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TOWARDS COHERENT RULES ON THE PROMINENCE OF MEDIA CONTENT ON ONLINE PLATFORMS AND DIGITAL DEVICES

ISSUE PAPER

December 2023

Michèle Ledger

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ABOUT CERRE

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ABOUT THE AUTHOR

Michèle Ledger is a researcher at the CRIDS research centre of the University of Namur where she also lectures on the regulatory aspects of online platforms at the postmaster degree course (DTIC). She has been working for more than 20 years at Cullen International and leads the company's Media regulatory intelligence service.

Embryonic rules on prominence are spread across various EU legal instruments. This piecemeal approach leads to a certain degree of complexity and legal uncertainty, which may also threaten the internal market. This report describes the situation while also putting forward recommendations to arrive at a more coherent framework.

EXECUTIVE SUMMARY

In view of the rapidly changing media consumption patterns with citizens increasingly using online services and digital devices, and the massive amounts of content being disseminated, policy makers are concerned about making sure that citizens are oriented towards content that is deemed to be of general interest.

This report provides a mapping of the European and EU level rules and initiatives that relate directly or indirectly to prominence of content of general interest, some of which have only been very recently adopted or proposed.

A key part of the jigsaw is the Council of Europe Guidance Note on the Prioritisation of Public Interest Content Online. This non-binding – albeit influential – document was adopted in December 2021 and provides a checklist of reference points to guide countries, public authorities, platforms and intermediaries, media actors and civil society organisations as they seek to shape, deploy, and/or monitor content prioritisation initiatives.

Article 7a of the Audiovisual Media Services Directive (AVMSD) is the main rule at the EU level that is directly relevant to the prominence of audiovisual media services. This issue paper examines how this article has been implemented in France, Germany, and Italy. Some similarities are identified but some important differences are also highlighted. The UK's recently proposed Media Bill is also examined as it also proposes rules on prominence. The UK's legal system is particularly interesting to examine as the UK implemented the AVMSD and therefore has similar rules to those of the Member States while also showing some specificities.

The report also examines other EU-level rules and initiatives which have an indirect or direct link to prominence, in particular the must carry rules included in article 114 of the European Electronic Communications Code (EECC), the recently adopted Digital Services Act and Digital Markets Act, and the 2022 strengthened Code of Practice (CoP) on Disinformation. The proposed European Media Freedom Act is also about to be adopted which proposes a right for users to customise their media offer, without this affecting national measures implementing Article 7a AVMSD.

The report elaborates the piecemeal approach to the question of prominence of content of general interest as rules are spread across multiple pieces of legislation in the EU, which creates a complex situation for all concerned (content providers, platforms, citizens, governments and regulators). It recommends that the guidelines of the Council of Europe should be more systematically followed and embedded in the legal frameworks, both at the EU and national levels.

Among the other recommendations, the report highlights that Article 7a of the AVMSD could be further detailed to include important clarifications, bearing in mind the division of competence between the EU and the Member States who remain competent for matters related to media pluralism and cultural diversity. Among the areas that could be clarified at the EU level is that only platforms used by a significant number of users should be bound to ensure prominence and that Article 7a could include rules of procedure. Drawing in particular on the comparison with the UK's Media Bill, more roles could be given to independent regulatory authorities such as to facilitate agreements between content providers and platforms. The articulation with rules on must carry could also be specified, and a debate could take place on whether fair commercial terms can be agreed between content providers and the platforms.

France, Germany, and Italy have implemented Article 7a by reference to services of general interest, while disaggregated content of media service providers is not (yet) captured. The Council of Europe guidance seems to allow disaggregated content to be covered (since it refers to content and not to services) while also clarifying that individual items promoted by the state could only be prominently displayed in case of public urgency. The AVMSD refers to audiovisual media services, whereas a recital alludes to content more generally. Another consideration is that the AVMSD recognises the integrity of audiovisual services and that any alteration of the services can only be allowed if the media service providers have agreed to this. This means that disaggregated content of audiovisual media services could only be displayed on platforms and other user interfaces only if the service provider has agreed to this upstream. Radio services are in scope of prominence regimes in all the three EU countries, which shows that the Member States already go beyond the scope of what is covered in the AVMSD.

Transparency requirements at various levels should be solidly embedded in prominence regimes. The ability for users to customise the media offer could be also more clearly articulated as this question is addressed by some national rules on prominence, in the draft European Media Freedom Act, but not in article 7a of the AVMSD, or in the Digital Services Act (for recommender systems).

Finally, the issue paper also highlights that the relation between the rules of prominence imposed at national level on platforms established in other member states should be addressed as this constitutes an area of legal uncertainty, which may entail serious negative consequences for the functioning of the internal market.

1. INTRODUCTION

Policy makers are increasingly concerned that citizens should be oriented towards certain content that is deemed to be of general interest or of public value. They have therefore adopted or proposed rules on **prominence, findability, discoverability, or 'must be found',** all of which address similar policy aims. The idea is certainly not new and was historically developed in the context of promoting the distribution and visibility of television services though must carry (and possibly must offer) obligations and rules on the ordering of channels on electronic programme guides which are used to navigate between channels on television sets.[1]

Nowadays, the question of findability has become a more complex issue since viewer behaviour is changing rapidly. Media in the broad sense is consumed though many new types of online services and digital devices, some of which may act as 'gatekeepers'. Ofcom reported in July 2023 that people aged between 16 and 24 predominantly access news through online sources, particularly social media and apps.[2] Data from the Reuters Institute is also compelling as, among other things, it shows that the younger generations "often pay more attention to influencers or celebrities than they do to journalists, even when it comes to news".[3] The range of intermediary devices and services is also wide: set-top boxes (offered by ISPs, cable operators etc), connected TVs (offered by TV manufacturers), online aggregators of TV channels (such as Zattoo in Germany), search engines, application stores (such as Play or Apple's Appstore), and gaming consoles all offer content to viewers and are all competing for eyeballs.

Policy makers are therefore increasingly seeking to secure appropriate prominence of certain general interest content, especially in times where we are flooded with information and it is increasingly difficult to distinguish fake news from trustworthy information, or propaganda from content that is intended to educate, entertain, and inform without political or ideological bias.[4] The rationale for securing prominence relates to promoting media pluralism and diversity which untlimately sageguards the fundamental rights of freedom of expression and the right to information. A new wave of **EU rules seeking to secure the prominence of media content** (directly or indirectly) is therefore currently being adopted, proposed, and tested.

This CERRE issue paper is aimed at **taking stock of the current set of rules at the EU level on prominence and discoverability of general interest content. It will also discuss the new draft laws**

[1] The concept is already used in the context of the promoting European works in article 13 para 1 of the 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. Modified by directive 2018/1808 of the European Parliament and of the Concil, article 13 imposes : "*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*". Must carry obligations, which are foreseen in Article 114 of the Electronic Communications Code (EECC) also give a special status to certain types of content.

[2] Ofcom's News Consumption in the UK 2022/23 report and press release. Older adults continue to use more traditional sources.

[3] See Nic Newman, Overview and key findings the 2023 Digital News Report, Reuters Institute, available online at https://reutersinstitute.politics.ox.ac.uk/digital-news-report/2023/dnr-executive-summary (accessed on 7 October 2023).

[4] See in particular 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 and Cappello M. Prominence of European works and of services of general interest, IRIS *Spécial,* European Observatory, Strasbourg, 2022.

that are in the process of adoption both at the EU level (the draft EMFA) and in the UK (draft Media Bill).

The issue paper:

- **Maps the European and EU provisions** that at are directly or indirectly linked to **prominence**; and
- Engages in a **critical reflection** on this evolution by highlighting areas of attention and by making some recommendations.

2. COUNCIL OF EUROPE GUIDANCE

One of the key parts of the jigsaw - is the Council of Europe's[5] Guidance Note on the Prioritisation of Public Interest Content Online.[6] This non-binding – but seemingly influential – document was adopted in December 2021 and provides a checklist of reference points to guide countries, public authorities, platforms and intermediaries, media actors, and civil society organisations as they seek to shape, deploy and/or monitor content prioritisation initiatives. All of its core principles are described in the table below.

This guidance note is meant to form good practice principles or a checklist to guide the states and public authorities as well as platforms and intermediaries in the design of their prominence regimes. It refers back to the existing Council of Europe standards relating to freedom of expression and information, media freedom and media pluralism as well as emerging framework principles for Artificial Intelligence (AI). It recalls that the state is the ultimate guarantor of the principle of media pluralism; the states have a positive obligation to ensure the effective exercise of freedom of expression and a regulatory framework aiming at ensuring the plurality of media types and diversity of content.

The CoE guidance treats the notion of prioritisation with caution: highlighting that the state should encourage the introduction of non-commercial prominence regimes but that they should be introduced (by law) only where necessary. When this is the case emphasis is put on the need to objectify the process in the law and to give a clear role to national regulatory authorities (NRAs) to determine what should constitute public interest content and on the oversight of the application of the rules. It is also noteworthy that the guidance refers to multi-stakeholder input into all aspects of the prioritisation regimes.

Interestingly, the guidance refers to content and not to the services. It also rules out that platforms should be obliged to carry specific items of content that states deem of public interest (except in public emergencies as defined). Platforms should reflect on the social impact of the design of their services, which should be designed to protect media pluralism. Also, the CoE seems to imply that users and content providers should be able to opt-out of prominence rules, whereas this topic is not yet clearly addressed at the EU level (as seen below).

Regretfully, the guidance **does not specify to which platforms and intermediaries** the rules on prominence could apply but it does set out that the principles should apply **'particularly strictly' to platforms that are more dominant given their reach scale and influence.**

[5] The Council of Europe is an international organisation focussing on the promotion of human rights, democracy and the rule of law across its 46 member countries

[6] Available at https://rm.coe.int/cdmsi-2021-009-guidance-note-on-the-prioritisation-of-pi-content-e-ado/1680a524c4

Table 1 Good Practice principles of the CoE

	FOR STATES AND PUBLIC AUTHORITIES	FOR CONTENT PROVIDERS, PLATFORMS, AND INTERMEDIARIES
OVERVIEW	✓ Should **encourage** the introduction of new non-commercial prominence regimes, in particular by platforms, media actors, civil society, academia that seek to improve the exposure of users to a diversity of media content online ✓ Where **necessary**, can introduce appropriate and proportionate measures to ensure the prominence of public interest content online	✓ Platforms to reflect on the social impact of the design of their services ✓ User interfaces and content moderation algorithms to be designed to protect media pluralism and to uphold principles of democracy, the rule of law, and human rights ✓ Where appropriate, platforms to develop prominence regimes in accordance with requirements for identifying public interest content ✓ As prominence regimes have the potential to operate as propaganda and private censorship; content providers and **users to be able to opt out of prominence**
PROHIBITIONS	**Should not oblige platforms to carry specific pieces of content/information** that states deem to be of public interest × Should not seek prominence for party or candidate-specific messages × States cannot oblige platforms to make prominent their own statements/communications, except for public emergencies defined by article 15 of the Convention	

	FOR STATES AND PUBLIC AUTHORITIES	FOR CONTENT PROVIDERS, PLATFORMS, AND INTERMEDIARIES
PROCEDURE	✓ Determination of public interest content to be based **on clear, non-discriminatory, viewpoint neutral, transparent, and objectively justifiable criteria** ✓ **Should allow platforms to have considerable margin of discretion on implementation** ✓ **Independent third parties** such as independent NRAs to determine what constitutes public interest content ✓ Co-regulation could be used ✓ **Should involve the participation of platforms and intermediaries, media actors, civil society, and other stakeholders** ✓ States to be open and transparent in their communications (especially on separating and clearly labelling advertising, public announcements, general communications, and emergency communications)	✓ Platforms to work with civil society, media actors, other stakeholders, and public authorities to design a prominence regime that serves the public interest and is compliant with human rights requirements such as freedom of expression ✓ Prioritisation practices to be subject to requirements of transparency relating to the criteria/standards for defining public interest content (clear guidelines) or of state-mandated requirement; standards to be applied without discrimination; transparency on process of selection of content deemed worthy of prioritisation; and of outcomes of prioritisation processes (impact on audiences, monthly and annual reporting) ✓ Standard of explainability to allow understanding of why and how prioritisation decisions are reached and deserve public trust
OVERSIGHT	✓ State-mandated requirements on prominence to be subject to **oversight** (regular reporting by platforms about how policies and decisions are made) ✓ Oversight could be entrusted to **independent NRAs** or equivalent bodies or to co-regulatory mechanisms ✓ **NRAs should have the necessary powers and resources** ✓ States to ensure that media and information literacy is sufficiently funded	✓ Platforms to facilitate voluntary audit of prioritisation in the public interest against published criteria and human rights impact assessments where appropriate ✓ Platforms to be able to challenge prominence obligations if they breach fundamental rights. Final decisions on this should be taken by an independent regulator or a court ✓ An efficient appeal procedure for prioritisation and deprioritisation to be established. Courts to bear the ultimate responsibility for ensuring compliance of the prioritisation decisions with the applicable human rights and the rule of law standards, for example to prevent discrimination on prohibited grounds as defined in Article 14 of the Convention or to ensure fair competition

3. MAPPING THE EU LEVEL RULES

At the EU level, two broad sets of rules can be distinguished: ones specifically dealing with media services and the others which are more targeted towards ensuring that the influencial online platforms take on some responsibility for giving prominence to certain content, especially in times of crisis or to counter online disinformation. Each of these will be taken in turn in the following sub-sections.

- In the first category is Article 7a of the Audiovisual Media Services Directive (AVMSD)[7] on the prominence of audiovisual media services of general interest. This category also includes the must carry rules included in Article 114 of the European Electronic Communications Code (EECC)[8], which are not prominence rules per se, but which are intertwined with the question of prominence and which contain useful elements that can perhaps be drawn into a possible reform of Article 7a. Article 19 of the proposed European Media Freedom Act (EMFA)[9] is also relevant to this category as it is about the right for users to customise their media offer. The rules on prominence in the UK's proposed Media Bill[10] are also an example of rules in this category and some of the proposed measures could be relevant in the context of possible reforms of Article 7a.
- The second category includes the various rules contained in the EU's recently adopted Digital Services Act[11] and Digital Market Act,[12] as well as the 2022 strengthened Code of Practice (CoP) on Disinformation.[13]

Article 13 of the AVMSD which foresees that Member States must ensure that media service providers of on-demand audiovisual media services secure at least a 30% share of European works in their catalogues and ensure prominence of those works **is not specifically covered in this report**, because the requirement applies directly to the audiovisual media service provder, and is not incumbent on other platforms.[14]

For a summary table of the EU-level initiatives, see summary table of EU rules below.

[7] 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.

[8] Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) OJ L 321, 17.12.2018, p. 36–214

[9] Proposal for a Regulation establishing a common framework for media services in the internal market and amending Directive 2010/13/EU, COM(2022) 457 final.

[10] Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1146008/1285-HH-Media_Bill_Standard_font_with_covers_accessible.pdf,

[11] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance) OJ L 277, 27.10.2022, p. 1–102

[12] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ [2022] L265/1-66.

[13] Available online at : https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation (accessed on 2 August 2023)

[14] On this see, https://erga-online.eu/wp-content/uploads/2021/01/ERGA_SG3_2020_Report_Art.131_final.pdf (accessed on 6 Ocober 2023).

3.1 Rules relating to Media Services

3.1.1 Prominence of audiovisual services of general interest (Article 7a AVMSD)

The 2018 AVMSD introduced an article on the prominence of audiovisual media services of general interest. Article 7a is very short:

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

A single non-binding recital provides a bit of guidance:[15]

> *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.*

Beyond the fact that the article is particularly short and general, some elements are noteworthy.

- First the article does not oblige the Member States to ensure the prominence of general interest services, it is only a **possibility**. This is in line with the CoE guidance.
- Second, the article only refers to audiovisual media services, that is, linear and non-linear audiovisual services (television services, video-on-demand services, catch-up services)**. Audio services such as radio or podcasts or press services are not covered.** For these other services or for individual items within the audiovisual media service, this means that the Member States are not only free to decide if they want to introduce prominence rules but if they do decide to, they are not bound by the minimum requirements of article 7a. It is striking to note that recital 25 refers to the ability for Member States to ensure the appropriate prominence of **content** of general interest, hinting therefore to a wider number of services than audiovisual media services and also possibly to the inclusion of individual items of programming.
- Prominence rules for audiovisual media services are only possible to promote 'general interest services'. But, the Member States are free to frame what is a general interest service as there is no common definition of what constitutes 'public interest'.[16]
- There is no mention of the platforms where the public interest services should be made prominent, no mention of a certain reach of the platform or how the prominence should be achieved, even from a methodological point of view.
- Of course the CoE guidelines had not yet been released at the time of adoption of the last revision of the AVMSD, so many of the elements of the CoE guidelines could not have been introduced in the text but they could be introduced during the next revision.

[15] Recital 25 AVMSD.

[16] Council of Europe Study Prioritisation Uncovered: The Discoverability of Public Interest Content Online. Eleonora Mazzoli and Damian Tambini (2020)., p.13.

3.1.1.1 ERGA Guidelines

The European Regulators Group for Audiovisual Media Services (ERGA) provides technical expertise to the Commission to ensure a consistent implementation of the AVMSD in the Member States. It provided views on how the article should be interpreted, noting that the wording of the article and the corresponding recital are "quite broad" and hinting at a wide array of options during the implementation phase.[17]

It warns that because of the rapid speed of technological innovation, a technology-neutral approach, but with the participation of platforms should be envisaged. ERGA advises that:

> *neither the legislators nor the NRAs should decide in detail on how to achieve appropriate prominence. Audiovisual media services are received via a range of delivery mechanisms which are constantly changing. In addition, while the power of media services to influence opinion-forming of the public and their relevance for democracy may justify certain prescriptions – but the basis should always be proportionality of regulation…(…) any regulation must be kept principle-based and technology neutral…*[18]

Industry would have a role to play as it could be required to set out the specific technical manner in which the objectives of measures taken under Article 7a could be met, in particular by balancing the need to maintain the attractiveness of the platform for users while also maintaining space for innovation. Then, the regulators would check on a case-by-case basis if the industry guidelines are implemented properly and they could intervene where allowed by the national framework.

On defining the content and services of general interest, ERGA also recommends that legislators should concentrate on identifying platform-neutral criteria to be used to identify content of general interest.

3.1.1.2 European Parliament resolution

The European Parliament resolution of May 2023 on the implementation of the AVMSD makes a number of interesting points in relation to Article 7a. Firstly, it says that the provision could be strengthened and that the Member States should be encouraged to better use and exploit the opportunities that arise from the appropriate promotion of audiovisual media services of general interest. Secondly, it suggests that ERGA develop guidelines for a harmonised European approach. Finally the EP resolution states that progress could be made towards an **obligation** of prominence under the condition that the scope and understanding of the general interest content is harmonised and does not go against EU values. This final step would be in contradiction to the CoE guidance discussed above.

[17] Ensuring prominence and access of audiovisual media content to all platforms (Findability); Overview document in relation to Article 7a of the Audiovisual Media Services Directve, available online at https://erga-online.eu/wp-content/uploads/2021/01/ERGA_SG3_2020_Report_Art.7a_final.pdf

[18] Idem, p. 7.

The EP criticises the move by some manufacturers to remove numeric buttons on remote controls. It argues that the practice puts at stake traditional numbering systems, which could undermide the visibility and findability of audiovisual media services of general interest.

The EP resolution maintains that the objectives of the AVMSD are served by Member States taking measures to ensure the prominence of audiovisual media services of general interest, as well as the prominence of European works, "vis-à-vis relevant user interfaces and platform services that offer their services to users in the territory of that Member State but are not themselves established there". This aspect is further discussed in section **Error! Bookmark not defined.** below.

It also recalls that it is important for these measures to be based on transparent and objective criteria; and stresses that the Member States are free to include other types of media, such as radio, online audio or the press, when transposing the AVMSD into national law.[19]

3.1.1.3 National situation

Not surprisingly, and as anticipated by ERGA, the Member States have implemented this provision very differently.[20] As highlighted in a report by the European Audiovisual Observatory, a minority of countries adopted rules on the prominence of services of general interest when they transposed the 2018 AVMSD. To date, only three countries have proposed specific rules so far to implement Article 7a: France, Germany, and Italy. Other countries have reserved the possibility for the government or the regulator to introduce such rules but have not yet done so.[21]

France

France has enacted rules on the prominence of services of general interest that will need to be complied with by mid-December 2023. The overall architecture is made up of legislation,[22] an implementing decree adopted by the government, and decisions by Arcom, the media regulator.

- Which services?

The law specifies that prominence must be given to general interest services which are defined as the services provided by the country's public service broadcasters that is, France Télévisions, Radio France, France Médias Monde, La Chaine Parlementaire, Arte and TV5. Arcom is allowed to adopt a decision to include – in a proportionate manner – other audiovisual services provided they contribute to media pluralism and to cultural diversity. It must be noted that, in France, an audiovisual communication service also covers radio. Arcom is obliged by law to publish the list of the general interest services if it decides to extend the scope of services of general interest beyond those prescribed by law. In June 2023 Arcom launched a consultation[23] to see if the scope of services of general interest should be extended to cover other services than those initially targeted by the law. It suggests that the 30 free-

[19] Available online at https://www.europarl.europa.eu/doceo/document/TA-9-2023-0134_EN.html (points 22 to 27)
[20] See Cullen International Benchmark (available on request) and Cappello M. (ed.), Prominence of European works and of services of general interest, IRIS Special, European Audiovisual Observatory, Strasbourg, 2022
[21] Ireland,Belgium, Bulgaria, Cyprus, Greece, Portugal and Romania, see database of European Audiovisual Observatory.
[22] General Broadcasting Law , article 20-7 available online at https://www.legifrance.gouv.fr/loda/id/LEGITEXT000006068930/ (consulted on 8 August 2023)
[23] The consultation and draft decision is abailable online at https://www.arcom.fr/vos-services-par-media/consultations-publiques/consultation-publique-relative-au-perimetre-des-services-dinteret-general-prescrite-par-larticle-20-7-de-la-loi-du-30-septembre-1986-relative-la-liberte-de-communication (accessed on 13 August 2023).

to-air channels available on the digital terrestrial television (DTT) network could be included, and possibly also the regional services available on DTT. It also seeks views on whether non-linear and in particular catch-up services should be included. It also asks questions on whether commercial radio services and podcasts should be included in the scope of services of general interest. At the time of writing, Arcom had not yet published an outcome of the consultation.

➢ On which platforms?

The law specifies that these services need to be prominently displayed (in the manner specified by Arcom) on defined 'user interfaces' that reach a certain threshold of use, which needs to be set by a decree adopted by the government. The decree was adopted[24] in December 2022 and sets two thresholds above which providers are subject to the obligation:

- 150,000 for user interfaces that are either sold, provided under a subscription contract, or leased during the last year in France
- 3m unique visitors per month in France for user interfaces provided by distributors of online audiovisual services or made available through app-stores[25]

User interfaces are defined in the law as any device that presents to the user a choice between several audiovisual services or between programmes that stem from these services and which is either:

- installed on a TV set or on equipment intended to be connected to the TV set, or
- installed on a virtual assistant, or
- made available by a distributor of audiovisual services ; or
- made available within an app store.

The law also specifies that Arcom needs to publish each year a list of user interfaces that are obliged to provide prominence because they meet the threshold specified in the decree. The list was published by Arcom in March 2023 and includes connected TVs (and their remote controls) offered by six manufacturers, three virtual assistants, four streaming devices, two universal remote controls, three game consoles, nine distributors and three app-stores.[26]

➢ How should prominence be ensured?

The law specifies that appropriate prominence (the law refers to visibility) can in particular be achieved:

- On the screen or home page
- Through user recommendations
- In the search results initiated by users

[24] Decree n° 2022-1541 of 7 December 2022, available online at https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000046711767#:~:text=Pour%20les%20interfaces%20utilisateurs%20mentionnées%20aux%203°%20et%204,de%20la%20dernière%20année%20civile (accessed on 13 August 2023)

[25] For a discussion on the thresholds, see https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000046712050

[26] The list is available online at: https://www.arcom.fr/sites/default/files/2023-03/Liste%20des%20interfaces%20assujetties%20aux%20obligations%20de%20l%27article%2020-7%20de%20la%20loi%20du%2030%20septembre%201986%20et%20du%20d%C3%A9cret%20du%207%20d%C3%A9cembre%202022.pdf (accessed on 13 August 2023)

- On remote controls of equipment giving access to audiovisual communication services

Also of interest, the law specifies that the service provider needs to be identified when its service is prominently displayed. At the time of writing, Arcom was in the process of adopting a decision to specify how prominence should be ensured. A draft decision was published[27] for consultation, which gives some general indications while also leaving the choice of measures to the service providers who need to report back to Arcom on the measures taken. The indications provided by the draft decision are the following: (1) services of general interest need to be easily accessible within a user interface. This means that the operations necessary for users to access a service of general interest within this interface should not, by their nature or number, be more burdensome than those necessary to access any other audiovisual communication service of the same nature (TV, radio, on-demand audiovisual media) accessible from this same interface, unless they have been personalised at the initiative of users ; (2) **taking into account users' personalisation capabilities**, appropriate prominence could be ensured in particular by grouping the services of general interest in a single location (in the case of graphical interfaces) ; and (3) where a remote control or any other device (hardware or software) intended to control a user interface provides direct access, (that is, without numbering), to one or more audiovisual communication services, it would have to also provide direct access to the services of general interest.[28]

Germany

§84 of Germany's Interstate Media Treaty contains rules on the discoverability of (TV and audio) broadcast, on-demand, and press services on user interfaces of media platforms.[29] The explanatory memorandum of the law[30] explains that the objective of the provision is to ensure media pluralism. The Media Treaty foresees that the state media authorities need to set the details of the rules through joint statutes or directives.

➢ Which services?

The Media Treaty confers a special status to content from the public service broadcasters (ARD, ZDF, Deutschland radio). Content from commercial providers that make a significant contribution to the diversity of opinion is also covered. This so-called public value content needs to be defined by the state (regional) media authorities for each period of three years and the list needs to be published. The criteria to select these offers is set in the Media Treaty as follows: the amount of time spent reporting on political and historical events (and on regional and local information); the ratio between in-house productions and programme content produced by third parties; the quotas of accessible offers; the ratio between trained employees (in the creation of the programme) and those that still

[27] The draft decision was published in March 2023 and is available online at https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000046711767#:~:text=Pour%20les%20interfaces%20utilisateurs%20mentionnées%20aux%203°%20et%204,de%20la%20dernière%20année%20civile (accessed on 13 August 2023)

[28] In June 2023, Arcom published a summary of the contributions it received following the consultation. Available online at https://www.arcom.fr/sites/default/files/2023-06/Synthese_contributions_consultation_publique_relative_aux_mesures_de_visibilite_appropriee_des_services_interet_general-Arcom.pdf (accessed on 13 August 2023)

[29] Available online at https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Gesetze_Staatsvertraege/Medienstaatsvertrag_MStV.pdf

[30] Explanatory Memorandum on the Interstate Treaty on the Modernisation of the Media Order in Germany, https://rundfunkkommission.rlp.de/fileadmin/rundfunkkommission/Dokumente/Medienpolitik/Medienstaatsvertrag_Begru__ndung.pdf p. 45

need to be trained; the quota of European productions; and the quota of offers for young audiences. According to the law, state media authorities need to organise a public tender with procedural safeguards. A special statute (so-called public value statute) was adopted by the state media authorities in June 2021 which contains the details of the procedure.[31] Further to the tender procedure, an overall list of the selected public value offerings was published[32] together with three individual lists[33] (one with linear TV, one with audio content, and one with on-demand content) with recommendations on the listing/ordering of the public and private offerings. The list for linear commercial TV contains 41 channels.

- In which platfoms?

The Media Treaty refers to user interfaces of media platforms that depict or convey information acoustically, textually, or visually for broadcasting, broadcast-like (that is, on-demand services), and press-like telemedia or software-based apps that serve mainly to navigate to these services.[34] These are for instance, EPGs and connected TVs or Zattoo. The Treaty also foresees that only platforms with more than 10,000 connected households or monthly users (infrastructure-bound) or with more than 20,000 monthly users for open internet platforms are covered. It must be noted that these thresholds are not new, and they already existed under the previous versions of the Interstate Broadcasting Treaty. A list of media platforms has been published by the media authorities, but this list may not be complete and does not identify the user interfaces.

- How should prominence be ensured?

It must be noted that platforms are not obliged to carry the public value content (these are not must carry rules).

§84(2) of the Media Treaty contains a prohibition of discrimination of broadcast content, which is not a prominence obligation per se: similar offers or content may not be treated differently. In particular, sorting, arrangement, or presentation on user interfaces must treated in the same way, unless there is an objectively justified ground to treat them differently. Permissible criteria for sorting and arrangement are the alphabet, the genre, or the scope of use. All offers need to be discoverable without discrimination through a search function.

At a second level, according to §84(3), the content of the public service broadcasters and of the selected private broadcasters need to be easy to find on user interfaces. Similar rules also exist for on-demand content (§84(4))

[31] Available online at https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Satzungen_Geschaefts_Verfahrensordnungen/Public_Value_Satzung.pdf

[32] Available online at https://www.die-medienanstalten.de/fileadmin/user_upload/die_medienanstalten/Themen/Public_Value/Gesamtliste_Public-Value-Angebote_v2.pdf (accessed on 15 August 2023)

[33] Available online at https://www.die-medienanstalten.de/fileadmin/user_upload/die_medienanstalten/Themen/Public_Value/Public_Value_Empfehlungen_Listungen_v2.pdf (accessed on 15 August 2023)

[34] Defined as «User interface a telemedium that conveys a textual, visual or acoustic overview of offers or contents of individual or several media platforms, which serves the purpose of orientation and directly facilitates the selection of offers, contents or software-based applications, which essentially serve the direct control of broadcasting, broadcast-like telemedia or telemedia pursuant to §19 (1)»

The statute adopted in June 2021 by the state media authorities, and which entered into force on 1 September 2021, specifies that the competent state media authority needs to work towards an agreement with the beneficiaries on the order of presentation. However, the law specifies that findability does not need to be ensured if the platform provider proves that subsequent implementation is technically impossible or only possible with a disproportionate effort. In practice, the lists published recommend an order, but the platforms are free to determine another order. If user interfaces related to media platforms do not ensure easy findability of public value content as required, this is regarded as an administrative offence which may be punished with a fine of up to €500,000.

Italy

Article 29 of the new Audiovisual Media Services Code has introduced prominence obligations into Italy's legal system.[35] The article provides the general framework and the regulator, AGCOM, is tasked with setting the details. The article states that to ensure pluralism, freedom of expression, cultural diversity and that information is guaranteed for the widest possible audience, prominence of audiovisual and radio media services of general interest should be ensured.

➢ Which services?

Article 29 refers to audiovisual and radio media services of general interest and provides that AGCOM needs to define the criteria for the qualification of these services. AGCOM organised a consultation between February and the end of March 2023 on draft 'guidance'[36] which proposed that the general interest services be the TV channels, the on-demand services, and the radio stations provided for free on the digital terrestrial network, satellite, and online by:

- the Public Service Broadcaster (PSB);
- the national generalist, semi-generalist, and thematic services of commercial providers that offer news;
- upon request and subject to AGCOM's evaluation, other national commercial providers that contribute to guarantee the pluralism of media, cultural diversity, and diversity of opinion. AGCOM would need to consider a number of factors.[37]

Local providers would also be captured in some instances. Online services would include free catalogues, catch-up TV and radio services, online streaming of FM and DAB radio.

➢ In which platforms?

Article 29 refers to the fact that prominence must be ensured on whatever the platform used for the provision of the service. However, AGCOM needs to define the procedure and criteria by which manufacturers of equipment (suitable for the reception of TV or radio signals), providers of indexing, aggregation, or retrieval services for TV/radio, and providers that determine the manner of

[35] Article 29 of Legislative Decree N° 208 of 8 November 2021. The article also covers the automatic numbering of digital terrestrial television channels, which are not described in this section.

[36] The draft guidance is available online at https://www.agcom.it/documents/10179/29174719/Allegato+10-2-2023+1676020191062/a3037de0-2a8f-4f51-a063-fb12616897e4?version=1.0 (accessed 06/10/2023)

[37] Share of news, current affairs programmes, social, educational and cultural programmes, EU works and programmes made accessible to disabled people.

presentation of the services on user interfaces need to comply with the requirement to ensure prominence.

AGCOM's draft guideline refers to:

- manufacturers of TV sets, connected TVs, DTT and satellite decoders, devices that can be connected to a TV set or a screen (to access to audiovisual and radio media services), devices to listen DAB+ radio;
- providers of interfaces and apps on TV platforms or app stores that allow access to services of general interest on other devices such as computers and smartphones.

➢ How should prominence be ensured?

The law gives AGCOM the mission to determine how prominence should be ensured. AGCOM proposes in its draft guidelines that relevant platforms would have to give prominence by introducing:

- A dedicated tile or an icon box immediately visible on the home page of the user interface or of the offer and that works as a unique point of access to general interest services. The icon would lead to a screen with logos services of general interest.
- Users would need to get access to services of general interest with a maximum number of two actions (clicks); and
- At least one additional measure among a list provided (such as within five recommended services or search results; or a tab on the remote control)

There are also requirements on the identification of services of general interest and to notify the regulator of measures in place.

Interestingly, AGCOM suggests setting-up a technical working group with stakeholders for three months and providing a six-month application deadline (from the publication of the list of general interest services). AGCOM would also be able to monitor compliance and to issue fines in case of non-compliance.

3.1.1.4 Critical appraisal

Comparing the three systems reveals some important differences and similarities.

- It is noteworthy that **many more services are recognised (at the moment) to be of general interest (public value) in Germany than in France** where only the PSB channels are covered at the outset. More channels, on-demand services, and other content could be added, but the overall thrust in France seems to be more restrictive than in Germany, which has also been much more generous in its selection by allowing many 'pure entertainment channels' to be added to the list.[38] In France, if the scope of the services initially covered in the law is extended, a proportionality obligation still needs to be applied and the increase of services classified as of general interest cannot result in a disproportionate constraint for user interfaces that would need to provide prominence. In Italy, the law also foresees that commercial services can be covered but it remains

[38] Some observers remark that the main benefit of being designated as providing public interest content in Germany is to act as a quality label.

to be seen which services will be designated. All three countries have gone beyond pure audiovisual services as radio services, for instance, are covered in all countries.

- **France is more restrictive on the platforms in scope** as the thresholds are much higher in France compared to Germany and a precise list is published each year in France, whereas it is not yet clear if such a list will be published in Germany. In Italy, there is no mention at this stage of a threshold, and the law is silent on that aspect.
- On how prominence should be ensured, **the law gives indications in France and Germany but the platforms themselves have some freedom to decide how prominence should be achieved in practice. Also, in France and Germany a non-discrimination or equal treatment principle is foreseen. In Italy, the law specifies that the regulator should decide how prominence should be ensured.**
- In France and Germany there is not a specific procedure (mediation or dispute resolution system, for instance) for the content providers and the platforms to agree on how prominence should be achieved. Neither of the systems are underpinned by specific must carry/must offer obligations and there is no mention of remuneration. In Italy however, AGCOM does foresee that the setting up of a technical working group with stakeholders for three months, where presumably potential issues could be discussed and ironed out.
- In line with the CoE guidance, in all three countries a clear role is given to independent regulators and the principles are mostly set out in the law.
- None of the countries have a special appeal procedure, although the ordinary rules on appeal would probably apply.
- The transparency and reporting requirements of the CoE guidelines do not seem to have been adhered to in the German system.

Additionally, some concerns may be raised because some of the platforms in scope are established in other EU Member States and the rules may constitute a restriction to the country-of-origin principle of the Electronic Commerce Directive (see below).

3.1.1.5 UK's approach (part 2 draft Media Bill)

The UK is also moving towards adopting prominence rules for the on-demand services provided by the UK's public service broadcasters (PSBs). The reform is interesting to examine given that the UK is no longer part of the EU (and is not bound to follow EU rules) but is also an important European country with strong democratic roots and legal traditions, similar to those in the EU. The UK also transposed the AVMSD into its national legal order, but at that time, had decided not to implement article 7a.

Since, the UK government published on 29 March 2023 a draft Media Bill to reform many aspects of the country's media regulatory landscape.[39] The final bill is not yet presented to the Parliament and could still be amended. Among the reforms, the bill proposes to introduce new rules on prominence.

[39] The bill is available online at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1146008/1285-HH-Media_Bill_Standard_font_with_covers_accessible.pdf (accessed on 8 August 2023).

These rules were partially influenced by Ofcom's Review of prominence for public service broadcasting, which made recommendations to the government for a new framework.[40] The new rules will build on the UK's regime for broadcast distribution that guarantees that the public service channels are widely available and given appropriate prominence. Part 2 of the Media Bill will introduce rules into the Communications Act 2003 to make sure that "designated internet programme services" (DIPS) are made available and are prominently displayed on « regulated television selection services » (RTSS) :

- DIPS are services that have as their principal purpose the provision of programmes delivered on the internet. This includes services which are entirely on-demand, or only partially on-demand and contain other services (for example live-streamed television programme services). Services provided by the UK's commercial PSBs such as All4, My5 and ITVX would be designated by Ofcom if they meet certain criteria, that is if the service is capable of making a significant contribution to the fulfilment of the PSB's public service remit (as defined by the Communications Act 2003) and that the content that supports the delivery of the public service remit (news and current affairs, for instance) is readily discoverable and promoted in the internet programme service (IPS). The draft bill contains rules for Ofcom to follow when it considers whether to designate a DIPS, including the need to consult interested parties. Prominence should also be given to regional PSB online services that are provided by S4C in Wales and STV in Scotland, subject to meeting the designation criteria. The draft Media Bill treats the BBC differently from the commercial PSBs due the separate regulatory framework for the BBC under the Royal Charter/BBC Framework Agreement. As a UK Public Service, the BBC's IPS (BBC iPlayer) would be automatically designated.
- As defined in the draft Bill, Television Selection Services (TSS) present programme services or programmes provided by those services to a user, and allow the user to access and select between those services and programmes. For example, a user interface on a smart TV where the user can select between on-demand apps, or between programmes provided by those apps that are made available on the 'rails' of the user interface. A TSS must be provided via the "internet and in connection with internet television equipment" (to be defined by the Secretary of State). The UK government say its intention is for the initial regulations to capture devices that are the main ways in which viewers access TSS. These could be smart TVs and pay TV services that host third party services, as well as connected TV devices such as streaming sticks and set-top boxes and also potentially relevant games consoles. Overall, Ofcom estimates that there may be approximately 30-40 platform providers that could potentially fall in scope of the regime on that basis. Whether devices such as smart phones, laptops, and tablets are brought into scope depends on whether the Secretary of State at some stage choses to specify these as part of the definition in the regulations. The government has decided that the framework should not cover video-sharing

[40] 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 (accessed on 8 August 2023).

platforms (VSPs) nor social media content. The reason given is that this is mostly user generated/short-form content where the platform does not have direct editorial responsibility.[41]

- A TSS would fall into scope of the regime, thereby becoming a Regulated Television Selection Service (RTSS) if it is used by a "significant number" of members of the public to access TV content online. Ofcom will provide advice to the Secretary of State on when a TSS is used by significant number, which will then inform a decision to designate.

DIPS would be obliged to offer ("must offer") their services to RTSS providers who would be required to carry ("must carry") them and to give them an "appropriate" degree of prominence. The draft does not specify where the content (for example, the apps) needs to be placed, but Ofcom would address this in a code of conduct. The draft also specifies that the arrangements that would be negotiated between the PSBs and the platforms should be consistent with the former being able to meet costs reasonably incurred in fulfilling its public service remit and not disproportionately restrict the innovation capacity of the platforms to allow users to select and access DIPS. Ofcom would also publish guidance on how PSBs and RTSS providers may act consistently with these so-termed 'agreement objectives'. The objective is to ensure that terms agreed are fair and mutually beneficial.

Ofcom would need to maintain a list of services and platforms in scope and could revoke the designation of internet programme services. Parties would also be able to refer disputes to Ofcom. Ofcom would be allowed to levy fees on providers to cover its costs and to impose fines.

➢ Critical appraisal

The UK's planned rules cannot be compared to Article 7a of the AVMSD as they are intended to work at the national level and not at a supra-national level. As the UK's Impact Assessment notes, the intention is to adopt a 'principle-based' framework within which the regulator, Ofcom, will settle the details and will be given enforcement powers.[42]

- What is striking with the rules in the UK is that they build on the existing regime for linear public service content so impose requirements on the PSBs to 'offer' their services to TV platforms that fall in scope of the proposed regime and requirements on those platforms to 'carry' these services and afford them appropriate prominence. This approach is not at all present in the rules on prominence of services of general interest of the AVMSD, or in the French, German or Italian legislations. Of course, national must carry obligations and possibly must offer may also kick-in in the EU but they are not linked in the same way as they are in the UK's legislative framework.
- The rules are strictly confined to PSB services (which in the UK also include commercial PSBs), whereas as we have seen in Germany particularly, that the list of public value content contains a wide range of commercial services, including, perhaps surprisingly, light entertainment services. In France and Italy, the rules could also go beyond PSB content.

[41] Impact Assesment for a 'principle based framework for a new prominence regime for PSB online services', available online at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1166202/Prominence_Final_IA_-_PLS_publication_version.pdf (accessed on 31 August 2023)

[42] Impact Assesment for a 'principle based framework for a new prominence regime for PSB online services', available online at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1166202/Prominence_Final_IA_-_PLS_publication_version.pdf (accessed on 31 August 2023).

- The PSBs and the platforms should enter into mutually beneficial commercial agreements but if they don't reach an agreement, the regulator would be able to intervene to support negotiations through a dispute resolution mechanism. This aspect is not at all present in the French, German, or Italian systems, nor in the EU level rules. It seems to be an interesting provision which could have a positive impact on the negotiation process between content providers and platforms.
- The UK government's Impact Assessment contains a thorough justification for the new rules, and in particular on the benefits both to the PSBs (more opportunity for audiences to find the channels online), for individual viewers and for the UK society as a whole.
- Last, the UK's planned regime foresees that Ofcom is allowed to levy fees on providers to cover its administrative costs. This is in line with the CoE guidelines, which specify that NRAs should be sufficiently well funded.

3.1.2 Must carry rules (Article 114 EECC)

Must carry rules are not equivalent to rules on prominence but they do somehow go 'hand in hand'. It is indeed difficult to imagine rules on prominence if the content is not on the platforms in the first place.[43]

The framework for Member States to impose must carry obligations is contained in Article 114 of the European Electronic Communications Code (EECC) and has led some Member States to oblige certain distribution networks (used by a significant number of end-users to receive the services such as cable, IPTV, etc.) to carry specified television and radio broadcast channels (and related complementary services such as accessibility services). This framework is justified by the need to safeguard media pluralism and has also been cited as potentially serving as a **model** when it comes to requirements that prominence rules should take into account.[44]

Article 114 and the related recitals frame quite tightly the must carry obligations that can be imposed at national level: only **reasonable** must carry obligations can be imposed, for the transmission of **specified** radio and television broadcast channels, only when they are **necessary** to meet general interests objectives that are **clearly defined** by each Member State. Must carry obligations need to be **proportionate** and **transparent**, and be subject to **regular reviews** (at least every 5 years[45]).

Two other points are also particularly interesting:

1. the obligation can only be imposed on undertakings **under the jurisdiction of the Member State** that imposes the obligation used for the distribution of channels to the public **where a significant number** of end-users use them as their principal means to receive the channel, and
2. the question of an **appropriate remuneration** can be determined at the national level but there can be no discrimination in the treatment of providers of electronic networks. If a

[43] It may also be interesting to draw a parallel with Article 17 of the proposed EMFA which seeks to introduce a media privilege so that certain safeguards would need to be put in place when the very large online plaforms would want to moderate media content (as defined).
[44] See Dr. Jörg Ukrow in Findability and discoverability chapter of Cappello M. (ed.), Prominence of European works and of services of general interest, IRIS Special, European Audiovisual Observatory, Strasbourg, 2022
[45] Recital 309 EECC also states that this is to keep them up to date with techological and market evolution and to make sure that they continue to be proportionate to the objectives to be achieved.

Member State does impose a remuneration, the Member State needs to specify this in the national law, including the criteria for calculating the remuneration.

3.1.3 Right to customise a media offer (Article 19 draft EMFA)

The proposed European Media Freedom Act (EMFA) was in the process of adoption at the time of writing of this report. It contains a provision (Article 19) that allows users to customise the media offer and to:

> *easily change the default settings of any device or user interface controlling or managing access to and use of audiovisual media services in order to customise the audiovisual media offer according to their interests or preferences in compliance with the law. This provision shall not affect national measures implementing Article 7a of Directive 2010/13/EU.*

The onus to ensure this is on the manufacturers and developers when they place the devices such as connected TV and user interfaces on the market. They need to ensure that they include a functionality to enable users to change the default settings controlling or managing access to and use of the audiovisual media services. Users should be able to do this in freely (that is, presumably themselves or without payment) and easily.[46]

The idea behind this provision is to make sure that certain media content providers do not make deals for priority or inclusion in the defaults on the home screen of a device, a remote control, pre-installed apps, search areas, etc. This could lead to media pluralism and competition/consumer choice or autonomy concerns. This ability for recipients to be able to change the default settings of a device or the user interface "should not affect national measures implementing Article 7a AVMSD".

The latest version (at the time of writing) of the political agreement[47] on the text extends the right to customisation to media offers and more precisely to devices or user interfaces that control access to **media services that provide programmes**. This means for instance that radio services would also be covered. But the political agreement also states that this provision should not affect national measures implementing Articles 7a and **7b**[48] of the AVMSD**.** Further, the political agreement proposes that the onus to ensure this should also be placed on the importers (on top of on the manufacturers and developers). A paragraph is also added to make sure that – through the newly created EU Board (replacing ERGA) – cooperation is fostered between media service providers, standarisation bodies, and other stakeholders to promote the development of standards for the design of devices and user interfaces that control access to these media services.

3.1.3.1 Critical appraisal

This rule seems to be a natural add-on to the rules on the prominence of general interest of the AVMSD as if the user is not allowed to change the default settings of a user interface, this would mean that the users would have no choice but to be confined by the content presented by the device

[46] Article 19.2 of the draft EMFA.
[47] Dated 20 Oct. 2023.
[48] Article 7b of the AVMSD provides that the Member States must take measures to ensure that audiovisual media services provided by media service providers are not without their explicite consent, overlaid for commercial purposes or modified. Exceptions to this principle must be included into national law in particular to safeguard the legitimate interests of users.

manufacturers or app providers. This could also negate national rules on the prominence of service of general interest. However, the link with the rules on prominence is not entirely clear as the article states that ability for recipients to be able to change the default settings of a device or the user interface "should not affect national measures implementing article 7a (and 7b) of the AVMSD ".

This wording could imply that rules on prominence that are set at the national level should always prevail over users' customisation choices. Alternatively, it is also possible to argue that this means that the national rule implementing rules on prominence should be able to decide if viewers should be still entitled – despite the prominence rules – to customose the media offer according to their preferences. France has allowed users to change prominence settings, and has therefore adopted the latter interpretation.

It is also interesting to see that although the Commission had intended this provision to only capture audiovisual media content, the co-legislators (Parliament and Council) are discussing the option of extending it to other types of media content (such as radio and podcasts). This seems to reflect the practice identified in the three Member State cases discussed above in which rules on prominence go beyond audiovisual media services.

The co-legislators are also referring to article 7b of the AVMSD on the integity of the programmes and services of audiovisual media services, which should not be shortened or in anyway altered without their consent. This reference seems to be a reminder that any rule on customisation should not lead to the possibility for users to modify or to disagregate somehow the services of audiovisual media service providers, an aspect which is not present in article 7a, but which may be usefully added.

This right to customisation is not present in the DSA's rules on recommender systems (see below), however, it may be argued that the right could also cover recommender systems covered by the DSA to the extent that they contol or manage access to and use of audiovisual media services.

3.2 Rules for Online Intermediaires

This section turns to the second set of rules which are more targeted towards ensuring that the **influencial online platforms** take on some responsibility for giving prominence to certain **content** (and not services as in the first section), especially in times of crisis or to counter online disinformation. It is interesting to see that this distinction between services and content is not explictly present in the CoE guidelines.

3.2.1 Recommender systems (Articles 27, 34, 35, and 38 DSA)

The EU's Digital Services Act (DSA) addresses for the first time in EU legislation some of the issues raised by 'recommender systems' which the DSA defines as « a fully or partially automated system used by an online platform to suggest in its online interface specific information to recipients of the service or prioritise that information, including as a result of a search initiated by the recipient of the service or otherwise determining the relative order or prominence of information displayed ».

The DSA contains four main sets of rules:

1. The first sets out **transparency obligations**: online platforms that use recommender systems need to set out in the terms and conditions the main parameters they use.[49] This rule is aimed at making sure that recipients are appropriately informed of how recommender systems impact the way in which information is displayed and how they can influence how information is presented to them.[50]
2. Secondly, online platforms need to set out in their terms of use **any options for the recipients of the service to modify or influence those main parameters**.[51] This means that they are not necessarily obliged to offer to recipients the option to modify the parameters, it merely states that the terms and conditions of use need to specify if any option is available and to explain the options.
3. Very large online platforms (VLOPs) and search engines (VLOSEs) are subject to additional rules: they need to make sure that recipients of services can use recommender systems that are not based on profiling.[52] This does not mean that by default the recommender system should not be based on profiling, it merely states that recipients should be able to **access one option to opt-out of recommender systems that are based on their profiling**.[53]
4. Lastly, the **risk management obligations** of the VLOPs and VLOSEs refer to the need to assess the way in which the design of the recommender systems (and any other algorithmic systems) used by VLOPs and VLOSEs can influence any of the systemic risks they need to assess and mitigate. These systemic risks include the dissemination of illegal content; any actual or foreseeable negative effects for the exercise of fundamental rights, among them freedom of expression and information, including the freedom and pluralism of the media; any actual or foreseeable negative effects on civic discourse and electoral processes, and public security; and any actual or foreseeable negative effects in relation to gender-based violence, the protection of public health and minors and serious negative consequences to the person's physical and mental well-being.[54][55]

3.2.1.1 Critical appraisal

The DSA applies to 'intermediary service providers' and the rules on recommender systems are focussed on online platforms and on very large online platforms and search engines. This means that recommender systems used by social media and app-stores are covered whereas recommender systems used for instance by online newspapers, online streaming platforms (that is, on-demand audiovisual media service providers) or in EPGs would normally be out of scope as they are not intermediary services. It is not entirely clear if recommender systems used by connected TV providers

[49] The main parameters need to explain, why certain information is suggested to the recipient of the service and need to include at least the criteria which are most significant in determining the information suggested to the recipient of the service; the reasons for the relative importance of those parameters. The information should therefore also be presented in an easily comprehensible manner.
[50] Recital 70 DSA.
[51] Article 27 DSA. If several options are available, they need also to make available a functionality that allows recipients to select and to modify at any time their preferred option. The functionality needs to be directly and easily accessible from the specific section of the online platform's online interface where the information is being prioritised.
[52] Profiling is defined within the meaning of Article 4(4) of Regulation 206/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)
[53] Article 38 DSA.
[54] Article 34 and 35 DSA.
[55] See Sally Broughton Micova and Andrea Calef, Elements for effective systemic risk assessment under the DSA, Cerre, July 2023, available at https://cerre.eu/wp-content/uploads/2023/07/CERRE-DSA-Systemic-Risk-Report.pdf

would be in covered by the rules of the DSA. This would probably need to be assessed on a case by case basis.

- **The first rule on transparency in the terms and conditions of recommender systems is extremely positive** as it will help users understand why they are being presented with information. Similarly, Article 5 of the Platform to Business Regulation also sets out an obligation for online intermediation services and for search engines to be transparent on the ranking of third party content on their platforms. In particular, they need to set out in their terms and conditions the main parameters determining ranking and the reasons for the relative importance of those main parameters as opposed to other parameters. Search engines also need to specify any possibilities to influence ranking through remuneration as well as the effects of remuneration on ranking.[56]
- This transparency requirement is not present in article 7a of the AVMSD, which means that the Member States are not formally required to introduce it either in their prominence rule whereas it is recommended in the CoE guidelines.
- The DSA does not contain a rule to allow users to change the default settings of the recommender systems but merely allows them to ask not to be profiled by VLOPS and VLOPs when they use recommender systems. This does not go as far as the provision of the draft EMFA (article 19) which in effect will allow users to customise their media offerings according to their preferences. **It would seem logical to try to align the rules by granting more rights to users in relation to recommender systems used by online platforms to allow them to customise the content they are presented with.**

3.2.2 Obligations of VLOPs and VLOSEs in times of crisis (Articles 36 and 48 DSA)

The DSA recognises that VLOPs and VLOSEs may have an important role to play in times of crisis that is, when extraordinary circumstances lead to a serious threat to public security or public health in the Union (or in a significant part of it).[57] This could cover events such as pandemics, wars, acts of terrorism, or natural disasters.

Article 36 was added at the bitter end of the negotiations, spurred on by Russia's invasion of Ukraine. It allows the European Commission to require VLOPs and VLOSEs to initiate a crisis response and to take one or more actions (the choice would remain with the platform and could be those taken to mitigate systemic risks) to prevent, eliminate, or limit any such contribution to the serious threat. Among these actions, **platforms could adapt their content moderation processes, take awareness raising activities, promote for instance trusted information, or ban certain content on their services**.[58] Although the choice of the measure needs to be decided by the platforms, the Commission will monitor them and could enter into a dialogue with the them to assess if they are effective, and could ultimately require them to review the measures or to stop applying them. A procedure, involving the European Board of Digital Services and scrutiny by the European Parliament needs to be respected

[56] These are defined in Article 2 as a digital service that allows users to input queries in order to perform searches of, in principle, all websites, or all websites in a particular language, on the basis of a query on any subject in the form of a keyword, voice request, phrase or other input, and returns results in any format in which information related to the requested content can be found.
[57] Article 36 1. DSA.
[58] Examples are given in recital 91 DSA.

to make sure that the measures remain exceptional.[59] Also, the Commission should aim to limit the measures to a period of 3 months.[60]

Another article (48) is similar but allows the Commission to initiate the drawing up of crisis protocols to address crisis situations (that is, still extraordinary circumstances affecting public security or public health). The Commission (possibly with the help of Member States's authorities and other Union bodies and agencies) must encourage VLOPS (and possibly other online platforms and search engines) to participate in the drawing up of these protocols, to test them, etc. **Again, among the measures these protocols could include are the prominent display of information from public authorities or other reliable bodies**.[61] The Commission will be allowed to ask the platforms to revise their protocols, including by taking additional measures. **On the process**, the article specifies that the Commission must «aim to ensure » that the protocols specify: the special parameters that determine what constitutes a a specific extraordinary circumstance; the role of each participant and the measures they need to put in place; a clear procedure for determining when the crisis needs to be activated (and the period which needs to be strictly limited); the safeguards to address any negative effects on fundamental rights; and a process to publicly report on the measures taken.

3.2.2.1 Critical appraisal

- Beyond the question of when these mechanisms should be triggered (when are we in a situation of crisis?), questions arise as to the type of information that would have to be disseminated by the platforms. The DSA refers to trusted and reliable information, information provided by Member States, or other relevant reliable bodies, **but there is no indication on the process to decide which information needs to be carried and from which source**. This seems to be in contradiction with the CoE guidance which states that the determination of public interest content should be based on clear, non-discriminatory, viewpoint neutral, transparent, and objectively justifiable criteria.
- There is no equivalent rule in Article 7a of the AVMS Directive (or in the directive in general) but Member Sates usually have provisions in place to allow public authorities to disseminate information of critical importance in case of emergency. It may be useful to examine if a similar provision should be included in the directive, if some member states fail to respect the procedural safeguards specified in the CoE guidelines. Indeed, the advantage of a rule on this in the AVMS Directive would be to enable the Commission to act against a Member State if it fails to include such safeguards in its legislative framework.

3.2.3 The EU's Digital Markets Act: equal treatment and objective and unbiased parameters for ranking, indexing, and crawling

Another part of the puzzle is the recently enacted EU's Digital Markets Act (DMA) which is now in force but has not yet been tested (as the gatekeepers were designed on 6 September 2023).[62] [63] The DMA

[59] Article 36 DSA.
[60] Article 36.8 (b) allows the Commission to extend the period by an additional period of no more than three months.
[61] See also recital 108 DSA.
[62] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ [2022] L265/1-66.
[63] Alphabet, Amazon, Apple, Bytedance, Meta and Microsoft, which together operate 22 core plaform sercices. They have six months to ensure full compliance with the DMA for each of their designated core platform services, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328

aims contribute to the proper functioning of the internal market by laying down harmonised rules to ensure a contestable and fair digital market. It only applies to core platforms services that are provided by gatekeepers.

The core platform services are enumerated in the DMA and cover services that may provide access to media content. Therefore they could play 'a decisive role' when it comes to ensuring a safe and pluralistic media online landscape:[64] online intermediation services, online search**,** online social networking, video platforms, virtual assistants, and operating systems (which can include connected TVs) are examples of such services. To be in scope, these services must be provided by gatekeepers and be designated by the Commission, under the criteria and procedure set in the DMA.

Some of the ex ante obligations that will be imposed on the designated gatekeepers may have an effect on the visibility of media content and seek to increase transparency for end users: article 6 (5) enshrines **a ban on treating in ranking and related indexing and crawling their own products and services more favourably compared to third party services**; the gatekeeper also needs to apply **transparent**, fair and non-discriminatory conditions when ranking; article 6 (12) obliges the designated gatekeeper to apply fair and non-discriminatory access conditions for other business users to access their app stores, search engines and social networks; and designated gatekeepers must **allow and enable technically end users to easily change the default settings of operating systems** (including of connected TVs), **virtual assistants,** and **web browsers** that direct or steer end users to products and services **provided by those gatekeepers** (article 6 (3)).

Although these rules are not directly linked to prominence, they will contribute to make sure that the platform's own content is not predominantly displayed and that the content from third parties can access the platform under fair, transparent, and non-discriminatory conditions, thereby contributing to make sure that content is present on the platforms at the outset. This can therefore be compared to a 'must carry rule'. It is also interesting to see that end users are given the right to change the default settings of certain devices and operating systems and web browsers but it is unclear if this would go as far as to enable end-users to fully customise the content on the platform, which would therefore amount to a similar rules as the one proposed in the EMFA (article 19).

3.2.4 Code of Practice on Disinformation

The signatories[65] to the strengthened Code of Practice on Disinformation of 2022 committed to a number of measures to counter online disinformation.[66] Under the heading on the need to safely design the architecture of the services, transparent policies, and the accountability of recommender systems, two commitments are closely related to the topic of this report.

- **Commitment 18** asks the signatories to minimise the risks of viral propagation of disinformation by adopting safe design practices. In particular, they need to take measures to mitigate risks of viral spreading of harmful disinformation by for instance **designing their recommender systems**

[64] Prof. Dr. Mark D. Cole, The proposal for a Digital Markets Act (DMA) : On gatekeepers, fairness and transparency in the online environment in Cappello M. (ed.), Unravelling the Digital Services Act package, IRIS Special, European Audiovisual Observatory, Strasbourg, 2021

[65] The list of signatories is available here : https://disinfocode.eu/signatories-archive/

[66] Available online at : https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation (accessed on 2 August 2023)

so as to improve the prominence of authoritative information and to reduce the prominence of disinformation, based **on clear and transparent methods and approaches for defining criteria for authoritative information.** Follow-up measures are also envisaged such as the need to report on the risk mitigation measures and to report on their deployment in each Member State, the need to publish the main parameters of the recommender systems and in the Transparency Centre,[67] and the need to report on the effectiveness of the measures.

- **Commitment 19** asks signatories that use recommender systems to make them **transparent** to recipients regarding the **main criteria and parameters** to be used for prioritising or deprioritising information and to provide options for users about these recommender systems.

Two other commitments can also be mentioned.

- **Commitment 21** asks signatories to commit to strengthen their efforts to better equip users to identify disinformation. In particular, in order to enable users to navigate services in an informed way, they commit to facilitate, across all Member States languages in which their services are provided, user access to tools for assessing the factual accuracy of sources through fact-checks from fact-checking organisations that have flagged potential disinformation, **as well as warning labels from other authoritative sources.**
- **Commitment 22** asks the signatories to commit to provide users with tools to help them make more informed decisions when they encounter online information that may be false or misleading, and **to facilitate user access to tools and information to assess the trustworthiness of information sources, such as indicators of trustworthiness for informed online navigation, particularly relating to societal issues or debates of general interest**.

3.2.4.1 Critical appraisal

These commitments are interesting as they constitute self-regulation which is now underpinned by the DSA, thereby making the commitments taken binding upon the signatory platforms.[68] From the wording, it appears that the authoritative information that could be prominently displayed refers more to individual items of information but entire services could not be ruled out either. In this case, in line with the CoE guidelines, particular attention should be taken as they state that platforms should not be obliged to carry specific items of information except in public emergency situations.

- It is laudable that the code of practice specifies that clear and transparent methods and approaches should be used to define the criteria for authoritative information, but the involvement of independent regulatory authorities could have been specified as being part of this process.
- Commitment 19 on the transparency of the recommender systems and on options for users is also positive and are all now echoed in the DSA.
- Commitments 21 and 22 are more on empowering users to assess online disinformation and how to access trusted and authoritatives sources of information. These measures are also in line with the CoE guidelines which in particular mention the need for media literacy tools.

[67] See https://disinfocode.eu
[68] See recital 104 of the DSA.

3.3 Summary Table of EU Rules

EU LEVEL RULES	WHAT SHOULD BE GIVEN PROMINENCE	ON WHAT PLATFORMS/SERVICES/DEVICES	DETAILS
ARTICLE 7A OF AVMD	Audiovisual media services of general interest	-	Member Sates allowed (not obliged) to ensure appropriate prominence
ARTICLE 114 OF EECC	Specified radio/TV broadcast channels	Undertakings under the jurisidiction of the Member State used for the distribution of channels to the public where a significant number of end-users use them as their principal means to receive the channel	– If necessary to meet general interest objectives that need to be clearly defined by each Member State – Must carry can be imposed but obligations must be reasonable, proportionate, transparent and subject to review every 5 years at least – Remuneration can be determined so long as it is not discriminatory and is set by law
ARTICLE 19 OF DRAFT EMFA	Audiovisual media services (Commission draft)	Device/user interface controlling access to audiovisual media services	Right for users to customise offer and to easily change the default settings (not affect national measures implementing Art 7a AVMSD
ARTICLES 27, 34, 35 AND 38 OF DSA	Not specified	Recommender systems used by online plaforms VLOPS and VLOSES	Recommender systems: – Transparency requirement, including on ability to modify targeting parameters – Opt out of profiling (for very large players, who also need to adapt recommender systems in case of systemic risks) – Tailor recommender systems as a risk mitigation measure

ARTICLE 36 AND 48 OF DSA	Not specified	VLOPS and VLOSES (possibly other online plaforms)	Commission can require plaforms adapt their content moderation processes, take awareness raising activities, promote for instance trusted information or ban certain content on their services.
ARTICLE 6(3) (5) AND (12) OF DMA	Core platform's own content Content of third parties	Core platform services operated by designated gatekeepers	– No self-prefencing in ranking – Transparency and fair, reasonable and non-discriminatory conditions in ranking and in access to app stores; search engines and social networks Allow and enable technically end-users to easily change the default settings of operating systems (including of connected TVs), virtual assistants and web browsers that direct or steer end users to products and services provided by those gatekeepers
CODE OF PRACTICE ON DISINFORMATION **(COMMITMENTS 18 TO 22)**	Prominence of authoritiative information Warning labels from authoritative sources , fact checkers, accurate information, informed online navigation	Services of signatories	– Minimise spread of online disinformation – Design recommender systems to improve prominence of authoritative information (reporting obligations) – Transparency in recommender systems Better equip users, through warning labels in particular

4. INTERNAL MARKET PERSPECTIVE

It is easy to see that rules on prominence could raise internal market issues because the prominence/visibility of general interest content is defined at national level but may need to be provided on platforms offered by providers established in another Member State than the Member State where the content needs to be given visibility. Taking the list published in France, we see that many platforms are indeed established in other Member States: Google Play, Apple Store, Amazon Prime, Sony PS5, Alexa (Amazon), Siri (Apple), or Samsung, LG, Sony (connected TVs), which shows that the problem raised is not purely theoretical. None of the rules address this issue, which makes it all the more difficult to analyse.

Article 3 para 1 and 2 of the Electronic Commerce Directive[69] enshrine the internal market principle for 'information society services' by stating the principle that each Member State needs to ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the "coordinated field". Conversely, a Member State of destination cannot – for reasons falling within the coordinated field – restrict incoming services.

Regarding the implementation of Article 7a of the AVMSD, the European Commission highlighted potential internal market issues in its comments on the draft rules that were notified by each of the three Member States to it under the regulatory transparency procedure set up under Directive (UE) 2015/1535.[70] [71] [72]

In each cases, the Commission made the same points.

The Commission acknowledges the need to preserve media pluralism as a fundamental value of the EU, as enshrined in Article 11, para 2 of the EU Charter on Fundamental Rights. The Commission recalls that media diversity and pluralism are recognised in the Electronic Commerce Directive but that the national measures must respect EU law, including the rules enshrined in the Electronic Commerce Directive.

Certain of the services that are covered by the notion of user interface constitute information society services as referred to in the Electronic Commerce Directive and as defined in the Regulatory Transparency Directive. Regarding the French notification, the Commission mentions in particular app stores and software used in connected devices which would be provided by providers established in other Member States but which would be bound to provide appropriate visibility on the French territory to services considered as general interest and to correctly identify the service provider with editorial responsibility, thereby adapting their offers to suit the French territory and respecting the

[69] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') OJ L 178, 17.7.2000, p. 1–16

[70] Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification) (Text with EEA relevance) OJ L 241, 17.9.2015, p. 1–15

[71] Comments on the French notification, available online at https://cdnx.nextinpact.com/data-next/file-uploads/commission%20européenne.pdf (Accessed on 16 August 2023)

[72] Comments on the Italian notification, available online at https://technical-regulation-information-system.ec.europa.eu/en/notification/23157

application rules of Arcom and regularly reporting to the authority on the measures deployed. It further notes that the obligations foreseen in each of the notified drafts fall within the "coordinated field" of the Electronic Commerce Directive.

The European Commission recalls that any restriction to a fundamental freedom as enshrined by the Treaty on the Functioning of the European Union can only be upheld when it is justified by an overriding general interest such as to maintain pluralism of the media provided (1) it is able to guarantee the objective pursued and (2) it does not go beyond what is necessary to reach the objective.

The Commission thus concludes that the draft measures as notified could constitute a restriction to the cross border provision of information society services as they would apply to non-national EU based providers. The reasons to derogate from Article 3.1 and 2 are enumerated exhaustively at Article 3.4 a).[73]

The Commission recalls that

> *"the objective of ensuring the appropriate visibility for audiovisual media services of general interest is an objective recognised and promoted by Article 7a of the AVMS Directive, which can however only be achieved in compliance with Union law, in particular with the e-commerce Directive. Without prejudice to the substantive assessment of whether it might be necessary and proportionate to impose certain measures on providers of user interfaces in order to protect and promote media pluralism, the Commission asks the French authorities to fulfil their obligation to ensure the compatibility of their national measures with Union law, in this case with the conditions laid down in Article 3 of the E-Commerce Directive".*

Similar concerns were also voiced by the Commission in relation to Germany's draft law. In addition, the Commission noted that some of the rules may also overlap with the Platform to Business Regulation, and that the Member States are no longer in a position to regulate issues falling within the scope of that regulation.[74]

For France and Germany, the comments did not have the effect of prolonging the standstill period, and the laws were adopted. For Italy however, the Commission issued a "detailed opinion" on 12 July 2023 and considered that the notified measure was in breach of Article 3 of the e-Commerce directive and that it could not be adopted as it is.

All these therefore leads to a conundrum: if national services of general interest cannot be imposed on platforms and user interfaces that are regulated from other member (but that are available in the member states in question) this will mean that purely national distributors and user interfaces will

[73] They need to be specific (against a given information society service) and only if the service provider prejudices the objectives or which could present a serious or grave risk of prejudice to those objectives. Also, to be able to derogate from the internal market clause, the Member State needs to respect the procedural conditions specified in the rest of the article (meaning in particular that the Member State of destination needs to ask the Member State of origin to take the measure in question and that it must notify the Commission that it intends to take the measure).

[74] Article 5 of Regulation (EU) 2019/1150 Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services - *OJ L 186, 11.7.2019, p. 57–79.*

face more stringent rules compared to the global players and the national prominence rules may not be guaranteed and could therefore be undermined. Also, this will have the effect of significantly reducing the effectiveness of national rules on prominence.

To conclude, even if we can see that the rules on prominence can inherently lead to internal market questions, up until now, these rules have not been challenged before the Court of Justice of the European Union. But, the question remains and it would be useful for the Commission to provide guidance on how to settle this conundrum.[75] The proposed EMFA also explicitly foresees the possibility for the newly created Board for Media Services (that will replace ERGA) to also issue guidance.[76]

[75] This issue has been avoided in Article 114 of the EECC (must carry) and in Article 13 of the AVMSD (30% quota requirement for European works and related prominence obligation for on demand audiovisual services) as the articles specify that the obligations can only be imposed on services that fall within the jurisdiction of the Member State.

[76] Article 15(2)(2), point (a) of the EMFA proposal foresees that the newly created board (that will replace ERGA) could in particular issue guidance on art. 7A

5. CONCLUSIONS AND RECOMMENDATIONS

The report shows that rules on prominence of content of general interest are spread across multiple pieces of legislation in the EU, which creates a complex situation for all concerned (content providers, platforms, citizens, governments, and regulators). The report maps the different sets of rules, by operating a distinction between the rules that concern the prominence of media **services** and those that aim to ensure the prominence **content**.

The CoE guidelines appear robust and contain very meaningful suggestions, but they do not seem to be followed in a systematic way by policy makers in the EU or at the national level. **The first and foremost recommendation of this report is therefore for these guidelines to be systematically followed and embedded in the legal frameworks, both at the EU and national levels.**

In light of other pieces of legislation described in this report and of the CoE guidelines, Article 7a of the AVMSD in particular seems too general. It does not oblige the Member States to introduce prominence rules, which is completely in line with the CoE guidelines. **But, it could be further detailed to include important clarifications, bearing in mind the division of competences between the EU and the Member States**. First, it could include a mention of **the types of platforms** in scope by including only those that are used by a **significant number of users** (like in article 114 of the EECC on must carry). It should also clearly mention in the article itself (and not in a non-binding recital) that that the audiovisual media services of general interest should be clearly defined and that only proportionate prominence obligations should be imposed. A mention of how and by who this proportionality test should be assessed would also be an interesting add-on.

Rules on procedure could also be included to determine in particular the general interest services in scope; how prominence should be determined in practice with the need to involve both the platforms, the content providers, and civil society (in line with the multistakeholder approach of the CoE guidelines); and reporting and appeal procedures.

The role of independent regulators could be further specified to include in particular a role in settling disputes. Regulators should be correctly funded to be able to fulfil these roles.

The articulation of how must carry rules interplay with rules on prominence could also be specified with a mention of whether remuneration can be sought and, if so, any conditions that should frame this remuneration.

It could also be further specified in EU legislation whether only designated services should be given appropriate prominence or if disaggregated content of service providers could also be prominently displayed. This seems to be laudable as the consumption models of content are changing, and increasingly the presentation of content on user interfaces (connected TVs, for instance) is more and more disaggregated, that is, it tends to present end users with a selection of individual content items from different media services (sorted in categories such as genre, recommended for you, and so on) rather than a selection of media services/channels, although the two types of presentation can sometimes coexist. Therefore, limiting the prominence of audiovisual media only to services without encompassing content items may leave aside a large part of the user interfaces, therefore affecting

the effectiveness of regulatory measure. However, the need to protect the integrity of the audiovisual media services is also an important concern, which is explicitely recognised also in the AVMSD. **Any rule on prominence of disaggregated content of service providers should therefore only be possible if the media service provider agrees to the provision of disaggregated content ex ante.** However, it must be stressed that individual items of content (announcements/communications) stemming from the state **could only be prominently displayed in case of public urgency.** In that case, sufficient safeguards should be included in the legislation, with a clear role to be given to independent regulators. The AVMSD could be modified to include such safeguards for audiovisual media services.

Transparency requirements at various levels should be solidly embedded in prominence regimes. The rules on prominence should be thoroughly backed up by evidence as to why they are needed, and public consultations should be organised at the national level. Users and citizens should also be informed when and why certain services/content are prominently displayed.

The ability for users to customise the media offer could be more clearly articulated either in the EMFA or in the AVMSD. Some pieces of legislation impose the requirement whereas others do not. In particular, the draft EMFA gives this right to users, but this should not affect national measures implementing Article 7a (and 7b) of the AVMSD, which may lead to differing interpretations on what this means in practice. The DSA does not allow for full customisation of recommender systems but it does allow users to opt-out of profiling, which constitutes perhaps a first step towards enabling users to be able to fully customise recommender systems.

As the CoE guidelines emphasise, the role media and information literacy and its related funding should also be foreseen.

Last but not least from a legal perspective, the articulation between the rules of prominence imposed at national level on platforms established in other Member States should be addressed as this constitutes an area of legal uncertainty which may have important consequences in practice.

Despite rules on prominence that may be imposed, the actors themselves have an important role to play to ensure that services and content of general interest is made available in an attractive and visible manner.[77]

[77] In the UK, Freely, a joint free to air IP TV service was recently announced by a number some UK PSBs service broadcasters (PSBs) including licence fee-funded channels (BBC) and non-licence fee-funded channels (ITV, Channel 4, and Channel 5). The offer is expected to be available in 2024. See https://the-media-leader.com/uk-psbs-to-launch-online-freeview-in-2024/

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