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VoD platforms and prominence. A European regulatory approach

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Abstract

In a scenario of abundance of digital contents audiovisual works need to be easily discovered to be consumed. Prominence, therefore, becomes essential. In Europe the idea of giving prominence became key to address how works can be promoted after the adoption of the Audiovisual Media Services Directive in 2007. In light of the amendment of this norm, this paper provides an overview of the regulation regarding prominence of VoD services at the EU level. The aim is to analyse its transposition into national provisions to identify different approaches and characterize them according to their implications for the general interest. It is concluded that to guarantee and justify that certain contents are easy to discover by citizens in an overwhelming digital world, the formulation of principles-based rules can be an appropriate solution.

Keywords

VoD. Platforms. Prominence. Discoverability. Public service. European Union.

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MAIN TEXT

1. Introduction

Audiovisual industries worldwide have undergone profound changes illustrated by the production, distribution and consumption of audiovisual services on line. Today citizens have at their disposal a broad spectrum of contents with free or paid access that they can consume through myriad devices. Furthermore, such consumption takes place in an increasingly personalized way, on demand and through platforms. Notwithstanding, it is not enough that said contents be at the disposal of potential consumers so that they can be viewed: users must be able to find the contents with ease.

The importance and implications of this process of ease of discovery, called prominence, have been known to audiovisual players and regulators for quite some time. In Europe, for example, as of the late 2000s interesting debates have ensued about how to put in place rules to ensure that European works can be easy to find and consumed (Attentional et al., 2009, 2011). This is intrinsically linked to the fact that in the European Union (EU) prominence has been a key concept for addressing how works can be promoted by on demand services since the adoption of the so called Audiovisual Media Services Directive (AVMSD) in 2007.

In light of the recent reformulation of this norm in November 2018 (Directive 2018/1808/EU), this paper provides an overview of the regulation regarding prominence of on demand audiovisual services (VoD) at the European Union (EU) level. The aim is to analyse its transposition into national provisions to identify different approaches and characterize them according to their implications for the general interest. In doing so, our study sheds light on the challenges and

implementation issues that might arise in a market scenario disrupted by the expansion of VoD platforms operating transnationally.

From a methodological perspective, this paper offers a regulatory analysis that relies on a critical bibliographical and documentary review of how this matter is dealt with at the European as well as national levels (examining articles in academic publications and specialized media, official reports, white papers, studies and legal texts). A legal analysis approach is especially important when providing an interpretation of particular issues and cases (Milosavljević and Poler, 2019), and document analysis offers an efficient, cost-effective means to access debates although it does pose limitations (Karppinen and Moe, 2019). This study tries to overcome them by placing research within the context of wider legal aspects and their historical evolution.

Even though no European country has a regulatory framework for prominence per se, and the implementation of this principle in relation to the transposition of the AVMSD has been very heterogenous within the EU (EAO, 2019), four national cases will be considered: France, Belgium (French Community), Germany and the United Kingdom. France and Belgium are of interest for three reasons: they are among the very few nations that have clear and specific references to prominence obligations beyond the wording of the directive; they are the only two States that after the 2010 amendment of the AVMSD set up criteria to monitor its implementation; and they had national legislation in place for on demand services even before the so called TVWFD became the AVMSD in 2007 (that is, they had measures that had some similar effect to Article 3i of the 2007 AVMSD before it was implemented; Attentional et al., 2009, 2011). In contrast, Germany and the United Kingdom (UK) have issued no prominence obligations for VoD services. Nevertheless, their interest lies in the

fact that they incorporated earlier the concept of prominence to their legal frameworks in relation to EPGs (that is, they did so under the European framework for EPG regulation created with the Directive 2002/19/EC – better known as the Access Directive).

It could also be said that these countries are of interest because they represent the diverse views that have existed in relation to the EU's audiovisual policy for many years, being the most obvious contrast between 'dirigiste' culturally protectionist France and the enthusiastically free-market 'liberal' UK, with another fault line running between large countries with strong audiovisual production capacities and small countries with weak culture industries (Collins, 1994; Gibbons and Humphreys, 2012). This latter division can apply to Germany and Belgium according to their particular features.

The British case is of additional interest due to its having left the UE. If after the end of the transition period set for 31 December 2020, the EU rules in the field of audiovisual and media services, and in particular the AMSD, no longer apply to the UK, two questions arise. The first one is whether the prominence obligation will nonetheless have a place in the UK; the second is what will happen to the capacity of influence which the country has had over the years in EU policy-making (Harcourt, 2016).

Before presenting the findings, and as a way of introduction, the article examines the notion of prominence along with its relation to other terms such as discoverability. After explaining how prominence is dealt with in the European scenario, selected national cases are analysed as well as challenges characterized. Finally, the potential broader implications for the general interest are discussed, concluding that in order to guarantee and justify that certain contents are easy to

discover by citizens in an audiovisual scenario increasingly populated by platforms, the formulation of principles-based prominence rules can be a viable alternative. It is maintained that such principles should guarantee ease of discovery for public service contents.

2. Prominence and discoverability

It is no simple task to define what prominence is in regard to the VoD services that platforms offer on line, nor is it easy to decide to which contents this regulation must be applied. For the first task, we have to address the meaning of this multifaceted term that applies to very diverse communicative realities, and in the second one, because it must be decided what contents should be the objective of the prominence.

Regarding the first point, we note that the origin of the word can be traced back to the late 16th century to denote something that juts out. From the Latin *prominentia* ('jutting out'), and in connection with the verb *prominere*, it refers to the idea of being noticeable, of standing out in relation to what is in the surroundings. The word prominence is intrinsically linked to the notion of discoverability since something prominent must be easily discoverable.

But what does the term discoverability imply? Borrowed from the field of law in English and the field of information technology in both English and French, it refers to the capacity to easily find an item, whether it be an application or a piece of content (Canada Media Fund, 2016: 10). The *Observatoire de la culture et des communications de l'Institut de la statistique du Québec* goes further in stating that *découvrabilité* refers not only to the capacity of a content to be easily discovered by a consumer search for it, but also to the capacity to be offered to those consumers who are not aware of its existence (OCCQ, 2017: 23). In a similar vein, Ofcom (2008:

49) classified findability, on the one hand, and awareness and serendipity, on the other, as potential barriers to the discoverability of online content. For McKelvey and Hunt (2019) discoverability is a kind of media power that concerns how platforms coordinate users, content creators, and software to make content more or less engaging.

When it comes to defining prominence (and discoverability, of course) in its relation with the supply and consumption of audiovisual services, we must address its application to a multiplicity of phenomena characterized by the fact that these contents can today be searched for and found in very different ways. For example, through programme schedules for individual channels, A-Z lists of programmes, recommendation tools that give suggestions based on previous viewing history, or hardware shortcuts that take the viewer directly to a particular third-party VoD app (Ofcom, 2019a: 19).

How then can we define making a content available in a platform that would be noticeable in relation to other contents? Let's take for example the case of user interfaces (UIs). There is evidence that suggests that UIs have the capacity to condition the way in which consumers access the services and interact with them, facilitating or hindering discoverability (MTM, 2019). The issue is that these UIs are not only present in the services themselves (in the search tools included with platforms such as Netflix or YouTube, for example) but also in the devices that we use for their access (smart TVs, set-top boxes and streaming sticks – that are USB-like media players).

In short, there are any number of different ways to discover content that surpass in terms of quantity and complexity the options offered up to now by EPGs as navigation tools for linear TV viewing. At the same time, the existence of UIs with

enhanced programme recommendations and more sophisticated search functions add to the possibility of personalization based on individual consumption data; this is precisely what characterizes VoD platforms. Among this range of possibilities, certain areas and positions for promoting content or apps within a service or device's UI are more desirable than others.

So, how should we define the type of content that would be noticeable in relation to others? For the European Broadcasting Union (EBU, 2020), for example, ensuring prominence should translate into securing findability and accessibility of general interest content on significant audiovisual platforms. The logic is that if platforms promote only the content commercially viable for them, those contents dedicated to minorities or niche audiences or genres get buried. Michalis (2018) points out that the new technological giants have big ambitions and are disproportionately powerful in financial terms, which is why one could expect them to be in a position to pay for the prominence of their own applications and services in the online environment at the expense of competing public service applications and services if negotiations and decision-making is left entirely to the market. In our view, since commercial platforms will be unlikely to promote content for the public good (e.g. via children's or factual genres), unless a case for business can be made, safeguarding public service content to be the one noticeable is key for the general interest. And that is so because public service content is vital for democratic societies in terms of social cohesion, cultural diversity and civic participation.

These are the types of regulatory challenges presented when it comes to deciding which contents should be the object of prominence and through which mechanisms. If in the analogue past governments were able to exercise direct influence on what nationwide audiences could discover, in the current scenario of

transnational platforms, existing regulatory frameworks have been proven to be limited. Ensuring the discoverability and prominence of certain contents has turned into an increasingly complex challenge for public policy.

3. Europe and beyond

Due to its specificity and history, it can be said that no jurisdiction outside of the EU has developed a comparable legal and policy framework. Nevertheless, concerns regarding the regulation of prominence of VoD services can be detected across the world. These are usually linked to other preoccupations, notably those related to content quota obligations.

At the international level, concerns have been framed, for example, within the debates that have been taking place in UNESCO regarding the adaptation of the 2005 Convention on cultural diversity to the digital era (e.g. Convention on Cultural Diversity Secretariat, 2018). At the national level the Canadian case stands out, however, examples can also be cited ranging from Australia to Colombia.

While the Colombian Ministry of Information and Communications Technology approved Decree n° 681 in May 2020, obliging VoD service providers to make Colombian works easily available and clearly identifiable in their catalogues, the resolution of the Australian Children's Screen Content Review remains pending since its release in August 2017. It stated that Australian content might not be receiving prominent exposure and was consequently difficult to find or less discoverable in the digital scenario (Australian Government, 2017:7). The Digital Platforms Inquiry (ACCC, 2019), at the same time, noted the ability of platforms to determine the content and prominence of material displayed to consumers, and recommended a

harmonized framework for digital platforms and the media. The Government has committed to implementing it (Fletcher, 2020).

We can affirm, nonetheless, that the Canadian debate is one of the most mature ones. Stemming from the 2013–2015 Let’s Talk TV consultations, the Canadian Radio-television and Telecommunications Commission (CRTC) noted that discovering Canadian content had become an issue in the digital environment. To continue the discussion, the Discoverability Summit was celebrated in May 2016 and a nationwide consultation took place between 2016 and 2017. This culminated in the release of the Creative Canada Policy Framework in September 2017 (DCH, 2017). Even though one of the three pillars on which it is built refers to promoting the discovery and distribution of Canadian content at home and globally, it did not pursue imposing regulations or taxes on new players. That might well change, especially in light of the Quebecoise experience (Montpetit, 2019) and its cultural policy *Partout, la Culture*. Accompanied by a 2018-2023 culture action, it includes measures such as the creation of a strategy to promote the visibility and discoverability of Francophone content from Québec across digital networks (Government of Quebec, 2018).

Within Europe, despite the fact that the Council of Europe (CoE) incorporates into one of its Recommendations the need to establish mechanisms that ensure due prominence of general interest contents in relation to the issue of diversity content (e.g. CoE, 2018), the fundamental debate has taken place at the EU level and in relation with the updating of the AVMSD.

The use of the term prominence in the specific area of the European audiovisual regulation can be traced back to the 1990’s and must be seen more specifically in relation to the amendments of the TVWFD, which came about with the approval of AVMSD in 2007 (Directive 2007/65/EC). A notable aim of these

amendments was to include non-linear services within the scope of the norm. One of the new provisions introduced in this regard was Article 3i, which put in place requirements to ensure that non-linear service providers promote the production of and access to European works, stating that such promotion could be linked to the sharing and/or prominence of European works (EU, 2007).

This text was maintained in the 2010 revised Directive (2010/13/EU), being moved to Article 13 without further specifications (it is however true that Recital 69 gave further examples of how the production and distribution of European works could be promoted: taking the form, for example, of the attractive presentation of such works in EPGs). Accordingly, the incorporation of the notion of prominence into the European regulation was produced through a loosely defined term and one particularly open to different interpretations, which could lead to a wide variety of indicators and procedures. This is precisely what happened. The norm was incorporated unevenly by EU Member States.

4. The AVMSD

Over the years the implementation of the AVMSD provisions on prominence was monitored (Attentional et al., 2009, 2011), leading to the early conclusion that prominence was a budding concept with a rather vague implementation. In fact, by 2011 only France and Belgium were ready to monitor its implementation. Currently, there is no regulatory framework that provides a closed definition of what should be understood as prominence in relation to on demand audiovisual services (EAO, 2019). Furthermore, the practice of VoD service providers has revealed many potential ways of ensuring the prominence of European works (EAO, 2015: 33), with the most commonly used methods being promotion and showing of European film

trailers on homepages; special offers and recommendations through an algorithm were employed by less than half of the VoD services surveyed, while even fewer employed a search function by country of origin.

This had very much to do with the fact that Article 13 of the 2010 AVMS Directive presented prominence initiatives as one possibility among others to promote European works. As a consequence of the transposition, VoD services were invited to promote European works by way of access measures which could include prominence initiatives (or not). As the mapping of national rules for the promotion of European works in Europe drawn up by the European Audiovisual Observatory for the European Film Agency Directors (EFADs) clearly explains¹ (EAO, 2019), this ended up being the case in the large majority of instances: 19 out of 31. Yet, out of these 19 cases, we can find a clear and specific reference to prominence obligations, beyond the wording of the directive, in 10 of them: Austria, Belgium – French and Flemish Community, Bulgaria, Finland, France, Italy, Poland, Portugal and Romania.

Among countries with strategies in place developed to assess how VoD service providers implement prominence, the following stand out (ERGA, 2018: 45): monitoring the promotional intensity of European works and the proportion of dedicated promotional spaces; measuring the performance of providers regarding adherence to the obligation; and mandating annual reporting by the service providers on their activities, including prominence measures.

It has yet to be seen what will happen now that the AVMSD has been updated. Member States are obliged to transpose new obligations contained in

¹ The mapping describes the situation in the 31 countries that are members of the EFADs: EU-28, Iceland, Norway and Switzerland.

Article 13 of the 2018 AVMSD, which, in regard to prominence, has been replaced with the following wording:

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 works².

(EU, 2018).

Once again, the Directive does not include a definition of prominence although it provides guidance in Recital 25 when it explains that media pluralism, cultural diversity and free speech should be objectives under which the promotion of general interest content shall be ensured. Additionally, Recital 35 explains that prominence involves promoting European works through facilitating access to them, and that it can be ensured through various means such as: a section dedicated to European works that is accessible from the service homepage, the possibility to find European works with the search tool available as part of that service, the use of European works in campaigns of that service, or a minimum percentage of European works promoted from that service's catalogue, for example, by using banners or similar tools. Specifically prioritising public service content is not contemplated and guidelines adopted in July 2020 did not clarify things further (EC, 2020).

The text of Article 13 is the result of a long and complex debate that began in May 2015 when the public consultation on Directive 2010/13/EU on Audiovisual Media Services - A media framework for the 21st century, first appeared (EC, 2015).

² These obligations will not apply to media service providers with a low turnover or a low audience.

The synopsis of the main responses to the consultation on promotion of European audiovisual content reveals that, in this respect, there was no clear consensus across stakeholders (EC, 2016).

At the same time, the interinstitutional trilogue negotiations on the text were not concluded until June 2018 because one of the touchstones of the agreement revolved around the need to ensure that the catalogues of VoD platforms contained a minimum share of European works (García Leiva and Albornoz, 2020). The European Parliament, together with some States (including France, Spain, Germany, Italy and Hungary), pushed for a minimum 30% share to which the phrase ‘ensure prominence of those works’ remained affixed.

5. National cases

Neither the UK nor Germany have prominence obligations in place for VoD services, although they have in fact regulated the matter in relation to EPGs since the mid 1990s. However, examples evidence a light-touch regulatory approach with a significant difference in terms of the aims pursued. Whereas the UK strategy is oriented towards securing due prominence for public service contents, the German concern is to avoid anti-competitive practices via balanced rules for both private and public providers. Therefore, where the former allows preferential treatment the latter focuses on guaranteeing equal treatment.

In the UK the question of due prominence first appeared in 1997 applied to EPGs and in a code of conduct drafted by what was then the media regulator, the Independent Television Commission (van der Sloot, 2012: 142). The prominence regime in force is based on the Communications Act 2003 and its Code of practice for EPGs which refers to appropriate prominence for public service channels. Ofcom

considers that ‘appropriate prominence’ allows a measure of discrimination but does not propose to be prescriptive about what appropriate prominence means since there are many possible ways in which EPGs could display information (Ofcom, 2004: 6). Therefore, EPG providers are required to ensure that the approach they adopt is objectively justifiable, and that it is published in a statement. The final aim is to safeguard the position of all public service channels and improve the discoverability of some (Ofcom, 2019b).

Due to the fact that current legislation only covers prominence of linear public service channels within EPGs, but not of content provided on demand, Ofcom is moving forward recommending the creation of a new legal framework that should initially focus on securing discoverability of public service content on connected TV platforms (Ofcom, 2019a). This framework should be flexible enough to be adapted to changes in technology and viewer behaviour, and should allow viewers to easily find public content on the homepage of connected TVs while giving protected prominence within TV platforms’ recommendations and search results.

In Germany, the Interstate Treaty on Broadcasting and Telemedia (*Rundfunkstaatsvertrag*) has been the primary applicable legislation until early 2019 when it was amended and transformed into an Interstate Treaty on Media (*Medienstaatsvertrag*). Finally adopted on December 2019, it could enter into force in fall 2020. This new treaty, designed in part to take into account the provisions of the amended 2018 AVMSD, extended the scope of application to so-called intermediaries, platforms and UIs (Etteldorf, 2018), ensuring that media content with added social value can be easily found and is not overlooked in the superabundance of the digital world.

The main goals for reform include general principles such as technological neutrality, transparency and prohibition of discrimination (Rundfunkkommission der Länder, 2019). More specifically, Section V has a subsection dedicated to media platforms and UIs which refers to findability (*Auffindbarkeit in Benutzeroberflächen*). In a nutshell, it mandates that:

- All offerings must be searchable without discrimination using a search function. Similar offers or content may not be treated differently in terms of sorting, arrangement or presentation in UIs, without objectively justified reasons; and traceability must not be unduly hindered.
- The content mediated by a UI must be directly accessible and easy to find on the first selection level. Within such content, programmes which make a particular contribution to the diversity of opinions and offerings must be easy to find.
- Services offered by ARD, ZDF and Deutschlandradio, contributing to the diversity of opinions and offers, must be easy to find in the context of their presentation.

Like the UK, Germany has a certain tradition regarding the regulation of EPGs: in 1996 the *Rundfunkstaatsvertrag* had already stipulated that the providers of systems which could control the selections of TV programmes had to offer all broadcasters their technical services in fair, reasonable and non-discriminatory conditions, with the homepage making equal reference to public and private channels. Precisely, this idea of equality in weight has remained one of the distinguishing features of the German regulatory approach toward EPGs; something that differs significantly from the British model that gives public channels due prominence (van der Sloot, 2012: 143).

Both France and Belgium French-Community have had clear and specific references to prominence obligations for VoD services, beyond the wording of the AVMSD, since the mid 2000s. Although both examples share as a main concern the promotion of European and French-language content and therefore pursue similar aims, the regulatory approaches developed evidence important differences in terms of means. The flexible and consensual Belgian approach, based on legal guidelines and cooperation with providers, contrasts with the French heavy-handed approach that entails intervention via detailed obligations. Their advantages and disadvantages have been portrayed in the evaluations of the implementation of their prominence obligations.

In France, according to Article 13 of Decree 2010-1379 on on-demand audiovisual media services, VoD service providers must include European as well as French works, of which a substantial proportion needs to be present and given prominence on the service homepage, notably through the display of images and the provision of trailers. Different studies found that the real impact of these obligations was questionable – since few users accessed services via their relevant homepage – and that other alternatives – such as search tools by origin of production – needed to be considered (CSA-F, 2013; IDATE, 2016).

It was no surprise therefore that, when the time came to comment on the amended AVMSD, the position of the *Conseil Supérieur de l'Audiovisuel* (hereafter CSA-F's) regarding prominence was that this obligation needed to be clarified in the text or within guidelines issued (CSA-F, 2017). This is in line with the French government view of maintaining the regulatory framework in place and extending it to the various forms of audiovisual services – including those of foreign players – and the idea of relying on the transposition of the AVMSD to do so (Bouquillion, 2019).

Nevertheless, it is difficult to foresee how the implementation of the 2018 AVMSD will be undertaken in France, in general, and if the definition of prominence will specifically be elaborated on further, in particular, since a new draft law on audiovisual communication and cultural sovereignty in the digital age was put forward by the Government in 2019. It is highly controversial because it affects several organic laws as well as major issues such as the reorganisation of regulatory bodies.

In Belgium - French Community, according to Article 46 of the Coordinated Act of 26 March 2009 on Audiovisual Media Services, VoD services are to promote the European works in their catalogue, including those by authors from the French Community, by highlighting, through an attractive presentation, the list of available European works. As Metzdorf points out (2014), unlike the rather rigid legal order in France, the audiovisual regulator for French-speaking Belgium, the *Conseil Supérieur de l'Audiovisuel* (hereafter, the CSA-B), actively shaped the interpretation of this disposition; the French Community selected 'prominence' as the primary means of promotion while refraining from establishing quotas or soliciting investments from VOD providers (which France did).

When the changes that the 2010 AVMSD brought with it were implemented, there was already concern in Belgium about defining the 'give prominence' idea. So that, although the same wording contained in Recital 69 of the Directive was adopted, the legislator had in fact already further specified this notion, stating that prominence would be achieved by increasing the visibility through the use of all possible promotional techniques. These included (Furnémont, 2013: 40): advertising inserts on the homepage of the provider's EPG and website; the creation of a special category in its electronic catalogue, dedicated specifically to European works; or

references to the European works available in its catalogue, in feature articles in its magazines or in brochures sent to its customers.

The CSA-B decided to suggest further possibilities such as giving prominence under headings ('new releases', 'last chance', 'great classics', 'favourites', etc.), via sections with preferential pricing or even available free of charge to users, or by using promotional campaigns for the VoD service itself. It also developed a structured methodology in collaboration with providers to facilitate enforcement of the requirements (Nikoltchev, 2013: 37; OMC Group, 2019: 12). Providers are expected to share a list of the tools used to implement prominence of European works, together with information about works consumed and the composition of catalogues, so that the regulator can put viewing numbers in relation to tools and strategies.

Even though the CSA-B "seemed to struggle with the establishment of a firm causal link between the measures taken to increase visibility and the consumption of the promoted works, inferring that further qualitative studies were necessary to that effect" (Metzdorf, 2014: 3), it was allegedly verified that with this approach European works were boosted (CSA-B, 2012; Collège CSA-B, 2015). It is therefore foreseeable that this is the path they will continue to follow.

6. Diverse approaches and challenges

As can be readily surmised, the task of securing prominence is not any easy one. Nor has the regulation in the EU contributed to facilitating it as the norm regarding prominence is the bare minimum, and since it first appeared it has maintained its loose definition that has led to a vague and heterogeneous implementation. In any event, all of the Member States will have to develop their own approach to the issue to comply with the transposition of the 2018 AVMSD. There are many concerns that

there might not be a consistent implementation across the EU: not only because few regulators are now ascertaining prominence, but also because of some of the challenges that may arise. In this respect, it should also be brought to the forefront the fact that VoD platforms' offerings evolve and include innovations on an ongoing basis (e.g. voice-driven search or casting content from mobile devices to the TV set). In other words, how prominence can be achieved today may be very different from how it can be achieved in five years' time.

Evidently then, the main challenges to the regulation of prominence do not only come from the complexity inherent to the concept or from the scant or diverse experience in this matter among countries, both in terms of design and implementation. Challenges also arise from increasingly sophisticated technological and market dynamics that shape what can be classified as commercial prominence: availability and ease of discovery of content depend on commercial negotiations – rarely made public – between TV platforms, content providers and third-party technology providers; and these deals range from securing presence on the homepage or inclusion in recommended sections, to the creation of hardware shortcuts for this purpose, such as buttons on remote controls (MTM, 2019).

The four cases presented here are of interest because they illustrate these problems and the array of possible solutions beyond the existence or not of specific obligations for VoD platforms under the umbrella of the AVMSD. Although one could think that those countries with specific references to prominence obligations for VoD services beyond the wording of the AVMSD have a heavy-handed regulatory approach to the matter, which is true for the French case that is founded on detailed obligations, it is not the case of Belgium – French Community, based on flexible guidelines and cooperation with providers. In a similar way, it could be posited that

those countries without prominence obligations in place for VoD services, like Germany and the UK, have a regulatory hands-off approach in this matter. Nothing could be further from the truth since in both cases the concern regarding prominence for specific contents has a long history. However, what is true is that their perspective is one of minimalist action, but clearly differentiated by the objectives they pursue.

In short, the findings reveal very different national approaches that suggest – once again – the conflict between economic liberals and cultural policy-oriented *dirigistes* that has shaped EU audiovisual policy (Gibbons and Humphreys, 2012), among other existing frictions. We can also highlight what emerges as a common element to all cases considered: the existence of a previous concern about prominence issues that cannot be directly linked to EU regulation. This concern, which might well be characterized as sociopolitical, has emerged in each country in a historically complex way, hand in hand with the evolution of its own cultural and communicative policies. And for this reason it is not a far-fetched supposition that the implementation of the 2018 AVMSD – and prominence obligations – will continue to be heterogeneous, as it has been until now, throughout the entire EU.

Another debate is to what extent and degree the UK's exit from the UE on January 31, 2020 could have repercussions on these processes. Once the 11-month transition period is over, the UK will stop following EU rules and no longer will be part of the EU's customs union and single market. In other words, the AVMSD will no longer apply to the UK, which will become a third country for the EU, and the framework would be that of the European Convention on Transfrontier Television of the Council of Europe signed by the UK in 1993.

In light of the possible flaws with this outdated norm and the rapidly diminishing likelihood of including audiovisual media services in any free trade agreement with the EU (Brady and Wiseman, 2019), some studies have already reflected on likely impacts of various post-Brexit scenarios on the EU regulatory environment for the audiovisual sector as well as major legal repercussions on both the UK and the EU (e.g. Cabrera Blázquez et al., 2018; Cole, Ukrow and Etteldorf, 2018). We will have to wait and see because the true consequences of Brexit will depend on whether the transition period ends with or without terms being agreed upon.

With respect to our study, two reflections can be made. The first is whether the prominence regulation will at any rate have a place in the UK, with the answer being yes as it has held such a position for a long time and Ofcom has made important proposals to extend the regulation beyond linear services to secure discoverability of public service content online. The second reflection is whether the UK's capacity of influence in EU policy-making could simply lead it to announce its end, together with a parallel strengthening of others' positions, such as that of France. However, the importance of its market in the region, as well as the international projection of some of the UK's audiovisual institutions (such as Ofcom and BBC), make it feasible that the European audiovisual space will continue to be inclined to listen to what its former member has to say.

At the same time, we must not forget that in European audiovisual history, the UK has not been the only country that opted for liberalisation and self-regulation positions (Collins, 2002; Gibbons and Humphreys, 2012). For this reason, many of the ideas personified by this country are not simply going to disappear from the European regulatory ambit because it no longer belongs to the Common Market.

Hence, the reshaping of the balance of power in the future construction of the regulation and European audiovisual policy will be one of the great unknowns to be revealed in the coming years. At any rate, it does not seem likely that Brexit is going to alter how the 2018 AVMSD will be implemented in each Member State in regard to their regulations on prominence.

7. As a way of concluding

This paper has offered an overview of the European regulation regarding prominence of VoD services analyzing different national approaches. To conclude, it reflects on the implications for the general interest of such approaches in particular, but also of regulating prominence in general in an increasingly competitive and complex audiovisual scenario.

Regarding the implications of approaches studied, due to ongoing developments in this field, any conclusions must be tentative. It is clear though that further research needs to be done since there is little evidence to suggest that one strategy is better than others. As to what our research has been able to ascertain, it is not possible to affirm that a heavy-handed regulatory approach can effectively guarantee prominence for certain contents without colliding with other objectives (notably those related to competition); nor, on the contrary, could a light-touch approach be possible without putting a strain on other principles (notably the protection of diversity). It also is unclear if any of the approaches studied will serve as benchmark at a European level.

Having stated that, if we expand our gaze to the implications of regulating prominence in general, in order to contribute to protecting the general interest, our

conclusion here is that the response must be formulated in a multi-dimensional way, and thinking in terms of audiovisual production, distribution and consumption.

In the first place, clarifying how prominence must be understood can have a direct and immediate effect on how contents are made available. Not only because it would influence the way in which said contents are presented to the viewer (tagged, location on the homepage, etc.), but also because it could have an impact on the routes by which they are accessed (EPG positions, search tools, players, etc.).

Secondly, in the mid and long term, it could lead to the possibility of counterbalancing commercial prominence. This type of prominence, which currently dominates the distribution of content (coming about for example from negotiations between TV platforms and content providers), could be substituted by a new equilibrium in which the notion of public interest has a clear place (for example, ensuring a certain location for public service contents).

Thirdly, it is difficult to predict to what degree this could end up influencing the actual production of contents. However, what is clear is that the regulation of prominence cannot be thought of as an isolated measure. Its purpose and usefulness can only prosper within a set of decisions that are comprehensively aimed at protecting the general interest.

In Europe, where audiovisual regulation has been developed in conjunction with competition law, progressing to a closed legal definition of what it means to grant prominence for certain contents in a digital environment is most difficult indeed. What can then be done? How can it be guaranteed –and justified– that some contents are easy to discover by citizens in an overwhelming online world?

There is not one sole or linear response to this question that every audiovisual system must confront, but it does seem clear that the solution will not come from a

closed list of obligations which might already be outdated when it emerges. The idea defended here is that the formulation of principles-based rules can offer instead an alternative (Ofcom 2019a; EBU, 2020). Such principles should guarantee ease of discovery for public service offerings, in general (whether they are linear channels or on demand catalogues), and public service productions, in particular (whether they are children's, factual or indigenous fiction genres).

Why? Because public service contents are intended for everyone rather than for just some; because they serve the public interest, rather than private interests; and because they are geared toward social benefit rather than commercial profit. In other words, the idea is that when deciding what type of contents must benefit (or not) from obligations of prominence, the criteria be that the values and aims are essentially sociocultural and not merely commercial.

Who decides what is prominence is a question related to power issues, and unless a general interest-oriented regulatory answer is given the market alone will have the last word about what is prominent or not. How traditional regulation will translate into the scenario of transnational VoD platforms, nobody knows, but a protective framework based on securing prominence for public service contents – so that they are visible and findable – may at least offer a chance to protect the audiovisual general interest in the digital world.

References

- ACCC (Australian Competition & Consumer Commission) (2019) *Digital Platforms Inquiry* – Final Report. Canberra: ACCC.
- Attentional, Rambøll Management, Pedersen Oliver & Ohlbaum Associates and Headway International (2009) *Study on the application of measures*

- concerning the promotion of the distribution and production of European works in audiovisual media services*. Final study report for the EC, Brussels, May.
- Attentional, Rambøll Management, Pedersen Oliver & Ohlbaum Associates and Headway International (2011) *Study on the implementation of the provisions of the Audiovisual Media Services Directive concerning the promotion of European works in audiovisual media services*. Final study report for the EC, Brussels, December.
- Australian Government (2017) *Australian and Children's Screen Content Review*. Consultation Paper. Canberra: Department of Communications and the Arts.
- Bouquillion P (2019) Digital Audiovisual Platforms, Between Transnational Flows and National Frameworks. In: George E *Digitalization of Society and Socio-political Issues 1. Digital, Communication and Culture*. Montreal: ISTE Edition, p. 107–116.
- Brady H, Wiseman C (2019) From Paris with Love: Latest Brexit Twist for Audiovisual Media Services Industry. Available at: <https://hsfnotes.com/brexit/2019/02/01/from-paris-with-love-latest-brexit-twist-for-audiovisual-media-services-industry/> (accessed 20 July 2020).
- Cabrera Blázquez F, Cappello M, Fontaine G, Talavera J, Valais S (2018) *Brexit: The impact on the audiovisual sector IRIS plus*. Strasbourg: EAO.
- Canada Media Fund (2016) *Discoverability: Toward a Common Frame of Reference*. Toronto: Canada Media Fund.
- Cole M, Ukrow J and Etteldorf C (2018) Research for CULT Committee – Audiovisual Sector and Brexit: the Regulatory Environment. Brussels: Policy Department for Structural and Cohesion Policies, European Parliament.

Collège d'autorisation et de contrôle du CSA (Collège CSA-B) (2015) Services sur plateformes internet et services a la demande. Bilan transversal 2014 - registre 2015. Available at: http://csa.be/system/documents_files/2570/original/CAC_20151217_synthese%20transversale_nouvelles%20plateformes_dv.pdf?1452597785 (accessed 2 February 2020).

Collins R (1994) *Broadcasting and Audio-Visual Policy in the European Single Market*. London: John Libbey.

Collins R (2002) *Media and Identity in Contemporary Europe*. Bristol: Intellect.

Conseil Supérieur de l'Audiovisuel (CSA-B) (2012) Evaluation du dispositif de mise en valeur des oeuvres européennes et de la FWB dans les services de VoD. Available at: <http://www.csa.be/breves/689> (accessed 20 February 2020).

Conseil Supérieur de l'Audiovisuel (CSA-F) (2013) Rapport au Gouvernement sur l'application du décret n° 2010-1379 du 12 novembre 2010 relatif aux services de médias audiovisuels à la demande (SMAD). Available at: <https://www.csa.fr/Informer/Collections-du-CSA/Travaux-Autres-publications/Rapports-au-gouvernement.-parlement.-etc/Rapport-au-Gouvernement-sur-l-application-du-decret-n-2010-1379-du-12-novembre-2010-relatif-aux-services-de-medias-audiovisuels-a-la-demande-SMAD> (accessed 2 July 2020).

Conseil Supérieur de l'Audiovisuel (CSA-F) (2017) Position du Conseil supérieur de l'audiovisuel sur la proposition de la Commission européenne visant à réviser la directive « services de médias audiovisuels ». Available at: <https://www.csa.fr/Informer/Toutes-les-actualites/Actualites/Position-du->

[Conseil-superieur-de-l-audiovisuel-sur-la-revision-de-la-directive-Services-de-medias-audiovisuels](#) (accessed 2 July 2020).

Convention on Cultural Diversity Secretariat (2018) *Open Roadmap for the implementation of the 2005 Convention in the Digital Environment*. Paris: UNESCO.

Council of Europe (CoE) (2018) Recommendation CM/Rec(2018)1[1] of the Committee of Ministers to member States on media pluralism and transparency of media ownership. Adopted by the Committee of Ministers on 7 March 2018 at the 1309th meeting of the Ministers' Deputies. Strasbourg: CoE.

DCH (Department of Canadian Heritage, Canada) (2017) *Creative Canada Policy Framework*. Ottawa: DCH.

EBU (2020) AVMSD: EBU Calls on Member States to ensure prominence of general interest content, June 10. Available at:
<https://www.ebu.ch/news/2020/06/avmsd-ebu-calls-on-member-states-to-ensure-prominence-of-general-interest-content> (accessed 17 July 2019).

Etteldorf C (2018) Draft new Inter-State Media Agreement and associated online consultation. *IRIS* 8:1/16. Available at:
<http://merlin.obs.coe.int/newsletter/download/238/pdf/en> (accessed 5 June 2020).

European Audiovisual Observatory (EAO) (2015) *The development of the European market for on-demand audiovisual services*. Strasbourg: EAO.

European Audiovisual Observatory (EAO) (2019) *Mapping of national rules for the promotion of European works in Europe*. Strasbourg: EAO.

European Commission (EC) (2015) *Consultation on Directive 2010/13/EU on audiovisual media services (AVMSD). A media framework for the 21st century.* Brussels: EC.

European Commission (EC) (2016) *Synopsis report of the Public consultation on Directive 2010/13/EU on Audiovisual Media Services (AVMSD) - A media framework for the 21st century.* Brussels: EC.

European Commission (EC) (2020) *Guidelines pursuant to Article 13(7) of the Audiovisual Media Services Directive on the calculation of the share of European works in on-demand catalogues and on the definition of low audience and low turnover.* Communication from the Commission 2020/C 223/03. Brussels: EC.

European Regulators Group for Audiovisual Media Services (ERGA) (2018) *ERGA Analysis & Discussion Paper to contribute to the consistent implementation of the revised Audiovisual Media Services (AVMS) Directive.* Available at: <http://erga-online.eu/wp-content/uploads/2018/11/ERGA-2018-08-SG3-Analysis-and-Discussion-Paper.pdf> (accessed 13 December 2019).

European Union (EU) (2007) Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. December 18. L 332/27. Official Journal of the EU.

European Union (EU) (2010) 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). April 15. L 95/1. Official Journal of the EU.

European Union (EU) (2018) 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. November 28. L 303/69. Official Journal of the EU.

Fletcher P (2020) Speech to the International Institute of Communications: The Harmonised Framework—digital platforms and the media, February 21. Available at: (<https://minister.infrastructure.gov.au/fletcher/speech/speech-international-institute-communications-harmonised-framework-digital-platforms-and-media>) (accessed 17 July 2020).

Furnémont JF (2013) New Issues and Challenges for Audiovisual Policy-makers, Films Institutions and Audiovisual Regulators: the Example of the French Community of Belgium. In: Nikoltchev S (ed) *Video on Demand and the Promotion of European Works. IRIS Special*. Strasbourg: EAO, pp.37–44.

García Leiva MT and Albornoz LA (2020) VOD service providers and regulation in the European Union: an audiovisual diversity approach. *International Journal of Cultural Policy*. Epub ahead of print 11 June. DOI: 10.1080/10286632.2020.1769614.

Gibbons T and Humphreys P (2012) *Audiovisual Regulation under Pressure. Comparative cases form North America and Europe*. Oxon: Routledge

Government of Quebec (2018) *Plan d'action gouvernemental en culture 2018-2023*. Quebec: Ministère de la Culture et des Communications.

- Harcourt A (2016) The UK role in EU policy-making. Briefing paper, University of Exeter, UK, May.
- IDATE (2016) *Effets économiques du décret n°2010-1379 du 12 novembre 2010 relatif aux services de médias audiovisuels à la demande*. Paris: CSA.
- Karppinen K and Moe H (2019) Digital Audiovisual Platforms, Between Transnational Flows and National Frameworks. In: Van den Bulck H, Puppis M, Donders K and Van Audenhove L *The Palgrave Handbook of Methods for Media Policy Research*. Cham: Palgrave Macmillan, p. 249–262.
- McKelvey F and Hunt R (2019) Discoverability: Toward a Definition of Content Discovery Through Platforms. *Social Media + Society* 5(1): 1–15.
- Metzdorf J (2014) The implementation of the Audiovisual Media Services Directive by National Regulatory Authorities. National Responses to Regulatory Challenges. *JIPITEC* 5: 88–104.
- Michalis M (2018) Distribution Dilemmas for Public Service Media. Evidence from the BBC. In: Ferrell Lowe G, Van den Bulck H and Donders K *Public Service Media in the Networked Society RIPE@2017*. Gothenburg: Nordicom, p. 195–210.
- Milosavljević M and Poler M (2019) Legal Analysis in Media Policy Research. In: Van den Bulck H, Puppis M, Donders K and Van Audenhove L *The Palgrave Handbook of Methods for Media Policy Research*. Cham: Palgrave Macmillan, p. 519–539.
- Montpetit J (2019) How it suddenly became chill to tax Netflix and other web giants. *CBC News*, 16 October.
- MTM (2019) Review of TV user interfaces in the UK market. Current offerings and future developments. Final Report. Available at:

https://www.ofcom.org.uk/data/assets/pdf_file/0022/154390/mtm-review-tv-user-interfaces-uk-market-full-report.pdf (accessed 28 January 2020).

Nikoltchev S (2013) (ed) *Video on Demand and the Promotion of European Works. IRIS Special*. Strasbourg: EAO.

Observatoire de la culture et des communications du Québec (OCCQ) (2017) *État des lieux sur les métadonnées relatives aux contenus culturels*. Québec: Institut de la statistique du Québec.

Ofcom (2004) *Statement on Code on Electronic Programme Guides*. London: Ofcom.

Ofcom (2008) *Ofcom's Second Public Service Broadcasting Review - Phase 2: preparing for the digital future*. London: Ofcom.

Ofcom (2019a) *Review of prominence for public service broadcasting. Recommendations to Government for a new framework to keep PSB TV prominent in an online world*. London: Ofcom.

Ofcom (2019b) *Review of prominence for public service broadcasting. Statement on changes to the EPG Code*. London: Ofcom.

OMC Group (2019) *European movies on the move. Ten actions for better circulation across. Report of Member State's experts on improving circulation of European films*. Luxembourg: The Publications Office of the European Union.

Rundfunkkommission der Länder (2019) *Der neue Medienstaatsvertrag. Zusammenfassung*. Available at: https://www.rlp.de/fileadmin/rlp-stk/pdf-Dateien/Medienpolitik/Zusammenfassung_MStV_2019-12-05.pdf (accessed 14 January 2020).

Van der Sloot B (2012) *Walking a Thin Line: The Regulation of EPGs. JIPITEC 3: 138–147*.