Subgroup 1

2022

Consistent implementation and enforcement of the AVMSD framework

Deliverable 3

Exploring how algorithms and recommendation systems could ensure the appropriate prominence of audiovisual media services of general interest (Article 7a) as well as the prominence of European works (Article 13(1)).

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1 Introduction

The ERGA Subgroup 1 work programme for 2022 builds on the solid foundation of the work accomplished during the prior years. The ongoing, broad and still highly relevant discussion on the possible effects, benefits and chances deriving from the AVMSD prominence measure is a steady reminder that the continuous work by ERGA is useful and purposeful.

Why is it relevant? Prominence is key in today's online environment, especially for various forms of media content. This is mainly due to the reasons:

- To ensure that relevant offers are present within the limited attention of users, while the degree of fragmentation within the media market is continuously increasing.
- To enable media content providers to refinance the production of media content, bearing in mind that the users´ attention, clicks and viewing time generate advertising revenues.
- To safeguard a pluralistic and diverse media landscape, as mentioned in Recital 25 of the AVMSD.

During the last years ERGA has been closely following the state of play related to the national transposition of the two AVMSD prominence measures, regarding general interest content (Art. 7a AVMSD) and European works (Art. 13 (1) AVMSD). Last year's work of ERGA SG 1 was marked by a relatively small number of national transpositions in place regarding the prominence of general interest and limited activities carried out by NRAs to conclude a first cycle of monitoring of the actual impact of prominence tools for promoting European works. It was among the aims of this year´s work to update the data on the state of national transposition to see how Member States have progressed.

Furthermore, in 2022 the Subgroup 1 set itself the goal to expand the discussion of prominence measures beyond the already identified topics and further contribute to the implementation of the AVMSD prominence measures. In this regard, one of the main questions in focus of the work of Subgroup 1, according to the ERGA 2022 Work Programme, was to explore how algorithms and recommendation systems could ensure the appropriate prominence of audiovisual media services of general interest (Article 7a AVMSD) as well as the prominence of European works (Article 13(1) AVSD).

Before this backdrop, it is the purpose of this report to provide an overview on the updated state of the national transposition of Art. 7a AVMSD and. Art. 13 (1) AVMSD. It is also among the objectives of this report to identify and discuss the possible challenges, opportunities and risks that come from the use of algorithms and recommendation systems with the aum of enhancing prominence.

2 Recent results of ERGA work on AVMSD prominence measures

In order to further analyse the question in focus of this report, it is necessary to understand the "relevant issues to consider" from the work of Subgroup 1 on the AVMSD prominence measures during 2021 and prior years.

Art. 7a AVMSD: The results of the 2021 Subgroup 1 report demonstrated that the state of national implementation of Art. 7a AVMSD varied largely in between Member States. At the time of the survey in April and May 2021, just 6 out of 24 Subgroup 1 members stated that their Member State had transposed the provision of the directive into national regulation. This was mainly due to the non-obligatory nature of the provision or the national legislators opting for a minimum transposition.

The few transposition examples already in place indicated a set of common denominators and a broad mutual understanding of the provision among ERGA members. It was mostly consensual that general interest content must promote media pluralism and must be of an adequate and actual public interest. Most Subgroup 1 members with and without national transpositions accentuated within their answers that a definition of general interest content should not be limited to public service media, where appropriate, but shall also include content provided by commercial media services, which aim to fulfil social, democratic and cultural needs.

The results of the report also showed similarities regarding the understanding of the technical implementation of prominence measures. As there are many different technical possibilities to ensure appropriate prominence of audiovisual media content, very detailed or less flexible measures incorporate the risk of being outdated soon since technology changes at a rapid space. Therefore, any measures connected to the implementation of Art. 7a of the AVMSD should be kept as abstract, principle-based and technologically neutral as possible in order to be future-oriented. Having a too detailed regulation might lead to a constant need for change and improvement, lacking behind the state of technological developments. Even so, due to the lack of a greater number of transposition examples effectively in force, any references concerning a more harmonized approach among Member States were seen as premature at the time of last year's report.

Please find details in the report on Art. 7a AVMSD from ERGA Subgroup 1 of 2021 under https://erga-online.eu/wp-content/uploads/2021/12/ERGA-SG1-2021-Report-Articles-7a-and-7b.pdf

Art. 13 (1) AVMSD

In 2020, Subgroup 3 collected the views of National Regulatory Authorities and VOD providers and issued a first report aiming at identifying the various measures that Member States might prescribe in transposing Article 13(1) of the AVMSD. With the ongoing state of transposition, the goal of the ERGA work in Subgroup 1 of 2021 was to get an updated overview of the transposition process, the monitoring procedures and compliance assessment in order to provide recommendations for the transposition of Article 13(1) AVMSD.

Based on the contributions of 21 NRAs to the survey collected in September 2021, the following observations were made. Regarding the minimum share of 30% of European works, almost all Member States had transposed the obligation without any modification. A few Member States provided more detailed measures such as higher quotas or sub quotas dedicated to audiovisual works in a certain language or strengthening the links with a particular culture or community. Most of the national legislations transposing the AVMSD do not precisely define the notion of prominence. With regard to the enforcement of prominence of European works, most of the Member States (17 out of 21) leave on-demand audiovisual media service providers free to use any mean they find appropriate.

Regarding the control of on-demand audiovisual media service providers' compliance with their obligations, most of the NRAs did not have the occasion to carry out a full control or monitoring of these rules by the time of last year's report. Furthermore, most of them still needed to implement concrete processes, as the transposition into national legislation was still recent for most of the NRAs. It was therefore too soon to determine which tools were the most efficient to ensure the prominence of European works in a post transposition environment.

Please find details in the report on Art. 13 (1) AVMSD from ERGA Subgroup 1 of 2021 under https://erga-online.eu/wp-content/uploads/2021/12/ERGA-SG1-2021-Report-Article-13_1.pdf

3 Results of ERGA Subgroup 1 questionnaire of 2022

3.1 National implementation on Art. 7a and Art. 13 (1) AVMSD

Since the end of the work done by ERGA Subgroup 1 during 2021, some Member States might have further concluded national transposition efforts regarding the prominence measures of the revised AVMSD. Hence, it was considered necessary to address ERGA members with updated questions on the state of implementation of Art. 7a AVMSD and Art. 13 (1) AVMSD to build the work of this year based on a complete picture of the ongoing processes of national transposition.

Therefore, all Subgroup 1 members were invited to provide answers to a digital questionnaire in June and July of 2022. The main intention of this survey among Subgroup 1 members was to gather substantial information on the updated state of the national transposition in Member States as well as ongoing legislative processes or discussions regarding the regulation of algorithms and recommendation systems. Subgroup 1 drafters received feedback from 29 Subgroup 1 members[1].

The digital questionnaire covered six questions in two separate categories. It is the purpose of the following chapter of this report, to set out the aggregated results from the digital survey among ERGA Subgroup 1 members:

Question 1: *Has your Member State taken national measures in transposition of Art. 7a AVMSD? If yes, please specify your answer. If not, please describe any ongoing discussion in your Member State regarding national measures for prominence of general interest content.*

> *„Member States may take measures to ensure the appropriate prominence of audiovisual media services of general interest." (Art. 7a AVMSD)*

Regarding the transposition of Art. 7a AVMSD, with the exceptions of both Italy and Ireland engaged in national legislative processes at the time of the survey, there have been no further national transpositions of Art. 7a AVMSD with regard to prominence of content of general interest on a national level in comparison to the above stated results from 2021. The results of the digital survey show that there are currently still six Member States with existing national regulatory approaches on Art. 7a AVSD. In terms of the application of an already existing national transposition approach, the German NRA recently issued a list with media services of general interest, which will benefit from enhanced prominence on user interfaces.

Most Subgroup members further stated that their NRAs did not take part in any political discussion related to measures ensuring the prominence of content of general interest in the light of Art. 7a AVMSD. Though, some NRAs stated that they have been approached by their government to examine or propose potential rules on prominence measures in the near future. The NRAs typically play a vital role in the discussion around national prominence measures. As a contribution to the discussions at a national level, some NRAs have already commissioned studies, have launched a series of hearings with the various stakeholders concerned or have addressed various actors with questionnaires to enhance the exchange and debate on the topic.

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[1] NRAs from the EU Members States, EFTA countries party to the EEA (without voting rights) and observer countries (without voting rights) took part in the 2022 ERGA Subgroup 1.

This shows that viable options for prominence regulation of content of general interest are currently being explored within a few Member States. In some cases, it was reported that the introduction of prominence measures related to Art. 7a AVMSD could be reconsidered by some national legislator at a later occasion.

Questions 2: Has your Member State taken national measures in transposition of Art. 13(1) AVMSD? If yes, please specify your answer. If not, please describe any ongoing discussion in your Member State regarding national measures for prominence of European works.

> *"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 these works." (Art. 13 (1) AVMSD)*

National regulatory measures in terms of the transposition of Art. 13 (1) have been implemented broadly. The results of this year´s survey confirm that the overwhelming majority of Members States (24 out of 29 respondents) had already transposed Art. 13 (1) into national law, commonly with a very similar wording to the exact wording of the AVMSD. A few Subgroup 1 members stated that their countries deviated from the percentage of 30% until a percentage of up to 60% of European works and that they included additional measure on the inclusion of national works (so called "sub-quotas" oftentimes refer to audiovisual works in the national language) in combination with the regulation of Art. 13 (1) AVMSD.

Within their answer to the survey, Subgroup 1 members highlight that the implementation of the measures differs between the two parts provision (quantitative vs qualitative aspect). The inclusion of a quota of at least 30% (quantitative aspect) with in the catalogues is very clear and well established in national measures. Although, some national transposition practices miss out on a clear determination of how the prominence of European works is to be ensured, due to a lack of specification. The AVMSD has not described into detail the means for ensuring prominence but has referred in general to the different possible methods, as also mentioned in the recitals of the AVMS Directive (i.e., search options, specific European/country categories, homepage references, recommendations and other AI based tools and general marketing activities). Some Subgroup 1 members stated that they were currently in the process of developing guidelines for the prominence of European works in the setting of Video-on-Demand platforms.

In general, NRAs have elaborated how the media service providers are expected to meet the legal requirements and under which conditions they could be exempted from minimum share and/or reporting obligations. Therefore, some NRAs have drafted codes that clarify how low audience and low turnover thresholds are calculated and which can also specify where services should be excluded from the quota on the grounds that it would be unpractical or unjustified by reason of the nature or theme of programme provided by the services. However, there remains a difficulty on the issue of audience, which is the absence of a harmonized measuring instrument shared by the market for all categories of on-demand audiovisual media services in most countries. NRAs may decide, on a case-by-case basis, to grant exemptions from this obligation if, given the design or focus of the service in question, it is deemed unjustifiable or unfeasible to fulfil. When it comes to granting exemptions the NRAs will closely follow the guidelines of the European Commission and use the proposed definitions and thresholds of low audience share and turnover.

Question 3: *Please indicate the results or findings of any completed or ongoing reporting activity set out by Art. 13(4) AVMSD within your Member State.*

Most Member States verify the fulfillment of quota obligations of European works through a (digital) monitoring or survey where the entities addressed by the regulation are required to state, on a service-by-service basis, the numbers (quotas) within their catalogues, which includes information of European works and provide information regarding how prominence of these works is ensured. In most cases audiovisual service providers falling under the regulation have to submit their data to NRAs on a yearly basis and the NRA shall verify whether media service providers have fulfilled the quotas requirement.

The results of the survey show that the regular monitoring and reporting activities have advanced in most Member States and that most countries have completed their first monitoring circle regarding the share of European works. They regularly inform the Commission of the application of Article 13 of the AVMS Directive. A few Subgroup 1 members stated that they were currently completing the first monitoring process at the time of the survey or that their NRA had not yet started with any monitoring or reporting activities. When monitoring activities are carried out, the guidelines of the European Commission, which define the calculation of the share of European works in the catalogues of on-demand AVMS, are taken into account.

A non-representative overview over the answers of Subgroup 1 members leads to the conclusion that most NRAs indicated that the audiovisual services on demand under their jurisdiction have predominantly been complying with the incorporation of 30% of European works in their catalogues and therefore accomplished the prominence obligations. In case of missing answers or not reporting correct data, the NRAs may also request further information or documentation deemed useful. In some cases, the providers might also be fined with an administrative sanction. As a result of the recent monitoring, a few Subgroup 1 members also state that they are currently carrying out proceedings concerning the non-fulfilment of the minimum share and the non-labelling of European works.

As mentioned, most national transpositions do not include measures or criteria to ensure prominence or clarify that prominence of European works also includes the promotion of these works. Art. 13 (1) AVMSD provides that prominence will be ensured by the reinforcement of the visibility of European works in the provider's catalogue by using possible promotion techniques. Even though it is up to the media service providers to demonstrate the reasoning and appropriateness of certain measures, it was mentioned by some Subgroup 1 members that the monitoring activities could focus more on how the services falling under the legislation actually ensure prominence.

3.2 National regulatory approaches on algorithms and recommendation systems

In the second part of the digital survey and to gather information regarding the main question (*How can algorithms and recommendation systems ensure the appropriate prominence of audiovisual media services of general interest as well as the prominence of European works?"*) in focus of this report, Subgroup 1 members were asked specific questions regarding already existing national regulatory approaches on the regulation of algorithms and recommendation systems.

Question 4: *Are you aware of any national regulatory measures regarding the regulation of algorithms and recommendation systems related to media content within your Member State? If yes, please specify your answer.*

Most Subgroup members stated that they are not aware of any national regulation or any specific discussion within their Member State regarding algorithms and recommendation systems related to the field of media regulation. Additionally, most Subgroup 1 members had not developed any thoughts or ideas related to this question and were therefore unable to share relevant information. In some Members States, there are ongoing high-level discussions concerning national regulation of algorithms and recommendations systems to ensure the prominence of audiovisual media services of general interest and of European works on video on-demand catalogues, , but the overall discussion is still in an exceedingly early phase. The answers of Subgroup 1 members show that there is a case were national media regulation is already in force that addresses the algorithms and recommendation systems of so-called information intermediaries (services like Social Media platforms, search engines and Video-Sharing-Platforms) with rules regarding transparency and non-discriminatory functioning of the algorithm when curating media content.

Question 5: *If not, please describe any ongoing discussion in your Member State regarding the regulation of algorithms and recommendation systems.*

In many Member States there is a broader ongoing discussion about the need to regulate algorithms and recommendations systems. This discussion is not specifically related to media content or media regulation. Within Subgroup 1 members, there are several existing provisions relating to the regulation of algorithms and recommendation systems in general, within the framework of the national obligations or means imposed on operators of online platforms.

Most NRAs are aware that there is an increasing urgency of a more extensive reflection, which pertains to the problem the accountability of platforms and their algorithms, especially recommendations systems. They highlight that the use of detection, removal and control tools on content, accounts and social pages, raises relevant questions on the legal nature of the policies adopted by the platforms. This is considered as a matter which requires legislative action for a correct balance between rights and values at stake, in full respect of freedom of information and of pluralism.

Most Subgroup 1 members highlight that the regulation of algorithms and recommendation systems must be regarded in the bigger picture with platforms increasingly bearing systemic risks by also promoting certain kinds of content like illegal content, content which affects rights under the charter, content that is harmful for minors, disinformation impacting elections and discourse, and certain other categories of harmful content. Subgroup 1 members also mention that the broader topic is considered in the context of the DSA. A few Subgroup 1 members state that the regulation of algorithms and recommendation systems is mainly thought of as a regulatory topic that would be better if it would be regulated on the EU level, not separately in each Member State to avoid national fragmentations.

Question 6: *Please indicate your additional ideas and thoughts on how algorithms and recommendations systems could ensure the appropriate prominence of audiovisual media services of general interest and of European works on video-on demand services.*

Most Subgroup 1 members are familiar with the fact that algorithms and automated content recommendations are used by providers of audiovisual media services and that they can play an important role in the discoverability of audiovisual media content, as is within the intention of presenting consumers with more relevant content and offering better user experiences. The answers also stress the fact that platform providers in general tend to promote the content that is popular among users or that is commercially viable for them. At the same time, it is important to keep in mind that personalization and targeting methods of algorithms and recommendation systems do not undermine the importance of exposing the population to a wide and varied selection of content.

With regard to the purpose of the AVMSD prominence measure, it could be seen as a benefit to use algorithms and recommendation systems to enhance the findability of general interest content and European works as it might contribute to ensuring freedom of expression and diversity of opinions. From a user perspective, it may also be a benefit, because general interest content or European works also reach users who would not usually actively search for those kinds of content or consume them.

Generally, there are many technical ways to ensure appropriate prominence of audiovisual media content that include the use of algorithms and recommendation systems. Within their answers, Subgroup 1 members shared their existing opinions, thoughts and ideas within NRAs on the main question in focus of this report. The following aspects should be considered within further work:

General	- Algorithms are used to provide users with features to select, organize, or present certain contents or applications from services editors, and/or recommend some of them. - Algorithms and recommendation systems and in general artificial intelligence tools could be used to ensure the appropriate prominence of certain forms of media content. - Algorithms could enable certain forms of media content to appear in the home page of a provider and in search engines. - Algorithms can contribute to the cultural diversity of the offer and to the exposure of diverse media content, but they can also tend to lock the user into filter bubbles.
Types of algorithms	- Algorithms of recommendation engines must be differentiated and can be classified: (1) algorithms "pushing" content to the user based on various factors (e.g. viewing history, choices of other users of the service with similar interests), (2) algorithms proposing an ex-ante classification of content by genre and sub-genre or (3) algorithms establishing a correspondence between the keywords provided by users and those descriptive of the request that enabled the indexing of the content.
Transparency & Non-discrimination	- Service distributors shall guarantee algorithmic transparency and neutrality in terms of content recommendations. Service distributors must communicate under fair and non-discriminatory conditions. - It is imperative that algorithms operate in a transparent environment and that users are aware of their existence. Services need to explicitly state what AI tools (algorithms included) are being used, how they are designed, used, and also how they operate. - The importance of transparency on the use of algorithms and recommendation systems: informing the user about mechanisms of the

	algorithms, in particular the selection criteria used to produce the results, to distinguish organic suggestions from commercial suggestions.
	- Publication of indices measuring the open or closed nature of an algorithm with respect to different search criteria.
	- The respect of pluralism and of non-discriminatory principles in the presentation of service distributors' offers and media services available.
	- With non-transparent algorithms that recommend content based on unknown parameters to encourage user engagement and maintain attention comes a risk for the promotion of hate speech, polarizing content and misinformation. This risk also includes a systematical exclusion of some communities from the democratic debate.
Platform measures	- Platforms might take measures to specifically promote the availability of certain kinds of content if this is considered desirable.
	- It is necessary to strike the right balance between the objective of ensuring the visibility of the media content and the need to allow platforms to provide their users with the service they expect.
	- Algorithms could match customers' preferences and their previous searches with certain content that regulators/providers would like to promote and thus ensure prominence.
	- If algorithms and AI tools adapt to users' habits, they could enhance prominence.
	- Platforms are required to take appropriate measures to address certain forms of content that cause harm. In doing so this may lead to "good content" being more prominent on platforms.
	- Perhaps on-demand providers should be encouraged to develop their own recommendations systems and that should be valued in some way.
Regulatory measures	- Probably the definition of categories or types of measures instead of the (examples of) measures itself would have to prevail (i.e. visibility on websites, recommendation, navigation, search enquiries).
	- In any case, categories or examples of measures would need to be defined in a technology-neutral and platform-independent manner to be effective and provide optimal clarity.
	- The question of regulatory measures must be considered in the light of personal data protection rules and intellectual property rights.
Labelling	- Certain forms of media content that should be promoted could be identified as such, i.e. general interest content is tagged as such upon its upload. This labelled content can be given prominence over content that is not tagged as general interest content. Similarly, using algorithms, European works can be given prominence over non-European works

This non-exhaustive table with answers to the question on how algorithms and recommendation systems could ensure the prominence of media content should be interpreted as a non-exhaustive collection of first ideas that still need further discussion and exploration. The very explorative topic on algorithms and recommendation engines is suitable for a broader discussion.

For ERGA, it has been vital to engage in fruitful discussions with industry stakeholders and academics ever since. Therefore, ERGA Subgroup 1 organized a workshop to discuss the Subgroup 1 topics with different stakeholders.

The topic on algorithms and recommendation engines was introduced with an input statement from an academic perspective from communication sciences. The presentation highlighted the main difference between different algorithmic functions of sorting media content as of "filtering" in terms of sorting and prioritizing according to specifically chosen principles and "optimization" towards specifically chosen goals (e.g. clicks, duration of visits). It also highlighted that the algorithmic recommendations can match the diversity of editorial recommendations, that users do perceive more diverse news and media contents through social media and warned of strong effect causing higher levels of polarization.

Within the workshop panel, the experts from different stakeholder perspectives expressed their concerns that algorithms and recommendation systems should be used to enhance the prominence of general interest content and European works, mainly due to risks of bias. It was apparent that the question that ERGA Subgroup 1 raised was very interesting and highly relevant, but nonetheless it is at a too early stage to find precise answers. The topic needs to be further discussed in the light of the next development of the framework at a European and national level, the entrance into force of DSA and its implementation and the possible national initiatives that will follow.

4   Conclusions

The national transpositions efforts regarding Art. 7a and Art. 13 (1) AVMSD have been concluded within Member States. In comparison to the reports of last year, there have been hardly any further transposition efforts. Art. 7a AVMSD was only transposed by very few (6) Member States due to the non-obligatory nature of the provision. In contrast, Art. 13 (1) has been transposed by a vast majority of Member States and the monitoring and reporting activities have been actively carried out by NRAs.

Most of the Subgroup 1 members stated that, at this stage, they have not been engaged yet in regulatory discussion in their Member States regarding the regulation of algorithms and recommendation systems within the field of media regulation. The answers did not contain much information on already existing or planned regulatory approaches with regard to promoting media content.

Rather than on this specific aspect, many Members States reported a broader ongoing discussion about the need to regulate algorithms and recommendations systems. When it comes to the regulation of algorithms, user autonomy, transparency and non-discrimination was highlighted as very important.

The regulatory topic of algorithmic transparency must be addressed in the bigger picture, taking into consideration the Digital services Act. With the entrance into force of the DSA, another milestone is added to the legal framework, meaning that ERGA, from now, has to consider also its rules and implications among the regulatory scenario. Moreover, further implementations regarding future measures on the appropriate prominence of general interest content are also addressed by the proposal for the European Media Freedom Act.

The question raised by ERGA SG 1 is a very specific and multi-dimensional issue which still needs further exploration. It has political, cultural, legal and economic dimensions, requesting a harmonised and consistent interplay with the other pieces of legislation.

The aim of the work of the present workstream of the Subgroup 1 was to fuel the debate around algorithms and recommendation systems with regard to the prominence of audiovisual media content and European works, offering "food for thought" and stimulating the regulatory discussion.

Although some Subgroup 1 members stated that they were not involved yet on such topic, nonetheless, they are starting a reflection to outline possible ideas and "relevant issues to consider" on algorithms and recommendation systems. It can be understood from such efforts and the overall answers from the survey stated in this report that a large number of NRAs is currently building up resources and knowledge and (technological, but not only) competencies to further engage in that kind of discussion in the near future.

The topic could be consequently tackled in the broader picture as enhanced in the light of DSA. Therefore, ERGA could liaise with relevant stakeholders, associations, and regulators' networks, including EPRA, with a view to exchanging on the Subgroup's proposed solutions for achieving the above-mentioned objectives.