, allows the user to access both audiovisual media services offered by providers operating on a digital terrestrial platform, and audiovisual media services offered by providers operating on other platforms (satellite and Internet).

AGCOM recognises also that the equipment manufacturers often provide tools for software-based navigation that offers the user a visual representation of the available content offerings - consisting, for example, of proprietary applications, tabs with direct links to specific programs and featured content suggested on the basis of the user's previous choices - which, although partially customisable by the user, is initially proposed on the basis of criteria not known a priori. AGCOM then underscores the need to find the right balance between, on the one hand, the imposition of ad hoc requirements aimed at preserving the availability and accessibility of broadcasting digital terrestrial services and, on the other hand, the opportunity to continue to guarantee the widest possible choice for the user.

4.6.3 Key findings on the prominence rules and other developments

The first thing that emerges when we explore the "two prominences" in the Italian framework is the different degree of development, with the "EU works" prominence running smoothly in a consolidated system for many years and the "general interest" prominence being at a very embryonic stage, with the proceeding still ongoing and a soon-to-be-launched public consultation of draft guidelines.

For the sake of completeness, it is appropriate to report also on the other aims of the deliberation n. 149/22/CONS: Article 29 AVMS Code includes also, apart from the

[165] Available at the following link: https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_FnOw5lVOIXoE&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_FnOw5lVOIXoE_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_FnOw5lVOIXoE_assetEntryId=27063516&_101_INSTANCE_FnOw5lVOIXoE_type=document.

implementation of Article 7a of the AVMSD, a series of provisions regarding logical channel numbering (LCN), which is also to be implemented by AGCOM.

The law states that, without prejudice to the right of users to reorder channels on digital television and to the possibility for pay TV operators to introduce additional program guides and services, AGCOM, in order to ensure fair, transparent and non- discriminatory conditions, has the right to adopt an automatic numbering plan for free-to-air and pay digital terrestrial television channels, and to establish with its own regulation the modalities of allocation of LCN positions to audiovisual media service providers.

The Ministry of Economic Development (now renamed Ministry of Enterprises and Made in Italy), within the framework of the authorisations and licenses issued for the exercise of DTT broadcasting, assigns to each channel its LCN position, based on the numbering plan adopted by AGCOM. The attribution of numbers to subjects already qualified for television broadcasting using digital terrestrial techniques is carried out with a separate provision supplementary to the authorisation.

Finally, all devices suitable for DTT signal reception, including those enabled for Internet connection, must have installed the numbering system of the digital terrestrial television channels referred to above. This system must be easily accessible. AGCOM issues the regulatory requirements necessary for the implementation of this paragraph and adopts the measures necessary to ensure compliance by the subjects who produce or import the devices.

This highlights how the prominence of services of general interest is strictly linked to a wider plan for audiovisual media services foreseen by the Italian legislator, whose actual extent still needs to be evaluated by the national regulator.

4.7 PT - Portugal

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4.7.1 Prominence as a principle deriving from national constitutional law

Prominence, as such, is not addressed by the national constitutional law in Portugal.[166] However, some rules on media activity and on cultural protection are considered in the law and these rules do address questions by which special protection for some content can be justified. In Art. 9, it is stated that the state has the obligation to "protect and enhance the cultural heritage of the Portuguese people". Under the principle of cultural protection, the state has to "promote the democratization of culture, encouraging and ensuring the access of all citizens to cultural enjoyment and creation, in collaboration with the media (Art. 73)"

[166] Portuguese Constitution, https://dre.pt/dre/geral/en/relevant-legislation/constitution-of-the-portuguese-republic.

and it is its obligation to "promote the safeguarding and enhancement of cultural heritage, making it a vitalizing element of the common cultural identity" (Art. 78).

The national constitutional law also sets up the rules for the functioning of media. The national media regulatory agency is a constitutional requirement (Art. 39) and has to ensure respect for the regulatory norms related to media activities.

4.7.2 Rules on prominence in national law

4.7.2.1 Overview

The AVMSD 2018 was implemented in Portugal in November 2020, after the new law passed in the Parliament in October (Law n.º 74/2020, of 19th November).[167] It came into force in February 2021. The discussion and approval of the law were somewhat controversial, due to the suggestion by Portuguese filmmakers and producers that national cinema could be undermined with the proposal. Although some changes were made to the first draft of the law (namely, the inclusion of a 1% tax on the revenues of VOD services), the sector remained largely unsatisfied with the process.

4.7.2.2 Rules on prominence of European Works

The rules concerning prominence are established in the Television Law, law n.º 27/2007,[168] which has been reviewed in order to accommodate the changes dictated by the implementation of the Audiovisual Media Services Directive. Prominence concerns specifically VOD. Before the implementation, the law had established since 2011 that VOD services should give "special visibility" in their catalogue to European works and that they should adopt technical functionalities to allow the public to search the catalogue by country of origin.

The concept of prominence arises in the last version of this law (resulting from the Law n.º 74/2020, which implemented the Directive), which states that VOD should "ensure a minimum quota of 30% of European works, having to guarantee them a prominent position". No definition of prominence is provided, and the requirement of "search" technical functionalities foreseen in the previous version of the law has disappeared. Rules protecting audiovisual creative works are not limited to European works: national works are subject to even greater protection, but only in with respect to linear service providers.

Prominence is not an issue in Portugal and has not been subject to any public discussion. Although it is foreseen in the law, no further explanation has been given on how it applies to VOD. The national regulatory agency published a report on "Audiovisual

[167] Law 74/2020 of 19 November 2020 implementing the revised AVMSD, https://dre.pt/dre/detalhe/lei/74-2020-148963298.
[168] Television and audiovisual on-demand services law of 30 July 2007, https://dre.pt/dre/legislacao-consolidada/lei/2007-34561375.

production in the services of television programming" in September 2022,[169]but no additional information is provided on how prominence should be understood or what kind of standards can be expected. The regulatory agency has only a description on how the services (for the moment, only national VOD) have understood the concept and on how they are applying it, from specific banners, such as Portuguese cinema and French comedies, to regular highlights on Portuguese and European works. It does seem like VOD providers are free to decide on how to accomplish this requirement.

The national media regulatory agency (ERC) also issued a guide on the monitoring of VOD in March 2021, where the new rules are presented in a single and more streamlined document than the law.[170] However, no details are presented on how to achieve prominence nor how the ERC will supervise compliance with the law. As noted before, the previous version of the law established the obligation to include in the search tool the origin criteria, but the new version is silent in this regard.

The monitoring and supervision of the rules concerning television and audiovisual services are a task of the national media regulatory agency (ERC), an independent administrative body. Therefore, also the rules on prominence are monitored by the media agency, which has the duty to analyse "compliance with the rules on the promotion of European works" and to provide an "annual assessment". The first assessment concerning 2021 was published in September 2022 (see previous fn.).

Public authorities for the regulation of media and cinema (the ERC and the Institute for Cinema and Audiovisual) have to cooperate in order to ensure the sharing of the data necessary for the inspection of compliance with the provisions of the law, namely the investment obligations. Also, linear service providers and VOD services are required to provide the Media Regulatory Authority, on a regular basis, with all the necessary elements for the monitoring of the compliance with the obligations set out in the law (Art. 49). They also have to appoint a representative located in Portugal.

Duty of information also applies to elements that are relevant for the determination of jurisdiction, the names of directors or people in charge, and the means of contact.

Only financial penalties apply in case of lack of compliance with the prominence rule. They are established in Art. 75 of the Television Law and classified as minor offenses (with penalties ranging from EUR 7 500 to EUR 37 500). However, non-compliance with the duty of information is a serious offence, with penalties ranging from EUR 20 000 to EUR 150 000. The monitoring of the compliance is performed by the regulatory entity which has the power to initiate an administrative proceeding.

The public service has a higher obligation in terms of the promotion of Portuguese and European works. The Television Law establishes the principle of a public media service, with regard to which it sets the following requirement: "to promote the broadcasting of programs in Portuguese, of diversified genres, and to reserve a considerable part of their broadcast time for European production, dedicating percentages higher than those required

[169] https://www.erc.pt/pt/a-erc/noticias/erc-retrata-difusao-e-producao-audiovisual-em-2021-/.

[170] https://www.erc.pt/download/YToyOntzOjg6ImZpY2hlaXJvIjtzOjM5OiJtZWRpYS9maWNoZWlyb3Mvb2JqZWN0b19vZmZsaW5lLzM5Ni5wZGYiO3M6NjoidGl0dWxvIjtzOjUwOiJndWlhLXBhcmEtZmlzY2FsaXphY2FvLWRvcy1zZXJ2aWNvcy1hdWRpb3Zpc3VhaXMtYSI7fQ==/guia-para-fiscalizacao-dos-servicos-audiovisuais-a.

by this law to all television operators". The percentages can then be defined through a document (concession contract) to be signed between the State and the public company (RTP) that provides the public service. The concession contract is currently under a revision process.

4.7.2.2.1 Other national rules on prominence including services of general interest

Based on public information, there is, until now, no specific obligation regarding prominence under Article 7a AVMSD, introduced in Portugal.

4.7.2.3 Key findings on the prominence rules and other developments

Prominence rules in Portugal are recent and the national regulatory agency, which has to present a report on compliance, has not yet dedicated much attention to this matter. The law itself is not very enlightening in terms of what prominence is. The last and only report existing to date was published in September 2022 and, for the time being, it seems like VOD services can interpret the requirement freely and adopt whatever measures they feel appropriate. The VOD services mentioned in the report considering the prominence rules are only the national services, which are associated with paid television distribution services. For the time being international VOD services are not being considered.

4.8 RO - Romania

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4.8.1 Prominence as a principle deriving from national constitutional law

No rules on prominence can be found in or derived from national constitutional law.

4.8.2 Rules on prominence in national law

4.8.2.1 Overview

The Romanian Government transposed the 2018 AVMSD by adopting the Law 190 of 28 June 2022[171] to amend and complement Audiovisual Law 504/2002,[172] the Government Ordinance on Cinematography 39/2005, and Law 41/1994 on the organisation and functioning of the Romanian Radio Broadcasting Company.[173] The law entered into force on 3 July 2022. The amendments to the Audiovisual Law 504/2002 include requirements on prominence of European works for VOD services. These are not entirely new as some requirements on the prominence of European audiovisual fiction works on VOD services had previously been introduced by a Decision of the National Audiovisual Council in 2012.

There are no clear rules for the prominence of general interest content.

4.8.2.2 Rules on prominence of European works

Art. 23(1) of the Audiovisual Law foresees that VOD services under Romanian jurisdiction must reserve at least 30% of their catalogues for European works and ensure their prominence — or, in literal translation, their "promotion". This can be done by facilitating access to such works through a dedicated section for European works that is accessible from the service homepage, the possibility to search for European works in the search tool available as part of that service, the use of European works in campaigns of that service or a minimum percentage of European works promoted from that service's catalogue, for example, by using banners or similar tools. On-demand audiovisual media service providers with revenues below 2 million euros, related to the provision of audiovisual media services, or with an audience level of less than 1%, are exempted from the obligation according to Art. 23(3). According to para. (4), if a service does not provide an audiovisual media service on demand for a certain period of time, compliance with the quota and prominence obligation is evaluated in relation to the actual time of providing the respective service.

Art. 26(2-3) of the National Audiovisual Council Decision 320 of 29 May 2012 regarding the supply of on-demand audiovisual media services[174] already required VOD services to promote the European audiovisual fiction works available in their catalogues on their homepage, in equal measure, and to classify the country of origin of each audiovisual programme available in the catalogue. Non-compliance with the provisions of this decision is sanctioned according to the provisions of the Audiovisual Law (cf. Art. 40).

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[171] Law 190 of 28 June 2022 to amend and complement Audiovisual Law 504/2002, the Government Ordinance on Cinematography 39/2005, and Law 41/1994 on the organisation and functioning of the Romanian Radio Broadcasting Company: https://legislatie.just.ro/Public/DetaliiDocumentAfis/256901.
[172] Audiovisual Law 504 of 11 July 2002 (amended): https://legislatie.just.ro/Public/DetaliiDocument/37503.
[173] Law 41 of 17 June 1994 regarding the organisation and operation of the Romanian Radio Broadcasting Company (amended): https://legislatie.just.ro/Public/DetaliiDocumentAfis/245758.
[174] National Audiovisual Council Decision 320 of 29 May 2012 regarding the supply of on-demand audiovisual media services: https://www.cna.ro/Decizie-nr-320-din-29-mai-2012,5314.html.

Broadcasters under Romanian jurisdiction must allocate a majority of their transmission to European works (which can go down to 30% in exceptional circumstances), according to Art. 22(1) of the Audiovisual Law. Additionally, Art. 24(1-2) establishes that 10% of transmission time or the programming budget must go to recent works by independent producers. However, there are no specific requirements regarding the prominence of these works. Art. 7 of Law 41/1994 also specifies that the Romanian Radio Broadcasting Company will promote and encourage the broadcasting of Romanian audiovisual creations, but this requirement is primarily linked to content quotas for works that promote Romanian culture and that of national minorities, without establishing specific transmission times or other forms of prominence.

As foreseen in Art. 10 of the Audiovisual Law, the National Audiovisual Council is the sole regulatory authority in the field of audiovisual media services and exercises its powers impartially and transparently, under the Audiovisual Law and the law of the European Union, without requesting or accepting instructions from any other institution or entity in the performance of its duties, with the exception of collaborations with self-regulatory bodies, carried out on the basis of agreements or partnerships. The Council will report to the European Commission by 19 December 2022 and, thereafter, once every two years, regarding the fulfilment of the obligations on the promotion of European works listed above.

In the case of failure to comply with the stipulated provisions, Art. 91 of the Audiovisual Law establishes that the National Audiovisual Council will issue a summons with the precise conditions and deadlines for entering into legality. If the conditions are not met within the term and under the circumstances established by the summons, or violates these provisions again, a contravention fine between RON 5 000 and RON 100 000 (about EUR 1 010 to EUR 20 250) is applied. Prominence is not discussed individually here, as the contravention refers, to, among others, Art. 23(1) which covers the joint obligation for reaching the catalogue quota and the prominence of the respective European works.

4.8.2.3 Other national rules on prominence including services of general interest

The Audiovisual Law does not explicitly link general interest objectives with prominence rules.

Art. 9 of Law 41/1994 obliges public radio and broadcasting services to transmit, with priority and free of charge, the communications or messages of public interest received from the Parliament, the President of Romania, the Supreme Defence Council or the Government.

4.8.3 Key findings on the prominence rules and other developments

The regulation transposing the revised AVMSD into Romanian law has only recently entered into force. Therefore, the actual functioning of the prominence rules is still to be implemented, monitored, and assessed. Public debates on the amendment to the

Audiovisual Law have primarily focused on the new rules for video-sharing platforms and the investment obligations for VOD services, rather than the quota and prominence measures. It is also worth noting that the latter are not entirely new, since they were introduced by a National Audiovisual Council Decision in 2012. Nevertheless, no clear reporting can be found on the mechanisms used by the Council to assess their implementation or outcomes since the adoption of said Decision.

4.9 SI - Slovenia

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4.9.1 Prominence as a principle deriving from national constitutional law

In Slovenia there are no rules on the prominence of European (and/or Slovenian) audiovisual works or other general interest content to be found in or derived from national constitutional law. Prior to the delayed transposition of the revised Audiovisual Media Services Directive (AVMSD), there were no prominence rules, and since they are relatively new, there has been no jurisprudence on issues related to these rules so far.

4.9.2 Rules on prominence in lational Law

4.9.2.1 Overview

The promotion of European (and Slovenian) audiovisual works is governed by the Act on Audiovisual Media Services (ZAvMS),[175] which entered into force on 12 January 2022. Before, there were no specific rules on prominence of such works in Slovenian law, at least not as envisaged by the AVMSD 2018 in terms of ensuring that audiovisual works are prominently presented and findable in VOD catalogues.

There are other (indirect) instruments aimed at the promotion and exploitation of film and other audiovisual works in general with a potential effect on the prominence of European works. The key law for the field of film and other audiovisual activities is the

[175] Act on Audiovisual Media Services (ZAvMS, Official Gazette of the Republic of Slovenia, No. 87/11, 84/15 and 204/21) (Zakon o avdiovizualnih medijskih storitvah (ZAvMS, Uradni list Republike Slovenije, št. 87/11, 84/15 in 2004/21)) http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO6225.

Slovenian Film Centre Public Agency Act.[176] Since the Slovenian Film Centre (SFC) also has among its tasks the promotion and exploitation of film and audiovisual activity in Slovenia, it leads dialogue with audiovisual service providers on including Slovenian films in their digital collections.

4.9.2.2 Rules on prominence of European works

The rules on prominence, introduced in January 2022, address only providers of non-linear (on-demand) audiovisual media services.

Due to the late transposition of the AVMSD, it is still too early to talk about the effects of the implementation of this novelty. On paper at least, it represents a step forward from the regulation that applies to linear audiovisual media services. Namely, in television broadcasting there are no rules safeguarding greater visibility and positioning of audiovisual works (e.g. in prime time). Linear service providers are only obliged to respect the quantitative quotas.

While in linear services, the share of European audiovisual works should be at least 50% of the yearly broadcasting time without the time dedicated to news, sports, games, advertising, teleshopping and video pages (Art. 16(4) ZAvMS), the proportion of European and Slovenian audiovisual works must represent at least 30% and 5% respectively in the catalogue of the provider of on-demand audiovisual media services in a given calendar year (Art. 16(2) ZAvMS). Similarly to the case of linear services, news, live broadcasts and recordings of sports events, games, advertising, teleshopping and video pages are excluded from the total number of works in the catalogue of programs in a calendar year (Art. 16(5) ZAvMS).

As regards calculation of the mandatory share of European and Slovenian audiovisual works in on-demand services, the ZAvMS refers to the European Commission guidelines governing the calculation of the share of European works in the catalogues of providers of on-demand audiovisual media services. A feature-length film, an entire season of a TV series, etc. shall be considered as a single work (Art. 16(2) ZAvMS).

The prominence rules for on-demand services are not limited to European audiovisual works, but apply also to national works.

According to Art. 16(3) ZAvMS, European and Slovenian audiovisual works shall be prominently displayed and adequately promoted. The service provider may ensure this in the following ways or by the following means:

- creating a specific section for European and Slovenian works accessible from the homepage of the service;
- enabling a possibility of searching for European and Slovenian works in the search engine available on the service;
- exploiting the European and Slovenian works in the campaigns of the service;

[176] Slovenian Film Centre Public Agency Act (ZSFCJA, Official Gazette of the Republic of Slovenia, No. 77/10, 40/12 – ZUJF, 19/14 – odl. US, 63/16 and 31/18) (Zakon o Slovenskem filmskem centru, javni agenciji Republike Slovenije (Uradni list RS, št. 77/10, 40/12 – ZUJF, 19/14 – odl. US, 63/16 in 31/18)), http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO5960).

- promoting at least 30 % of European works and at least 5 % of Slovenian works in the catalogue of the service.

The Slovenian public service broadcaster is obliged to dedicate at least 25% of the annual broadcasting time on its first two television channels to Slovenian audiovisual works; whereby one quarter of this share must have been created by independent producers (Art. 92(2) of the Mass Media Act).

According to Art. 109(1) of the Mass Media Act, the Communications Networks and Services Agency of the Republic of Slovenia (AKOS) is responsible for supervising compliance with the obligatory quotas regarding Slovenian audiovisual works. The national regulatory authority determines the supervision methodology by means of a general act.

In case of non-compliance of on-demand service providers with European and Slovenian audiovisual quota and prominence obligations, the regulator can impose fines ranging from EUR 6 000 to EUR 60 000 (Art. 43 ZAvMS). The fines for non-compliance of television broadcasters with Slovenian audiovisual quota obligations range from EUR 8 350 to EUR 62 600 (Arts. 134 and 135 of the Mass Media Act).

Providers of audiovisual media services that, according to the data from their annual reports in the previous calendar year, did not generate more than EUR 200 000 of turnover with the audiovisual services offered in the Republic of Slovenia, are exempted from these obligations.

4.9.2.3 Other national rules on prominence

Art. 7a AVMSD, allowing the possibility of imposing measures to ensure the appropriate prominence of audiovisual media services of general interest, is not subject to an implementation obligation and has not been transposed in Slovenia. This may however change since the government announced its intention to modernise the legal framework governing the media, and the media services of general interest will be in focus.

4.9.3 Key findings on prominence rules and other developments

Due to the late transposition of the AVMSD, which was completed only in January 2022, there are no reports on the application and functioning of the prominence rules. There are no current debates on the implementation of these rules and so far no need to change them has been identified and discussed in the public.

Monitoring of the compliance and enforcement, which AKOS is responsible for, will be crucial for the correct implementation of the prominence rules in the spirit of the AVMSD objectives for the benefit of European and Slovenian audiovisual works and services of general interest.

5 Comparative analysis

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5.1 Introduction

The nine country reports in this IRIS Special cover eight EU member states – Belgium, Bulgaria, Germany, France, Italy, Portugal, Romania, and Slovenia – as well as the United Kingdom, a Council of Europe member that has ceased to be a member state of the EU.

The reporting countries comprise relevant media markets and language areas in Europe. They are of particular importance with regard to the topic of prominence in relation to audiovisual media services and content, as they have not only transposed Article 13 AVMS into domestic law but most of them have also introduced measures in connection with Article 7a AVMSD which states that member states may introduce measures ensuring prominence of services of general interest. As this second provision does not mandate a "transposition" into national law, only a limited number of the member states overall have introduced new measures in the sense of Article 7a AMVSD.[177]

The reporting countries cover both federal states and centralised states. In federal states, implementation of EU rules such as the AVMSD can be subject to a degree of differentiation between the federal entities.

5.2 Prominence as a principle deriving from national constitutional law

Generally, the reporting countries' constitutional law does not contain provisions concerning prominence as a principle. In Belgium this would not be possible in the federal

[177] These are Belgium (Flanders), Bulgaria, France, Germany, Greece (not reported on here), and Italy, cf. European Commission, Study on media plurality and diversity online – Annexes, 2022, p. 13 ff. In addition, considering the transposition table of the European Audiovisual Observatory (https://avmsd.obs.coe.int/), a search for Article 7a "transpositions" also refers to Cyprus, which in Art. 30L of the Law on Radio and Television Organisations (in the consolidated version of 23 December 2021), gives the national regulatory authority the power to take measures in the meaning of Article 7a AVMSD (without these being mandated by the law), to Portugal, which in Art. 25.1 of the Law 27/2007 on Television and Audiovisual On-Demand Services Law (in the consolidated version of 19 November 2020) foresees that distributors shall "prioritise" certain categories of services, which describe such programmes that can be regarded as being of general interest, as well as Romania. For the latter, the general provision of the powers of the national regulatory authority is mentioned (Art. 17 (1) d) of the Law No 504/2002 of 11 July 2002 (the Audiovisual Act; consolidated version of 3 July 2022)) which includes certain tasks that could authorise the authority to also take measures ensuring prominence of general interest services, although such a power is not expressly included.

constitution due to the lack of a respective competence which lies with the regional entities. It is different in the case of Italy, where a link to the concept of prominence in general exists in the Constitution, which also includes an understanding that this covers *inter alia* essential public services. This principle was for a long time directly applied to radio and television broadcasting activity in the country, constituting essential public services of pre-eminent general interest. The Portuguese Constitution, without addressing prominence, contains rules on media activity and cultural protection which might serve as a link to ensuring prominence.

There is, however, constitutional jurisprudence in some of the countries (BG, DE) which provides for a general constitutional framework that must be taken into account by the respective legislators when introducing statutory law on prominence in transposition of the AVMSD or beyond. The Constitutional Court of Bulgaria, referring to ECtHR jurisprudence, held already in 1996 that a duty of the media exists to publish information and ideas relevant to matters of public interest. More complex and detailed is the case law of the German Federal Constitutional Court (BVerfG) in this regard, focussing on broadcasting. Due to the guiding principle of media pluralism, prominence of content relevant for the formation of public opinion and thus for the democratic system is considered a very important aspect of safeguarding it. The BVerfG holds in particular that an increase in the broadcasting offerings available and the diversity of providers in itself does not suffice to meet the requirements set by fundamental rights as to quality and diversity in broadcasting but could rather serve one-sided interests or mere economic considerations. It highlights the relevance of public broadcasting from which the need to be able to easily access its content can be deduced.

5.3 Rules on prominence in national or federal law

In the reporting countries, a set of rules on prominence in statutory law exists, not least due to the transposition of the relevant provisions of the AVMSD in its latest version of 2018. The United Kingdom also transposed the AVMSD in its revised form, still being an EU member state when it was adopted. Of the countries covered in this report, transposition was achieved only after the deadline had expired, in Romania and Slovenia in 2022 and in Italy in 2021, but the latter had voluntary prominence rules in place since 2015 already. The transposition typically resulted in a modification of the rules set up in part in the 1990s (BG, GB, IT, RO), in part from the transposition of the AVMSD of 2007. Notably, in the case of Bulgaria and Romania, rules on prominence were in place already before their accession to the EU. In Germany, the relevant legislative process went further than the mere transposition of the AVMSD by comprehensively reforming the relevant broadcasting and media legislation, now also taking into account “new” media players such as media platforms, user interfaces and media intermediaries, and introducing a detailed public value-prominence regime. In some reporting countries (United Kingdom), the rules on prominence which existed prior to the AVMSD 2018 remained unaffected by the Directive or its transposition. Slovenia is the only reporting country in which no such rules existed prior to the transposition of the AVMSD 2018. The scope of the various rules in the reporting countries’ statutory law differs. In Romania, for example, there are no explicit rules on the

prominence of general interest services or content. Elsewhere they are optional possibilities for regulatory authorities or are laid down in the law itself. Prominence obligations in the countries analysed only apply for on-demand audiovisual media services.

5.4 Prominence of European works

All of the reporting countries have provisions on prominence of European works in their statutory law, resulting from the obligatory implementation of Article 13 AVMSD. As a consequence, these rules apply only to non-linear audiovisual media services. Although these prominence rules are not aimed at a more general highlighting of content but are one element of the promotion of European works, which is a special regime under the AVMSD, they were also covered in the national reports to facilitate an understanding of possible similarities or connections to rules – where they exist – concerning prominence (or promotion) of other types of content, such as that of general interest or public value, or even entire services.

5.4.1 VOD service providers

Article 13, paragraph 1 AVMSD provides not only for a 30 % share of European works in the catalogues of VOD service providers, but it also requires prominence for these works. Accordingly, such quotas or catalogue shares are foreseen in the law of all of the reporting countries, sometimes with an additional focus on domestic works (PT, SI) or productions in the language spoken in the respective country (BE (VL)), or with additional rules on special attention to independent producers (RO), accompanied by the requirement that prominence of these works is ensured. In Germany, examples of the content that qualifies for application of rules of prominence are laid down in the statutory law with a reference to the AVMSD provisions on “European works”, but details are then regulated by the competent media regulatory authorities. Similar provisions also exist in the United Kingdom and in Italy. German law defines in detail the scope of other relevant terms in this context, such as “catalogue” or “titles”, whereas in French law, there are particularly detailed provisions on the services covered (or not covered). In Slovenia, a negative catalogue is in place excluding various programmes, such as news or teleshopping, from the catalogue share which is basis for the calculation in line with the Directive and the European Commission Guidelines.

Concerning the question of prominence of European works in the catalogues of VOD service providers, the national rules in some cases defer for the details to the providers themselves. In those cases there is no guidance in place by the relevant media regulatory authorities on how to achieve or guarantee such prominence (BE (VL), GB, PT) or how “prominence” is even defined (GB, PT). In the United Kingdom the reason is explicitly mentioned by the regulatory authority in its Guidance as leaving the decision to the providers as no “one-size-fits-all” solution would work across the different services. The providers are encouraged to develop their own innovative means of ensuring prominence, leaving them with the widest margin of appreciation. Where more detailed rules or guidance are in place, they provide examples for measures in line with those set out in the

AVMSD (BG, DE, FR). Italian law provides for a particularly detailed list of measures. Sometimes, such information, even if it is not in the legislation itself, can be extracted from materials relating to the legislative procedure such as preparatory documents or explanatory memoranda (BE (VL), DE). In Portugal, only a description exists on how domestic providers have understood the concept and apply it but there is no detail in the legislation.

There are various means of ensuring prominence, as highlighted in the country reports. Making European works available directly on a service's homepage or main page, dedicating sections for European works (accessible from services' homepages or a particular position for such works in the catalogue), highlighting European works in the search function or the catalogue as such or providing the possibility to search for European works in the search tool available, campaigns, separate advertisements or recommendations, either individualised or not, making available trailers, banners ('French comedies', 'Portuguese cinema' etc.) promoting such works, also in social network reviews and articles, or even highlighting such works during commercials or in subscriptions campaigns. The detailed Italian law provides for minimum quotas as to the share of 'visible' European works in catalogue sections, multiplatform promotional campaigns, in recommendations and commercial communications sent to users, and also holds that EU works must be kept in the catalogue for no less than seven days unless this would infringe on licensing arrangements or other distribution rights. Furthermore, Italy is the only country covered in this report in which a scoring system is in place, assigning each measure or tool a certain score from which an overall minimum must be reached by the VOD service providers. French law holds that the mere mentioning of a title is not sufficient to ensure prominence. In Romania, the classification of the country of origin of each audiovisual programme available in a service's catalogue is obligatory. To guarantee efficient prominence, the language of any of the above-mentioned means or tools must be the language(s) spoken in the relevant state, such as German in Germany, a requirement laid down there in the relevant national legislation.

The regulatory authorities, in part in collaboration with self-regulatory bodies, have certain powers and competences to ensure that the prominence obligations are taken into account by VOD service providers. Within their monitoring powers, the authorities typically are entitled to request information and documents, for example on a service's catalogues and the (European) titles therein, the numbers of viewers, the prominence tools used, or reasons for exemptions from the rules. The information requests may also cover financial and administrative data, such as investments, names of directors or persons in charge for means of contact, from individuals and legal entities subject to prominence obligations. The right of regulatory authorities to collect data and request information from the VOD service providers is in addition to standardised reporting obligations of the providers. Such obligations are in place in all reporting countries. Typically an annual reporting obligation exists such as in Belgium (both the Flemish and French communities), France, Italy, and Portugal. The scope of the obligations varies as do the procedures. In BE (VL) a table is made available on the regulatory authority's website and in completing the information the service providers need to specify the "prominence methods". A similar form is in use in Italy. In Portugal, in order to ensure effective compliance, providers are obliged to appoint a representative for this purpose located in the country.

In return, regulatory authorities report to parliaments, governments or relevant ministries (BE (VL)) or directly to the European Commission (BG, RO), and in part also make their reports and assessments public (BG, PT).

Where a regulatory authority finds that a breach of prominence obligations has occurred, it may impose sanctions. In particular, financial penalties can be imposed which in absolute numbers range from EUR 250 (BE (FR)) to approximately EUR 285 000 (GB) with a smaller range elsewhere of approximately EUR 1 500 to EUR 10 200 (BG), approximately EUR 1 000 to 20 250 (RO), EUR 7 500 to EUR 37 500 (PT), or EUR 6 000 to EUR 60 000 (SI) respectively, but may in relative numbers reach from 1 % (IT) to a maximum 3 % (BE (FR)) or 5 % (GB) of a service provider's annual turnover. In some reporting countries, in case of repeated offences, penalties imposed may be significantly higher, such as twice as high as the normal sanctions (BG) or 5 % of a service provider's annual turnover (BE (FR)). Periodic penalty payments are also possible (BE (FR)). Portugal in addition provides for stricter financial penalties in the range of EUR 20 000 to 150 000 in the case of non-compliance with the duty of information. Exceptionally high penalties are in place in Italy. There, the range is between EUR 100 000 and EUR 5 000 000 for the infringement of prominence obligations; penalties in the case of non-compliance with the duty of information are EUR 100 000. Non-pecuniary sanctions range from warnings with an obligation to comply (BE), enforcement notification (GB) or notices of objection (DE) and similarly formal warnings (FR), to the suspension, revocation or withdrawal of an authorisation (BE) or a time- or scope-limited prohibition or blocking of a service respectively (DE, FR). In France, cases of repeated non-compliance may result in final withdrawal of an authorisation or unilateral termination of a licence. Also in France, sanctions imposed on providers may be made public in the Official Journal. In Germany and Romania, mechanisms exist allowing for the provider to first rectify the situation within a reasonable deadline. Notably, in Portugal, no sanctions other than financial penalties are in place.

Not all VOD service providers necessarily fall under prominence obligation regimes. In alignment with the AVMSD, exemptions apply in particular for small providers, the scope of such exemptions differing between reporting countries and, in the case of Belgium, even between the regions, because it can be linked to the size and structure of the audiovisual market. In BE (VL), the annual turnover threshold for service providers is EUR 500 000, whereas in BE (FR) it is merely EUR 300 000. In France, the threshold is one, in Romania EUR two million (in the latter case in relation to the provision of audiovisual media services). The smallest annual threshold reported is in Slovenia with EUR 200 000 generated from audiovisual services offered in the country. Service providers with a small audience and small and micro-enterprises are excluded from prominence obligations (BE (VL), BG, FR, GB). Whereas the definition of what constitutes a small or micro-enterprises is typically based on the Commission Recommendation on the definition of micro-enterprises, small and medium-sized enterprises as is suggested in its Guidelines, providers with small audience shares are subject to different definitions in the reporting countries. In Bulgaria and Romania, the relevant audience share is less than 1% of the total audience of all on-demand audiovisual media services offered in the state's territory whereas in France, the threshold is 0.1 %, however jointly with abovementioned turnover threshold. In BE (FR), also such providers are excluded whose catalogue is of a specific nature and made up of a minimum 80% non-European works. Similar exemptions, though broader in scope, exist in Bulgaria and the United Kingdom. In France, for example, providers mainly devoted to

pornographic programmes are exempted from prominence rules as are providers with a very low number (below 10 each) of either long-form cinematographic or audiovisual works in their offers.

5.4.2 TV service providers

Generally, there are no prominence requirements for European works with regard to linear service providers, which is in line with the Directive that in Article 13, paragraph 1 AVMSD only addresses VOD service providers with the prominence obligation. The rules on quota shares for European works and independent productions follow in the member states the provisions in the AVMSD, while some add further indications about specific inclusion of domestic works. However, these rules are not supplemented by an explicit reference to a prominent featuring of the content, for example during prime time, except for France.

5.5 Prominence of services of general interest

As mentioned above, only a few member states have chosen to also use the possibility offered by Article 7a AVMSD on prominence of services of general interest. Although these measures are of specific interest in the context of this report, the limited existence of such rules means that not all country reports could provide any additional information concerning such regimes. A number of the reporting countries, which were selected also in view of this, have either pre-existing or newly inserted rules on prominence of services of general interest (BG, DE, FR, IT) or refer to possibilities of the regulatory authorities to take measures that may lead to comparable solutions (RO), such as obligations to give specific content more attention. In Portugal for example, a prioritisation of certain programmes to be selected by distributors exists. In the United Kingdom, comparable rules were already in place prior to the adoption of the revised AVMSD. Of the reporting countries, Belgium is a particular case, since in BE (VL), rules on prominence of services of general interest exist as a result of the use of the Article 7a AVMSD possibility, whereas in BE (FR) such rules were already in place before. In the United Kingdom and in Italy, relevant decision-making processes are currently ongoing that may change the use of this instrument.

Rules on prominence of services of general interest have usually been adopted with a view to ensuring pluralism in and of the media, freedom of expression, cultural diversity, and the effectiveness of information but also, in a changing media landscape, to ensure public service broadcasters continue in a sustainable way to be available in practice to the viewers (UK).

In BE (FR), Bulgaria, and Germany, there are rules for distributors establishing must-carry obligations, partly extending to non-linear services of general interest. Although these are not prominence rules as such, they also contribute to ensuring availability of specific services on the distribution channels as a first condition to enable findability for the viewers. In BE (FR), the distribution of a basic offering must be guaranteed by ensuring access to the regional public service broadcaster and selected international services; on a

cable network, local media access must additionally be ensured. Similarly in Bulgaria, access to the national television and other program services defined by the regulatory authority must be ensured on any network type. In Germany, mirroring its federal character, so-called regional window programmes must be granted broadcasting time in the main two commercial television programmes with the widest coverage nationwide. Also, an obligation to grant broadcasting time to independent third parties can be imposed on private television broadcasters. Furthermore, infrastructure-bound media platforms are subject to special provisions on their capacity allocation as regards public service broadcasters and those private broadcasters covering regional windows.

Since a more recent amendment, the legal framework in Germany goes well beyond the prominence systems established elsewhere. It contains a must-be-found approach for media services in user interfaces and the services that profit from such an obligation are those that are qualified as public value. These have to be easily findable and commercial broadcasters can apply for a selection as public value if they contribute in a special way to diversity of opinion, which is determined in a selection process by the media regulatory authorities.

In France, the law provides for appropriate visibility of the services in question, defined as services published by public service media publishers. As in other reporting countries, the French regulatory authority may include other audiovisual communication services in the obligation. The United Kingdom puts its focus on the prominence of the channels, programmes, and services of the main five public service broadcasters including their on-demand services and related apps.

As is evident from above, rules on prominence of services of general interest are binding on a number of addressees. They include distributors (BE (FR), BG, DE) on any network (satellite, terrestrial, cable, IPTV) (BE (FR), BG), providers of on-demand TV platforms which, depending on the definition, can include hardware manufacturers as in the case of Smart TV, TV operators, global TV platform providers (planned new regime in UK; partly DE), private television programmes and broadcasters (DE), infrastructure-bound media platforms (DE), EPGs (DE, GB), “operators who determine the modalities of presentation of services on user interfaces” (FR) or simply ‘any platform’, also including TV and radio equipment manufacturers, providers of services for indexing, aggregation or research of audiovisual content, and providers that determine how content is presented on user interfaces (IT). In BE (FR), cable networks are explicitly highlighted with the provision of special rules. French law sets certain thresholds as regards the operators falling within the scope of the prominence rules and excludes interfaces that exclusively offer services of the same publisher and either its own or the controlling company’s subsidiaries where applicable.

BE (FR) law also provides a rule with regard to user interfaces/EPGs and recommender algorithms, the latter of which must be transparent and neutral notwithstanding preferential treatment of European audiovisual works. Also in German law, the principle of non-discrimination with regards to findability is repeatedly highlighted, in particular in connection with user interfaces/EPGs. German law also lists criteria to be taken into account with regards to ‘public value’, again mandating the regulatory authorities to regulate relevant details in a statute. In France, operators’ reporting obligations vis-à-vis the regulatory authority are enshrined in the law as is the publication of a periodic review

by the relevant authority. French law also contains sanctions in case of non-compliance which ultimately foresee the imposition of financial penalties of up to 3% of turnover excluding taxes in the previous 12 months or 5% respectively in case of repeated infringement. A similar regime of implementation and enforcement is foreseen in the United Kingdom once the relevant legislation there is adopted and has subsequently entered into force.

The measures to ensure prominence of services of general interest are comparable to those with respect to prominence of European works. The reports mention easy findability or appropriate visibility, provided by prioritised presentation, recommendations to users, prominent places on services' homepages, user interface or screens, results of user-initiated searches, or on devices of remote control of the equipment giving access to the services of audiovisual communication.

Rules with regard to prominence of services of general interest are less strict when compared to the national rules to ensure prominence of European works. The reason for this is in particular the strict difference between the two, whereby Article 7a AVMSD only creates a possibility for member states to act in that sense, but imposes no obligation to do so nor does it give any details on how a prominence regime for services of general interest would have to be designed. In addition, it needs to be considered that in many member states the latest revision of the AVMSD was only transposed recently and where the opportunity was used to introduce new or extended prominence obligations – or an authorisation for the regulatory authorities to introduce such a framework – often the implementation depends on further steps, such as publishing details in statutes or guidelines, which may not have happened yet. Therefore, despite relevant rules being in place, in some reporting countries, no definition of what constitutes a service of general interest is in place yet (BE (VL), BG, IT). In BE (VL), no relevant implementing measures at all have been adopted yet but a system of co-regulation will likely be established.

6 Conclusion and looking ahead

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This IRIS Special issue deals with the notion of prominence as used in the context of regulating audiovisual media services, mainly in the relevant legislation of the European Union. In a world of ever-increasing availability of audiovisual content through a variety of different access points, it is a challenge for the user to find the content that may correspond best to what one is currently searching for. Whereas it may have been simple to switch on the TV, have a choice of a couple of dozen TV channels all being disseminated in a linear way in which it was predetermined what one could see at which time and one only needed to have an understanding which channels were public service broadcasters, which commercial, which maybe special interest or teleshopping, the situation is more complex today. Content can be found by using search functions on different devices and with different functionalities and this may lead to specific services (including that content) or the content item isolated. Obviously, this situation is not only challenging from a user perspective but also in a regulatory dimension as the question arises, whether certain services or content should be prioritised in the way it is presented to the viewers, for example in the listing of a search, and how such potential obligations could be imposed on which type of service providers.

It is this very question that is discussed in the EU context under the keyword of prominence for certain content or services. Specifically, there are two ways that this idea is currently enshrined in the EU Audiovisual Media Services Directive. As a specific way of promoting European works, VOD service providers not only have to respect a minimum-share obligation for their catalogues comparable to the approach of having quotas for TV services, but they also have to ensure that these European works are given prominence. Because the existence of a high(er) number of titles due to this obligation alone does not automatically lead to higher potential consumption of these titles, the rule is supplemented by a need to raise attention with regard to the European works. Member states, in the transposition and application of the Directive, have to ensure that the providers under their jurisdiction comply with this obligation without the Directive itself laying down mandatory ways of achieving such prominence. There are only examples listed in the relevant Recital that suggest possible instruments that include giving direct access to the European works titles in the catalogue through a dedicated section already on the main page of the service, offering search functions for these titles which have to have been labelled accordingly, or certain ways of marketing this part of their offering. As the obligation for prominence was added only with the latest revision of the Directive in 2018 and member state transposition was in many cases only completed with a (sometimes significant) delay, the actual application of the new rule and the effectiveness of the measures chosen by VOD providers still remain to be seen.

While the rule for prominence of European works in VOD services' catalogues is mandatory and every EU member state has to ensure compliance with it by all providers

under its jurisdiction, the second reference to prominence in the AVMSD is of a different legal nature. With that provision, it is merely stated that member states may, but are not ordered to, take measures to ensure that services of general interest are given appropriate prominence. This very openly formulated provision, besides not mandating a transposition, does not determine which providers are addressed by such potential obligations that member states may impose. It also does not indicate which criteria should be used in order to decide whether a service is of general interest. Finally, it leaves open under which circumstances the prominence required would be regarded as appropriate. In a more declaratory manner the AVMSD provision on general-interest prominence acknowledges the member states' power – possibly even invites the use of it – to maintain or introduce such rules. In view of the competence of the member states to determine what is of general interest to their populations, some states refer to "public value". Consequently, even the relevant Recital does not detail any further what conditions need to be fulfilled for such general-interestprominence regimes. What it does do, however, is deliver the justification for introduction of such rules, namely in view of the importance of media pluralism, freedom of speech and cultural diversity. With that, this prominence idea is tied to the one concerning European works, for which diversity of the offering and enhancing pluralism are the justification. Prominence of relevant content or relevant services orients the viewers towards these services and their content, thereby fulfilling the fundamental-rights-based goal of highlighting some areas in contrast to others. The difference in wording between the provision and Recital concerning prominence of general-interest services versus content is interesting to note.

More importantly, with this provision the addressees of the AVMSD are, at least indirectly, further expanded: prominence of such general-interest services can be established also by VOD service providers, but it is much more likely member states will address other types of services with obligations of this kind, for example user interfaces (specifically electronic programme guides), search portals, Smart TV or app menus, network infrastructure providers and others. The Recital therefore underlines that member states should only introduce these rules if they are proportionate, meaning necessary to achieve one of the mentioned objectives and not too burdensome for the undertakings that are concerned by the obligation. Those states that have already introduced or are in the process of implementing obligations for different kinds of such providers requesting them to give appropriate prominence to certain services in the way they design their offering to the viewer, have typically included at least some or all of the public service media in the privileged group. In some examples this extends to other services, such as commercial providers or specific channels, for example directed at regional audiences. Some of these regimes predefine which service is concerned, others have set up complex procedures in which every service provider fulfilling certain conditions can apply for categorisation as general interest. A selection is then made and only after that the obligation is set for distributors to respect this preselection.

For both prominence approaches – European works and general-interest services – regulatory authorities of the member states have been assigned an important role, as the chapters of this IRIS Special show. This concerns the further detailing of the legislative framework, for example by defining measures that providers have to choose, by selecting and determining the list of services to be considered, and by taking care of the monitoring of compliance with the obligations. This role is important because for some aspects of the

prominence regimes a content selection takes place, although not for individual items and *ex post*, but by pre-determining which services justify a label as general interest or public value, and such a decision needs to be taken by independent bodies outside the regular administration if they have not been laid down in the law itself. Also, by involving regulatory authorities there is a flexibility in further developing the conditions that concern the means and instruments to be chosen to reflect the market situation and technical evolution. In view of the interdependence of the instruments for prominence chosen with the functionalities of a specific service and its overall design, it is not surprising that the regulatory framework or the work of the regulatory authorities rely strongly on the providers of the services to choose the appropriate solutions instead of rigidly demanding certain instruments. In the monitoring of compliance by the providers – which for the moment can mainly be observed for the European works prominence obligation as there is a mandatory reporting scheme from the member states to the European Commission and such data therefore has to be measured – it is evident, too, that in a first step it is the self-declaration of providers that is used to check for compliance and in case of doubts these are further investigated. Where violations of the European works obligations, including prominence in the case of VOD providers, are found, the member states' regulatory authorities can impose sanctions which include in some states significant fines.

Because of the relevance of solutions in the new digital environment with an important role of "intermediary" providers that are between production and consumption of service and content, the idea of prominence obligations for such providers to the benefit of certain content and services is also explored in the framework of the Council of Europe. Besides relevant Committee of Ministers Recommendations that refer to this idea in more general terms, there is a very recent Guidance Note on the Prioritisation of Public Interest Content Online which was adopted by the Steering Committee for Media and Information Society in December 2021 and gives impulses for states to consider introducing such rules and elements to be taken into account.

The more important the intermediaries and third parties that move into a position between the end user – in the case of audiovisual media content the viewer – and the original producer of content or provider of a service, the more important rules on finding, discovering, and easily or directly being able to access services and content that has been pre-determined as being of special relevance, will become. This is especially relevant to ensure a minimum amount of comparable content reaches wide parts of society and thereby contributes to avoidance of a situation in which certain societal groups remain in their own "filter bubbles". Giving "prominence" as presented in this IRIS *Special* is therefore a snapshot of the current approaches and it is likely that in future the possibilities granted by the AVMSD and beyond will be further explored. The question will remain one of prominence in media policy of the future.

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