



PRIORITISATION UNCOVERED

The Discoverability
of Public Interest
Content Online



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Executive Summary

Whilst the freedom of expression implications of content takedown, ‘privatised censorship’ and down-ranking of content have been much discussed in recent years, content curation practices like up-ranking and prioritisation have been under less scrutiny. Yet content moderation and curation are two sides of the same coin and they both determine which content is circulated and accessed online. In contemporary media systems, routes for accessing audio-visual media content online are more complex than the channels and electronic programmes guides (EPGs) typical of linear distribution. As media consumption shifts onto a range of on-demand, mobile, social and streaming services, the role of hardware devices, operating systems, users’ interface design, and related search and discovery functions becomes pivotal in nudging audiences’ choices and ultimately driving access to and consumption of content. The aim of this report is to provide a clearer understanding of what prioritisation of public interest content means in an internet-distributed ecosystem, discuss emerging issues with current industry practices in this area, and highlight related policy needs, and potential avenues for intervention.

Definitions and regulatory framework



Content prioritisation processes refer to the range of design and algorithmic decisions that positively discriminate and promote content by making it more discoverable or prominent on different devices and related user interfaces. If a gatekeeper prioritises content, making it prominent and more discoverable, it will have increased reach, a potentially wider audience and/or be more likely to be accessed by a specific target group.

Currently, online content curation practices and related prioritisation decisions are not covered by a specific regulatory framework, but in the linear distribution, EPGs and cable services are covered by legacy broadcasting and must carry rules. While the policy debate is growing in different national contexts, there still a lack of a coordinated approach and a lack of knowledge of industry practices and policy needs in this area.

Industry practices in a changing landscape



A range of new, commercial and non-commercial content prioritisation practices are in operation. Media and technology companies promote content through electronic programme guides, on demand recommendations, social media feeds, search results display, user interface design and other algorithmic processes. In some cases, but to an extent unknown, prioritisation is based on determinations that content serves the public interest. In other cases these decisions are driven by private interest, economic incentives, and purely commercial transactions.

Researchers have not been able to ascertain why such content is prioritised, as these decisions are complex and involve different actors. Overall, factors that can influence decisions on what to prioritise as public interest content include regulatory environment, technological architecture, level of users’ agency and literacy, and commercial negotiations between intermediary services and content providers.

Emerging issues



Key issues related to current industry practices and that are relevant for the Council of Europe and its member states include:

- threats to media pluralism and independence;
- potential private and state capture;
- prioritisation as soft censorship and propaganda;
- the long-term sustainability of public service media and local content providers;
- threats to citizens' autonomy and perpetuation of inequalities;
- lack of intermediaries' transparency and accountability.

Recommendations



The Council of Europe and its member states should consider a range of new policy interventions in order to monitor and mitigate possible detrimental impacts of prioritisation of 'public interest' content, and ensure that determinations of public interest content are genuinely based on the public interest.

Such interventions could include a combination of minimum legal, operational and technical standards over content curation processes that are introduced with a co-regulatory approach; regulatory obligations and voluntary incentives to promote exposure while respecting consumers' freedom of choice; targeted media literacy initiatives; and sector-specific ownership and independence rules that can foster fair industry practices and avoid undue market and state power over content discovery.

Figure 1. Overview of the report and summary of its key messages

Introduction

With the shift towards IP-delivery, Internet-connected devices and an increasing use of on-demand and streaming video services, the media industry has grown into a complex system where search, discovery and ranking functions are powerful determinants of access to content. Search providers, social media, video user interfaces and app stores are increasingly seen as gatekeepers, grabbing control of the online media environment, influencing audiences' choices, filtering what content can be found and accessed online, and potentially influencing democratic processes (Epstein, 2018; Laidlaw, 2012; Moore and Tambini, 2018; Tambini and Labo, 2016; Zittrain 2014). This report will argue that the content policies and prioritisation practices of these intermediaries are not neutral decisions that happen in a vacuum. On the contrary, they have significant cultural, political and economic implications. What video clips are recommended on your YouTube homepage, what posts are most visible in your personal Facebook newsfeed, what is included in the results of the first page of your Google search, or what apps are included in the default settings of your smart TV can have a decisive influence on the content and information that you access. Because of its importance as a determinant of media consumption, content prioritisation has been a source of tension between the various media stakeholders that are competing for the presence and reach on physically limited interfaces and for the limited attention of viewers.

Although academics and publishers have raised concerns about the impact of gatekeeping power on media plurality, freedom of expression and control over public opinion formation (Craufurd Smith and Tambini, 2012; Laidlaw, 2010, 2012; Napoli, 2015, 2019), prioritisation has received only intermittent attention from policymakers. Content prioritisation depends on multiple actors involved in the audio-visual value chain and it is part of broader policies and curation strategies (see Figure 2). Content might be prioritised because it is deemed to be worth the attention of the viewer, or because viewing has economic value for the creator and/or the intermediary or advertiser. Whether content should be prioritised because it is deemed to serve public and societal values and achieve public interest objectives is only recently becoming a topic of policy debate. The question of whether law and policy should intervene and deliberately create regimes of prominence for the online world, or whether it should step back from the ongoing process of ad-hoc private construction of a new prominence regime, raises complex issues at the intersection of freedom of expression and media pluralism.

Historically, spectrum licensing has enabled prioritisation of broadcast channels subject to higher public interest standards and stronger accountability. However, at the time of writing, most of these regimes do not apply online, or apply only to a very limited set of digital intermediary services. Several public and private institutions are drafting ethical standards, ranking guidelines and general content policy guidelines as part of their corporate social responsibility efforts, which however are leading to a disconnected and fragmented framework. Because of the implications for fundamental rights, pluralism and democracy the Council of Europe has a strong interest in gaining a strategic overview of these developments. Indeed, whilst many of the phenomena described are at a relatively early stage of development, it is essential that policy and civil society respond to the potential undermining of media pluralism, diversity, free expression, and media independence that they represent. Even though the issues raised are transnational, they may not apply to all member states equally, since their political, economic and social differences need to be taken into account. Nevertheless, with this study we aim to provide an analytical framework that can inform the thinking of the Council of Europe and its member states in this complex policy area and lay the ground for future policy debates.

Within this context, the aim of this report is to provide a fuller understanding of industry practices and policy needs with regard to the prioritisation of public interest content online, in order to identify potential problems with the shift to the internet distribution. Even though these issues broadly concern the cultural and creative sector as a whole, for the purposes of this exploratory and conceptual study, the focus is primarily on audiovisual media content and news. The research is based on a literature review of relevant academic research, industry and policy publications and on semi-structured experts' interviews, which have been used to deepen knowledge and understanding on specific issues.¹ The report is structured into four main sections. Firstly, we provide a framework for analysis to inform future policy debates on the prioritisation of public interest content. This framework provides definitions of key concepts contextualising them in current policy debates, with a specific focus on European law interventions and Council of Europe recommendations in this area.² The section is informed by both the literature review and insights gathered through the interviews and related empirical analysis. Interviews' data have indeed enriched all sections of the report. The second part of the study focuses on how industry practices on content prioritisation online are raising new challenges for content providers, such as broadcasters and users. Thirdly, we discuss the potential issues arising from current industry practices. These include freedom of expression, media pluralism and independence, intermediaries' transparency and accountability, and the sustainability of local and national providers. The report will then conclude with a reflection on the role that regulatory interventions could play to address some of these issues, with particular attention to the role that the Council of Europe and its standard-setting instruments could have in this area.

1. A Framework for Analysis

1.1. Context and Significance

Moderating and filtering out harmful content, and curating and prioritising public interest content, are two sides of the same coin, and they are both pivotal for the future developments of our democratic and information systems as they impact citizens' freedom of speech and freedom of reach (Mandese, 2019). In order to assess the implications of prioritisation for fundamental rights and democracy we need to question the role of new gatekeepers and investigate who decides what should be made relevant to whom, on what basis. For instance, in the context of prominence on electronic programme guides (EPGs), empirical evidence shows that a higher ordinal position of a channel on the EPG (near the beginning) is usually associated with higher audience reach and viewing share, all else being equal (El-Husseini, 2010, 2013; Expert Media Partners, 2018a; Klein et al., 2012; OfCom, 2018).³ Viewing data from the Broadcasters' Audience Research Board (BARB) on channel's reach on Freeview, Sky, and

¹ Overall, interviewees included a number of representatives from different stakeholders ranging from industry associations to individual organisations involved in the internet-distributed audiovisual media value chain, like broadcasters, pay-tv operators, and internet platform organisations. The sampling has been done through a combination of purposive and snowball sampling, which were used to identify and select interviewees based on their profile, expertise and functions within each organisation. More information on the methodology can be found in Annex 2.

² A summary of key terms and definitions used throughout this study is also provided in Annex 1.

³ This is supported by a number of UK-based studies, including the reports: (i) Technologia, The value and optimal management of channel position and prominence on electronic programme guides: A report for DCMS, 4 July 2012; (ii) Attentional, An Analysis of the Audience Impact of Page One EPG Prominence: A report for Ofcom, July 2010; and (iii) FEH Media Insight An Analysis of the Audience Impact of Page One EPG Prominence: A Report for Ofcom, 29 April 2013; (iv) Ofcom, A report on the discoverability of PSB and local TV services, 27 June 2018; (v) Experts Media Partners, Report on the UK Market in EPG Positions, July 2018.

Virgin Media platforms in the UK also confirm this trend.⁴ These data show that the reach generally decreases as the EPG position (i.e. the channel's number) increases, although we should take into account that there are also a number of other characteristics of a channel that affect its performance, such as target audience, quality of content, previous audience, and promotions (Figures 2 and 3). Experimental research has demonstrated that changes in EPG position can lead to changes in the audience: as you would expect, interfaces and suggestion impact media consumption in predictable ways.⁵

Moreover, video-on-demand (VOD) and streaming services may also enhance the consumption of certain films and television content by actively promoting them on their home pages (Cabrera Blázquez et al., 2016: 18–19), or by personalising the users' interface design and highlighting specific catalogue rows. Such is the case the "Netflix Originals" catalogue row, which tends to be bigger and more visually prominent than other programmes' row, with trailers that automatically play to attract the viewers' attention. Promotional spots on a video service interface are usually paid by the distributors and/or rights holders of the film/TV programme and these are highly competitive deals. The European Audiovisual Observatory's report on "The Visibility of film on on-demand platforms in Germany, France and the United Kingdom" has shown that most of the promotional spots were allocated to US films (between 55% and 57%), whereas European films are taking between 30% and 35% of promotional spots (Fontaine, 2015: 8).

Further, search engines and social media can also shape, prioritise and omit certain information on their results page, and this has impact on what content and information are ultimately accessed by users. Already in 2017, people were increasingly finding their content, especially news, via search engines (20%) and social media (25%) services offered by US-based internet companies like Google and Facebook (Nielsen, 2017). By 2019, these online sources had overtaken television in terms of reach for "first contact with news" (Reuters Institute, 2019). These digital intermediary services have become integral to how people find and access content all over the world, and the way they rank, organise and prioritise content has great influence on users. Marketeers and content providers are obsessed with search engine optimisation (SEO) techniques, which should lead them to be in the first page of a Google search, as users are likely to click on the first set of results (Mohsin, 2020; Sterling, 2018).

The impact of content prioritisation decisions was evident and tangible also during the Covid-19 global pandemic, when almost all major digital intermediary services actively promoted fact-checked and high-quality news on this topic and prioritised sources considered reliable and trustworthy, such as the World Health Organisation, national Departments of Health, and national PSM organisations (Figures 3 and 4). The decision to do so was taken also to respect the 2018 European Code of Practice on Disinformation, where signatories recognised the importance of "diluting the visibility of disinformation by improving the findability of trustworthy content" (European Union, 2018c: 3). This demonstrates that on the one hand, these services have the capability to surface authoritative content and make an

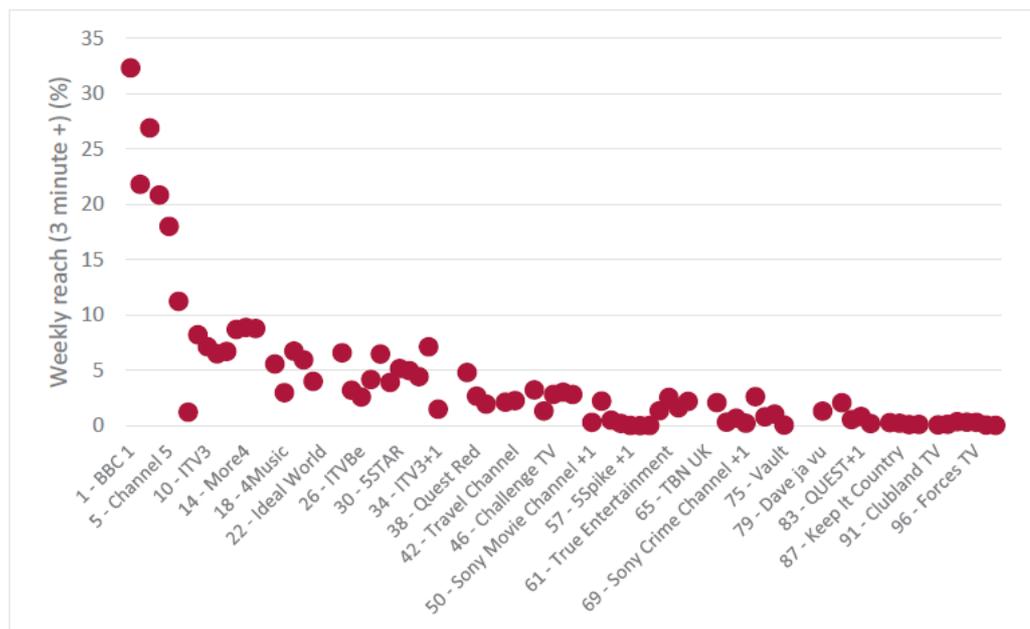
⁴ For more information on the cited companies: a) Freeview is the UK digital terrestrial television platform, operated by DTV Services Ltd, as a joint venture between the BBC, ITV, Channel 4, Sky and transmitter operator Arqiva (see <https://www.freeview.co.uk/>); b) Sky Group Limited is a British media and telecommunications conglomerate, which is a subsidiary of Comcast, with operations in the UK, Ireland, Germany, Austria, Switzerland, and Italy; the company is primarily involved in satellite television, producing and broadcasting, broadband services and streaming service, the latter through Now TV (see <https://www.sky.com/>); c) Virgin Media is a British telecommunications company which provides telephone, television and internet services in the UK, and since 2013, it is a subsidiary of Liberty Global plc, an international television and telecommunications company (see <https://www.virginmedia.com/>).

⁵ https://www.ofcom.org.uk/data/assets/pdf_file/0015/57201/impact_of_epg_prominence.pdf

editorial choice when curating their homepages, results rankings and newsfeed; and on the other hand, that this could be facilitated with multi-stakeholder collaboration and regulatory incentives.

Thus, while still working within the Framework of the First Amendment to the US Constitution, which prohibits state restrictions on freedom of expression, these US-based companies have implemented a soft form of corporate social responsibility in the context of content curation and prioritisation. We should take into account that this was done in a moment of global emergency and that positive discrimination was limited to content and news related to Covid-19, whereas curation and prioritisation strategies on other topics and matters remained unchanged. This prioritisation approach takes place in the context of a wider attention economy that values emotional resonance and controversy above the public interest, and independent researchers also found that a large spread of Covid-19 related mis- and disinformation during this period. The research furthermore found that the audience of “state-backed” news content on Covid-19 was much greater than that of independent media (Bright et al., 2020; COMPROP, 2020).⁶ However, the same was not true of streaming and VoD services like Amazon Video Prime or Netflix. Their distribution algorithms and curation strategies were not significantly changed or adapted during the Covid-19 pandemic. Actually, audience and market data show that what surged in popularity and was surfaced in some users’ “Top 10” lists or as recommended titles on Netflix were movies and TV fiction shows about pandemics and disasters (Clark, 2020; Sutton, 2020).⁷

Figure 2. Freeview 3+ minute weekly reach (%) by EPG position – slot 1 to 999 (UK Market).⁸



⁶ State-backed media outlets were defined by the authors and collaborators of the Computational Propaganda Coronavirus Misinformation briefings as organisations that are either directly funded by the state or are editorially managed by their governments. For more information, see the Weekly Briefings of the Oxford University Computational Propaganda Unit <https://comprop.oii.ox.ac.uk/research/posts/coronavirus-misinformation-weekly-briefings/>.

⁷ It is unknown to what extent the recommendations of this type of movies were driven by the popularity amongst the users, individuals’ searches, editorial decisions, changes in the algorithms or perhaps a combination thereof.

⁸ Source: BARB, average 3+ minute weekly reach (%), individuals (4+), 26/02/2018 - 03/06/2018. Channel slots are based on EPG positioning in England as at the start of June 2018. Source: http://www.digitaluk.co.uk/channels/channel_listings (accessed 8 June 2018). Note that weekly reach figures are UK wide. Where values are blank, these channels are not reported by BARB.

Figure 3. Sky 3+ minute weekly reach (%) by EPG position – slot 101 to 199 (UK market).⁹

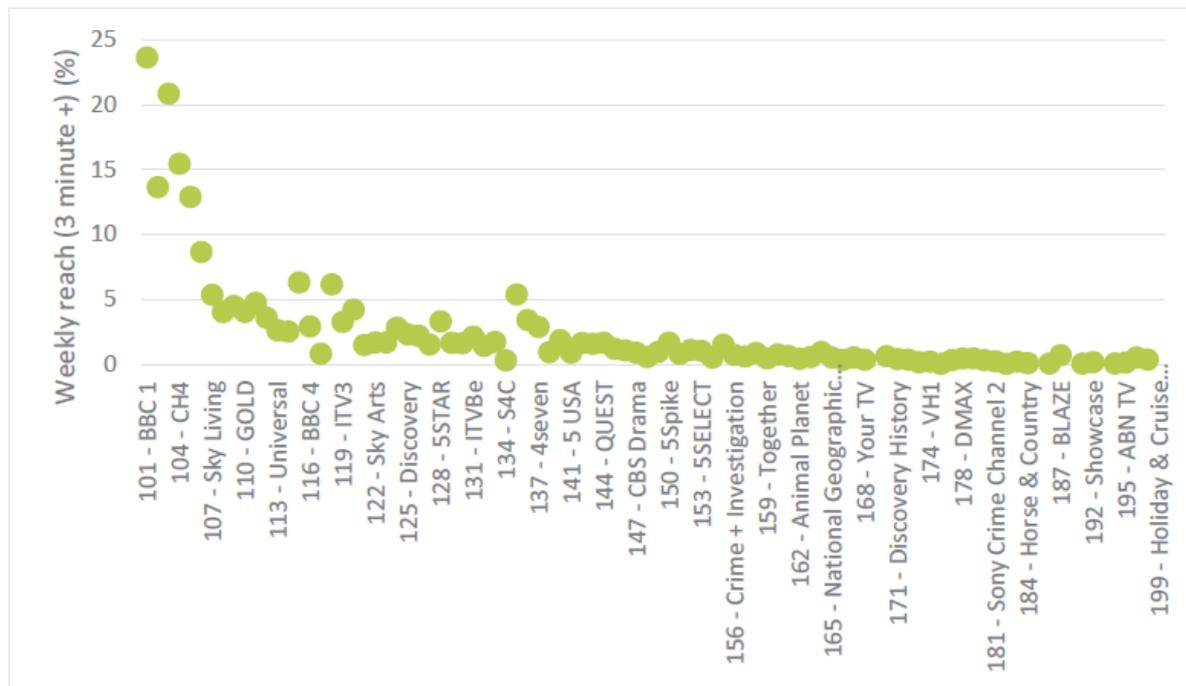
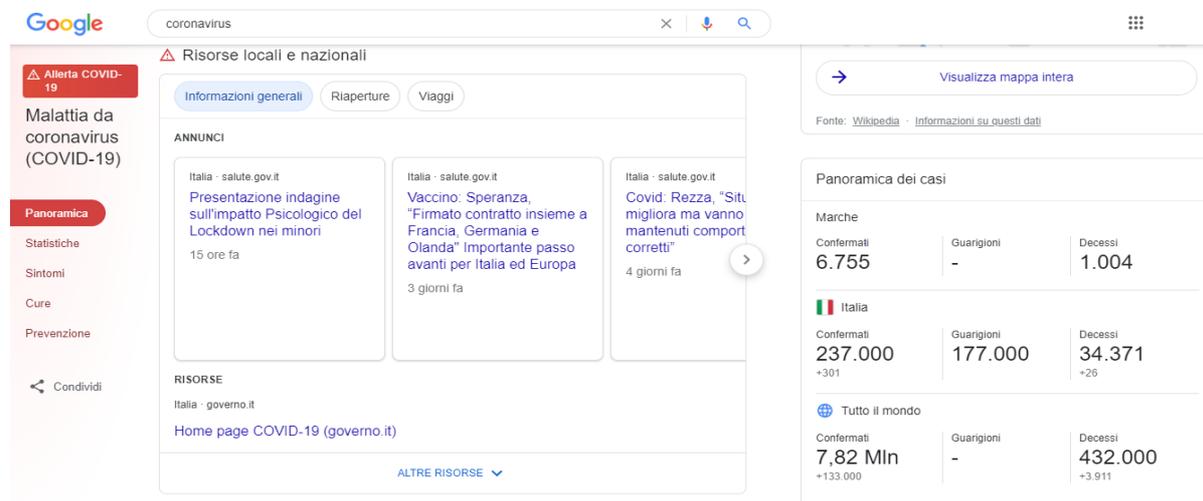


Figure 4. Google Search Engine Results Page (SERP) for the query “coronavirus” (Source: personal users’ search).



⁹ Source: BARB, average 3+ minute weekly reach (%), individuals (4+), 30/04/2018 - 03/06/2018.11 (Note that we have used a shorter time period for our analysis of the Sky platform as the EPG was reshuffled at the start of May 2018). Channel slots are based on EPG positioning in the London region as at the start of June 2018. Source: <https://www.sky.com/tv-guide/> (accessed 8 June 2018). Note that weekly reach figures are UK wide. Where values are blank, these channels are not reported by BARB.

Figure 5. Facebook's Covid-19 Information Centre (Source: personal Facebook page).

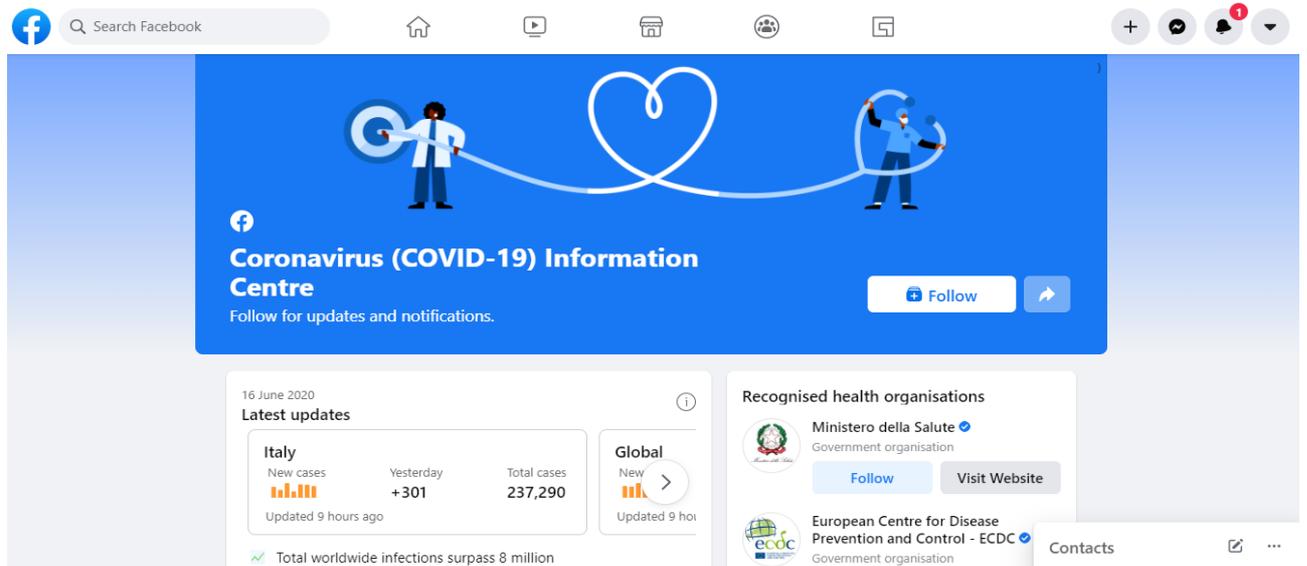
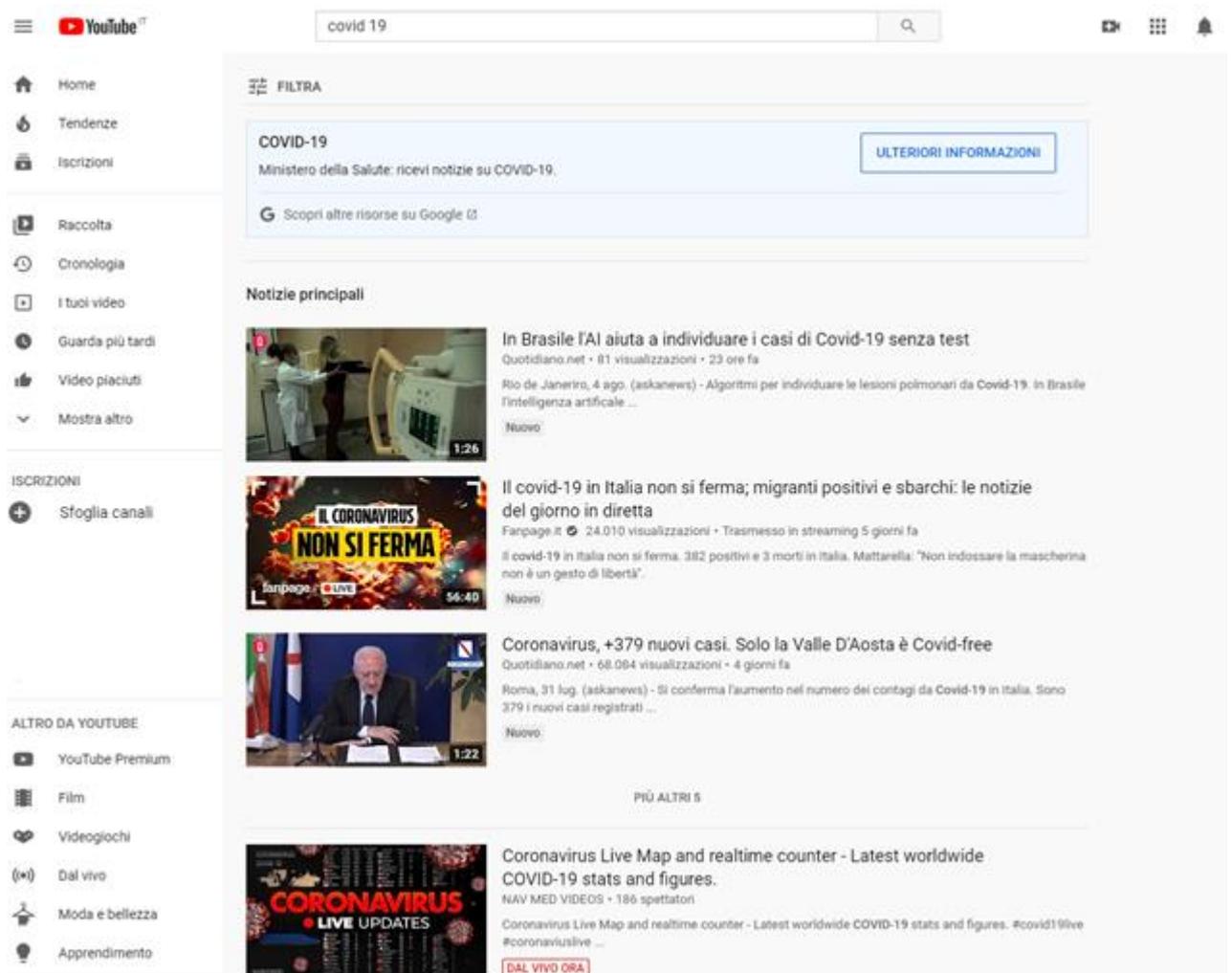


Figure 6. YouTube's first results on covid-19 (Source: personal YouTube account).



In a nutshell, **the gatekeeping power that we examine in this study refers to the control of how content and information is curated online, for example by selecting, adding, manipulating, shaping, deleting or personalising such content on different interfaces and devices** (Hesmondhalgh and Lotz, 2020; Laidlaw, 2010, 2012; Tambini and Labo, 2016). **In this sense, we can define the internet information gatekeepers as the organisations and digital intermediary services that have control over the flow, content, and accessibility of information online** (Laidlaw, 2010, 2012; Tambini and Labo, 2016). Relevant examples for the purposes of this report include both software and hardware-based services, such as video and audio content aggregators, technology manufacturers of internet-connected devices, search engines, social media, and app stores. With their content policies and prioritisation processes, these services can influence to some extent consumers' ability to judge what is worth accessing and watching (Laidlaw, 2010; Tambini, 2016). **The internet information gatekeepers can therefore influence content curation activities and related prioritisation processes, which refer to the range of design and algorithmic decisions that positively discriminate and promote content, by making it more discoverable or prominent on various devices and user interfaces.**

As we will further argue, these gatekeepers can award priority to certain content based on private interest and purely commercial transactions, like prominence for payment, or promoting content that is most likely to be selected by audiences or advertisers or generate the most revenue in the data economy. But increasingly, stakeholders ask whether certain categories of content, such as “public service” media, or “public interest” content, or “quality journalism” should be made more prominent on new platforms, as they were on the traditional ones. This important area of policy is seen as the new frontier in building media systems resilient to threats of hate, disinformation and private censorship. In this sense, scarce resources of prominence and attention combined with the increasing abundance of content online are making the competition for prominence fiercer in communications markets. However, claims to support regulatory intervention on prioritisation of content are inherently controversial. On the one hand, an intervention to promote the prominence of certain categories of content, based on legal obligations or public authority, can be seen as an unwelcome intrusion into the domain of free expression. It can be seen as a threat to the role and independence of the media, and a form of soft propaganda and soft censorship. If such decisions are taken under pressure from government, obvious questions of media freedom arise. On the other hand, it can be seen as a positive intervention to protect rights to receive ideas, media pluralism or the watchdog role of the media. Simply leaving the internet gatekeepers to self-regulate might, in turn, have significant implications for freedom of expression, especially media plurality and independence from undue private interferences, as well as for social inequalities.

In summary, whilst the freedom of expression implications of content takedown, ‘privatised censorship’ and down-ranking of content have been much discussed, including by the Council of Europe¹⁰, curation and prioritisation and its implications for free expression, pluralism and democracy have been under less scrutiny. The responses of intermediary services during the health emergency demonstrate that practices are changing very fast. These services are taking decisions about which sources of information should be considered trustworthy, what weight of prominence they should be given, for whom, and thereby they are exerting a powerful shaping effect on public opinion. Overall, based on the literature review and insights gathered from the qualitative interviews, we argue that decisions over content prioritisation are strongly influenced with varying degrees by at least four main categories of factors,

¹⁰ See: <https://www.coe.int/en/web/freedom-expression>

respectively the regulatory context, technological architecture, users’ agency, and commercial negotiations. To develop a framework that can inform future policy debates in this area, we will firstly discuss the relevant regulatory environment (Section 1.2), while the other factors will be analysed in the subsequent sections (see Section 2).

Table 1. Some examples of gatekeepers and content prioritisation processes.

Type of gatekeeper	Example	Content prioritisation processes	Regulatory Framework	Definition of public Interest Content
Device manufacturer	Smart TV set provider	Channel Priority, EPG prominence, location of apps on homepage, dedicated buttons on remote controls.	Competition law framework; PSB EPG prominence rules ¹¹ ; AVMSD. ¹²	Public Service Broadcasting
Video-on-demand (VOD) services¹³	TVOD: Apple iTunes SVOD: Netflix	Promoted titles (generally in a carousel at the top of the home screen); Recommendation rows and titles; personalised user interface; catalogue’s ranking system and dedicated subcategories (to order different rows, and within the same row), popularity rankings (e.g. “top 10” or “top picks for you”); ‘up next’ features; auto-play functions; voice and text keyword search.	Self-regulation; user agreements, EU speech codes, duties of care, AVMSD. ¹⁴	‘Quality content’ ranked on the basis of user feedback, audience data, and consumption patterns.
Search engine	Google Search	Prominence of search results, ranking systems (within the same page, and between different pages); dedicated and sponsored boxes.	Self-regulation: user agreements, EU speech codes, duties of care.	‘Quality journalism’, fact-checking approval; user feedback; popularity rankings (based on clicks, access data and audience data). (Exact criteria unknown).
Social Media	Facebook	Flagging and tagging, ranking of newsfeed, instant articles, recommendation algorithms, personalised user interface.	Self-regulation: user agreements, EU speech codes, duties of care.	‘Quality journalism’, fact-checking approval; users’ feedback, personal settings and preferences. (Exact criteria unknown).

¹¹ PSB EPG prominence rules are extended to smart tv via regulatory interventions only in certain member states (such as UK and Germany), whereas in most of the other countries this is not covered within regulation yet.

¹² The revised AVMSD proposes an extension of its European works and general interest content provisions to TV-like services and on VOD service but it is not prescriptive and therefore it is up to the EU member states to decide how to proceed. We are currently still in the implementation phase; thus, it is not clear how different member states will transpose these provisions into national law.

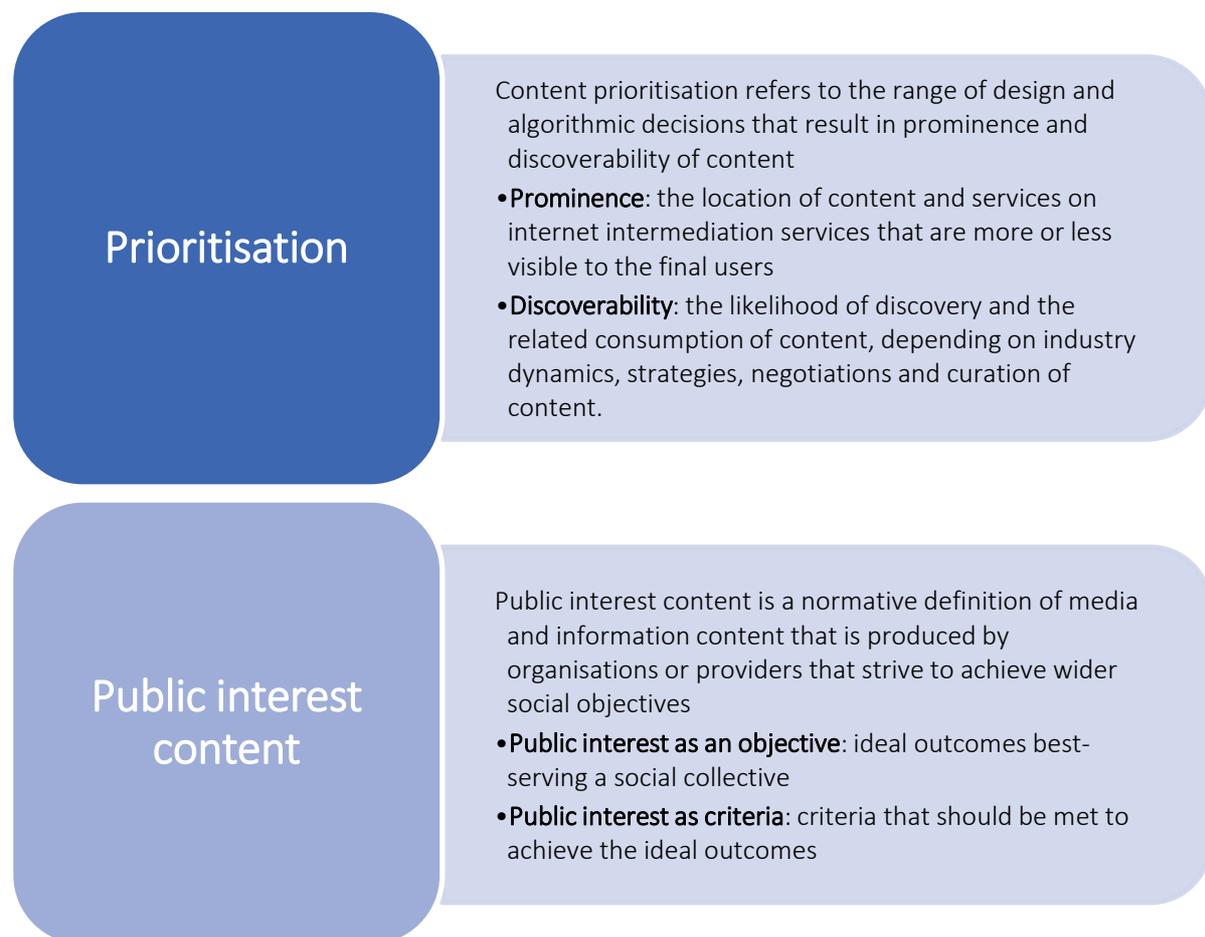
¹³ Video on demand services can be either Transactional VOD, TVOD, or Subscription VOD (SVOD). TVOD are services such as Apple’s iTunes, which sell (also called electronic sell-through (EST)) or rent films and television content on a pay-per-view basis. TVOD services are basically replacing DVD and Blu-ray sold in physical stores for retail and rented in video clubs, and therefore act as a digital store and video club as consumers pay their purchase or rental fees on a pay-per-view basis (Cabrera Blázquez et al., 2016: 17–18)(Cabrera Blázquez et al., 2016). SVOD services sell access to a catalogue of films, television content and documentaries against a monthly subscription fee. These services are competing more directly with traditional pay-tv services for subscribers and revenues, and with the physical home entertainment market as consumer preferences shift from ownership to access to audiovisual content (Cabrera Blázquez et al., 2016: 13–14). The market for SVOD has rapidly grown in recent years, with almost every player in the market launching its own SVOD. Examples are Netflix, Apple TV+, Amazon Prime Video (which has both a SVOD and TVOD content offer), Disney+, Sky Q, Britbox (joint venture of UK PSB, BBC, ITV and Channel 4), and many other services offered by European players.

¹⁴ See note 7.

1.2. Definitions and Regulatory Context

Although the institutional forms and principles may vary across nations, as communication theorist James Michael observed, the regulation of media and communication is “as old as blood feuds over insults, and... as classic an issue as deciding whose turn it is to use the talking drum or the ram’s horn” (Flew, 2018: 1; Michael, 1990: 40). In this perspective, posing questions about the public interest in new forms of intermediation, and how and to what extent certain forms of information should be made more visible and others hidden, are a normal part of societal evolution. Currently, online content curation and related prioritisation decisions are not covered by a specific regulatory framework, but EPGs and cable services are covered by legacy broadcasting and must-carry rules. There is also an overall lack of a coordinated approach, mainly due to the fact that media content regulation is under national jurisdiction and therefore often differs from country to country. However, as media technologies advance and we move towards a globalised and digitally convergent media industry, it becomes more difficult to strike the right balance between different interests and objectives in this area. Thus, it is important to provide clarity on how we understand the two key concepts at the core of this report: what is prioritisation, and what is public interest content in today’s internet-distributed media industry? This section will provide a framework for these notions and it will contextualise them within existing regulatory and policy regimes.

Figure 7. Summary of the two core and intertwined concepts used in the report.



1.2.1. Public Interest Content: Tensions and Criteria

The term “public interest” is often used in European media regulation but is highly contested and ill-defined. In the early 1990s, Prof. Denis McQuail identified the term “public interest” in the media context as “the complex of supposed informational, cultural and social benefits to the wider society which go beyond the immediate, particular and individual interests of those who communicate in public communication, whether as senders or receivers” (McQuail, 1992: 3). Regulatory interventions are justified for a perceived common good that is in the interest of the community as a whole, even when that might be against the interest of certain private individuals. The media industries such as broadcasting have historically been infused with an ethical obligation to serve the public interest, an obligation that has been transcribed into media policy and regulation (see for instance Feintuck and Varney, 2006; Napoli, 2015).

While traditionally we tend to assume that there is a fundamental public interest in media communications, this is difficult to specify and codify into practice. Indeed, the ideal of public interest has been operationalised into diverse sets of criteria and values, often described as public value criteria. However, there is no one commonly shared definition of such criteria and there are often tensions and conflicts between them as the claims used to support them are at best vague and malleable (Feintuck and Varney, 2006: 74–75; Tambini, 2001: 26). National, regional and international policymakers and regulators are constantly attempting to define and operationalise public interest into applicable criteria and assessment frameworks, which can be applied to certain categories of content and actors, like the public interest test set out in the UK Freedom of Information Act for public service media (Information Commissioner’s Office, 2012) or the UK public interest test for media mergers¹⁵. However, establishing what content and/or providers can be considered of public interest and therefore being granted certain regulatory benefits, like prominence, is a site of contestation, conflicting interests and contradictory value systems. Further, the notion of public interest is sometimes used or seen as an ideological means to limit fundamental liberties of expression, push unjustified regulatory ambitions, or grant regulatory benefits to certain actors (McQuail, 1992).

Such restrictive conceptions do not find support in the case-law of the European Court of Human Rights (“the Court”) which has adopted a wide interpretation of public interest in terms of content that can be legitimately published or broadcast. The ECtHR applies the concept of “public interest” as one of the criteria in the exercise of balancing different conflicting rights and interests, including in many cases about content-based restrictions of freedom of expression protected by Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”). Generally, the Court specifies that the notion of “public interest” relates to matters which affect the public to such an extent that it may legitimately take an interest in them, matters which attract its attention, or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community. This is also the case regarding matters capable of causing considerable controversy and matters that should be brought to the public’s attention since they concern an important social issue, or involve a problem that the public would have an interest in being informed about.¹⁶ Of course,

¹⁵ This is explained in the following reports: <https://blogs.lse.ac.uk/mediase/files/2016/01/LSE-MPP-Policy-Brief-14-Monitoring-Media-Plurality-after-Convergence-FINAL.pdf>; and <http://eprints.lse.ac.uk/69847/1/LSE%20MPP%20Policy%20Brief%2018%20-%20Media%20Plurality,%20the%20Fox-Sky%20bid,%20and%20the%20case%20for%20referral%20to%20ofcom.pdf>.

¹⁶ The principles on public interest are comprehensively presented in the Court’s case of *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, ECHR 2015.

not all that is allowed to be published – meaning what is within the legal limits of freedom of expression as laid down in European or international law – need be given, or indeed deserves prominence.

The problem for policymakers is to translate into regulation a workable definition of public interest content, with related criteria and assessment frameworks. When it comes to industry practices and decisions on content prioritisation, stakeholders have different and contested understandings of what content is valuable for them and for consumers, and therefore what should be defined as public interest content on their services, and what should be granted a prominent position. One of the most common definitions of public interest content associates public interest content with content produced by public service media (PSM) organisations. Indeed, thanks to the public service principles of independence, pluralism, universality, innovation and quality (European Broadcasting Union, 2017) that have been translated into PSM’s remits and legal obligations, the content produced by PSM has often been recognised to carry some sort of public value, intended as value for individuals, industry and society as a whole (Benington, 2011; Benington and Moore, 2011). Historically though, the prevailing neo-classical economic thinking has used market failure arguments to restrict this understanding of public interest content primarily to niche market failure genres, like news and current affairs, documentaries, educational and cultural programmes, that are not as commercially viable as entertainment programmes. In this view, public interest content is constructed in economic theory as ‘positive externalities’ or ‘public goods’ that would lead to market failure. The inherent limitations of neo-classical economics and market failure arguments applied to PSM have led to broader tensions in the definition of public interest as an objective for media organisations (Coyle and Woolard, 2010; Lowe and Martin, 2013; Mazzucato and O’Donovan, 2016). Codifying it into criteria that can be implemented and assessed has therefore been extremely challenging for both industry representatives and policymakers.

For example, ahead of the 2005 Charter renewal, the BBC was the first PSM to operationalise its public interest mission. It introduced the notion of public value to the media world and established criteria that would help the organisation to achieve such mission with its services and content, including by external regulation via a ‘public value test’. (Knoll, 2012; Lowe and Martin, 2013; Spigelman, 2013). There are actually few public bodies where the concept is more developed than the BBC, with its enduring mission to “*act in the public interest, serving all audiences through the provision of impartial, high-quality and distinctive output and services which inform, educate and entertain*”¹⁷. Within the BBC, public interest content is therefore understood as content that is of interest and valuable for each individual on the one hand, but it also carries broader public value for the media sector and society as a whole (Coyle and Woolard, 2010; Mazzucato and O’Donovan, 2016).

However, using PSM’s channels and services as a proxy for public interest content has also been criticised as a narrow and limiting interpretation, as it does not include other media organisations and content providers that engage in this debate and deliver social and public benefits to citizens. While we recognise the importance of PSM organisations in promoting a favourable environment for quality information and ensuring a diverse breadth of content,¹⁸ public interest content is a wider category than that produced by legacy PSMs. A growing number of media industry representatives are indeed calling for an expanded and more inclusive notion of public interest content, which acknowledges that

¹⁷ [BBC Charter](#), paragraph 5.

¹⁸ Council of Europe Draft recommendation on promoting a favourable environment for quality journalism in the digital age; and Council of Europe’s Recommendation Rec(2007)3 of the Committee of Ministers to member states on the remit of public service media in the information society.

also both national and international organisations, as well as both private and public actors, can contribute to the production and distribution of public interest content (Cairncross, 2019; McDonald, 2018; Netflix, 2020; Ofcom, 2020; Sky UK, 2018; Sweney and Conlan, 2019). Interviewees from private and commercial media organisations have indeed shown that they have also developed their own understanding and criteria to define public interest content. Few research participants have also highlighted that economic and public interests are not necessarily opposed. On the contrary, one can be a by-product of the other even if the driving rationale is to keep a stable revenue stream and customer base (Internet platform representative 1, 2020; Pay-tv operator representative 2, 2020; Public service media representative 4, 2020; Policymaker representative 5, 2020).

“Well, my fantasy would be that there would be more funding to invest in original content that has a social purpose, rather than just a commercial purpose. And perhaps even support with platforms like that. I think the concept of public service broadcasting could possibly be widened to include the grassroots community media world as well.”

(Community media representative 1, 2020)

“The difference [between PSM with commercial revenues and private broadcasters] is that they have a designation and a particular status and some obligations in their license [to act in the public interest]. But actually, all of us do things of public value that we are not obliged to do at all. We do it because there is a happy overlap between what is in our economic interests and what is in the public interest, and I think that actually goes for the vast majority of what we do. And then we do some things because we feel that it is the right thing to do as an organisation as part of society. We like to think that we are part of the communities that we provide a service to and that we gain our living from, and that is our role to ensure that we are responsible and give something back.”

(Pay-tv operator representative 2, 2020)

“I think one possible difference between how a commercial player might think about it [i.e. public interest content] and how a PSM should be thinking about it is that public value is kind of a by-product of what we do. [...] For a business like ours, our imperatives are largely commercial ones, but it happens that there is actually a happy marriage because what we find, as we grow, is that for us to generate the greatest commercial value, we actually need to produce some kind of public interest content or acquire programming that is in the broadest possible interest to our audiences. And by responding to those needs, you might argue that we are generating some public value, which is not dissimilar to what the PSM are doing, even though the underlying rationale is a little bit different.”

(Digital intermediary representative 1, 2020)

Further, there is growing support among industry representatives and policymakers for a criteria-based approach that does not define types or genres of programmes, but it establishes principles and technical standards that content providers should respect through a co-regulatory approach. The most advanced proposal to this effect comes from the Journalism Trust Initiative (JTI) which is arguing for technical standards and public interest criteria for journalism that could be agreed and implemented through co-regulation (News media representative 1, 2020). Thus, the JTI does not call for a definition or hierarchy of content per se, as labelling content or journalists might be misused and turned into censorship (News media representative 1, 2020), but they aim to set up technical standards that would intervene at the level of the journalist practice and content governance system. This might take the form of criteria that can be assessed and measured either quantitatively or qualitatively and that should be respected by media outlets and internet gatekeepers in order to ensure that authoritative and fact-checked sources are granted due prominence on digital intermediary services, like social media, search engines and content aggregators (News media representative 1, 2020). The rationales could be extended also beyond news and it would ideally shape the market to create a more diverse and pluralistic online media ecosystem where users are exposed and prompted to consume more public interest content (News media representative 1, 2020).

“First of all, I think it is really important to state that we are not talking about quality, as this can really be problematic. I would say that the objective of public interest really comes down to certain benchmarks in the manufacturing level of journalism and this is very important, but it is not doing so by ranking individual pieces of content or individual journalists, as this could be obviously easily misused and turned against journalism or journalists, and turned into censorship. It is more about the process level of journalistic production [...].”

(News media representative 1, 2020)

In summary, examples like the JTI’s one show a possible definition of public interest content and related criteria that are based on professional standards, rather than content standards. Professional standards can be based on procedures and professional practices that lie behind the production and distribution of given content, rather than attempting to differentiate genres or providers *ex ante*, which can be misused. Whilst acknowledging that there is intense disagreement over these criteria and how they should be implemented, whether with regulation, co-regulation or self-regulation, there is a broad agreement over a principle-based approach that goes beyond evaluating individual programmes or genres. This approach broadens the categories of media organisations that can act in the public interest through their content and services and should therefore be granted due prominence. Based on the interviews and document analysis, we have summarised in the table below those criteria that have emerged as relevant to make such decisions (see Table 2). By establishing commonly agreed criteria through industry or technical standards, we could ideally promote good industry practices while respecting media freedom, plurality and freedom of expression. Instead of imposing its judgment over specific content or providers, the regulator would collaborate proactively with industry representatives to achieve those benchmarks.

Table 2. Examples of relevant criteria for providers of public interest content.¹⁹

Criteria for providers of public interest content
Cultural or educational mission (incl. libraries, theatres and museums)
Creation of public value (incl. societal, individual and industry value)
High consumption and popularity (e.g. based on audience measurements and viewing figures)
High coverage of local, regional and national topics, which are deemed relevant for the broader public, such as international events, business, politics, science, technology, etc.
High coverage and representation of all audiences, including niche audiences
High degree of accuracy, fact-checking, professional standards of journalism
High degree of diversity, intended in its broadest sense i.e. diversity of content, sources and exposure
High degree of independence from state, private and market undue interference
High degree of innovation and originality
High degree of reliability and trustworthiness
High degree of respect for ethical principles
High degree of transparency of sources, revenues, and ownership
High quality
High standards of transparency or accountability to the public
Public media institution, such as public service media organisations/ public ownership
Universal reach and distribution

1.2.2. Content Prioritisation

In this study, content prioritisation refers to the range of design and algorithmic decisions and processes that positively discriminate and promote content by making it more discoverable or prominent on different devices and related user interfaces. Prominence and discoverability are therefore two interlinked outcomes of prioritisation processes. To better understand the implications of current industry practices in this area, we should therefore clarify and contextualise two key aspects of prioritisation, namely prominence and discoverability.

¹⁹ Examples of criteria gathered from the interviews and the literature review of relevant industry standards, code of practice, and European media law and Council of Europe Recommendations. The criteria are listed in alphabetical order and they are not considered to be hierarchical. The table therefore presents an overview of public interest criteria that a provider should strive to achieve in order to be recognised as a provider of public interest content, and as such could therefore benefit from prioritisation processes.

1.2.3. Prominence

Prominence is an outcome of content prioritisation processes and it concerns the “physical” i.e. virtual or visual location and prioritised placement of a channel/app/service compared to others in time and/or space on a given interface. Thus, it concerns the degree to which certain kinds of channels and services (and therefore content) stand out from others in electronic programme guides, video interfaces, catalogues’ listing, etc. (Hesmondhalgh and Lotz, 2020: 389). From a regulatory perspective, prominence rules are part of traditional content regulation instruments that have a positive or promotional approach, rather than a negative or prohibitory one. Generally, positive content regulations may require that content providers commission and produce a certain amount of locally produced material and public interest content, while distributors ensure that such content is delivered effectively to audiences. Positive discrimination is needed for such programmes because they are deemed to carry public, social, and cultural values for citizens. At the same time, this content usually has a low return on investment and low audience reach, and therefore, if simply left to the free market, these programmes might slowly disappear, as it partially happened with the shift to multi-channel digital distribution (Bergg, 2004; Cowling and Tambini, 2002; Tambini, 2004).

Within the European Union area, this type of positive discrimination has been translated into safeguards to support specific types of content and providers, such as PSM’s channels and European works. The two main positive safeguards are must-carry and appropriate prominence obligations. The former refers to the obligation for electronic communication networks to transmit and distribute specified television and broadcast services, which is established by the recently revised European Electronic Communications Code (European Union, 2018b). The latter, however, refers to the Audiovisual Media Services Directive (AVMSD), which recognises member states’ freedom to adopt rules that ensure an “appropriate” prominent positioning of audiovisual media services of “general interest” (Article 7(a), Recital 25 AVMSD), and of European works (Article 13(1), Recital 35 AVMSD) on linear television (European Union, 2010, 2018a).²⁰ Since its most recent revision, these provisions have been extended also to video on demand (VoD) services (European Union, 2018a). However, member states are still in the process of adopting their national prominence frameworks and there are

²⁰ The quoted articles and recitals recite as follows:

- Recital 25: “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.”
- Recital 35: Providers of on-demand audiovisual media services should promote the production and distribution of European works by ensuring that their catalogues contain a minimum share of European works and that they are given sufficient prominence. The labelling in metadata of audiovisual content that qualifies as a European work should be encouraged so that such metadata are available to media service providers. Prominence involves promoting European works through facilitating access to such works. Prominence can be ensured through various means such as a dedicated section for European works that is accessible from the service homepage, the possibility to search for European works in the search tool available as part of that service, the use of European works in campaigns of that service or a minimum percentage of European works promoted from that service's catalogue, for example by using banners or similar tools.
- Article 7(a): “Member States may take measures to ensure the appropriate prominence of audiovisual media services of general interest”.
- Article 13(1): Member States shall ensure that media service providers of on-demand audiovisual media services under their jurisdiction secure at least a 30 % share of European works in their catalogues and ensure prominence of those works.

significant differences in the implementations of the AVMS Directive. For instance, with regard to the attractive presentation and prominence of European works, only 5 countries (6 with the French Community of Belgium) have introduced an explicit and mandatory obligation to give visibility to EU works in the catalogues of on-demand AVMS (Figure 8).

The rationales and policy objectives guiding the European law provisions on prominence are described as public interest objectives of media pluralism, freedom of expression and media diversity (European Union, 2018: 72–73). Interestingly, the latter was intended not only as content and source diversity but also as exposure diversity (Helberger et al., 2018; Napoli, 2011), as the text prescribes that availability of diverse outlets and programmes is not sufficient nowadays and that prominence obligations should intervene also at the level of search and access. Thus, to ensure a diverse and pluralist media environment, media policy frameworks have introduced these measures of positive discrimination for “general interest” or “public interest” services. These provisions though are not prescriptive, and contrarily to other rules contained in the AVMSD, it is optional for member states to regulate this matter. At the moment of writing, most existing national prominence frameworks apply mainly to linear broadcasters and distributors, which do not reflect the changing landscape of our contemporary media system and the role that digital intermediaries play in it.

Even though policy debates in this area are still an early stage (Policymaker representative 4, 2020), European policymakers have recently announced their interest in launching far-reaching overhaul of online content rules (Espinoza, 2020) and questions around the prominence of public interest content on digital intermediary services have been explicitly addressed in the European Commission’s public consultation on the Digital Service Act (European Commission, 2020).²¹ Further, Europe-wide bodies like EPRA, the European Platform of Regulatory Authorities, and ERGA, the European Regulators Group for Audiovisual Media Services, are examining similar issues but with a particular focus on the impacts of gatekeepers and prominence respectively on media pluralism (EPRA, 2020)²² and on news content and journalism (ERGA, 2020a).²³ Despite these ongoing debates, concrete regulatory proposals at member states’ level have only been advanced by the United Kingdom and Germany (see information boxes), while the Council of Europe has developed a Draft Recommendation on promoting a favourable environment for quality journalism in the digital age²⁴, which includes a guideline on due prominence for public interest journalism. Thus, it is evident that there is an interest and a need to revise and adapt the regulatory framework in this area. In doing so, **policymakers and regulators need to address a number of crucial questions regarding:**

- the “appropriate” degree of prominence on different online interfaces;
- the enforcement and monitoring mechanisms required;
- the types of devices and digital intermediary services that should be covered;
- the extent to which regulation should intervene at the level of search and recommendation systems without impacting freedom of expression and freedom of choice.

²¹ To access the full survey of the public consultation, see: https://ec.europa.eu/eusurvey/runner/Digital_Services_Act.

²² For more information on the current debate within the EPRA network, listen to the podcast panel on “Media plurality in the age of algorithms” accessible here: <https://shows.acast.com/epra/episodes/media-plurality-in-the-age-of-algorithms>

²³ For more information on the current debate within the ERGA network, see their response to the European Commission DSA consultation: https://erga-online.eu/wp-content/uploads/2020/06/ERGA_SG1_DSA_Position-Paper_adopted.pdf.

²⁴ To access the full text of the Draft Recommendation, pending adoption by the Council of Europe’s Committee of Ministers, see: <https://rm.coe.int/msi-jog-2018-rev7-e-draft-recommendation-on-quality-journalism-finalis/168098ab76>.

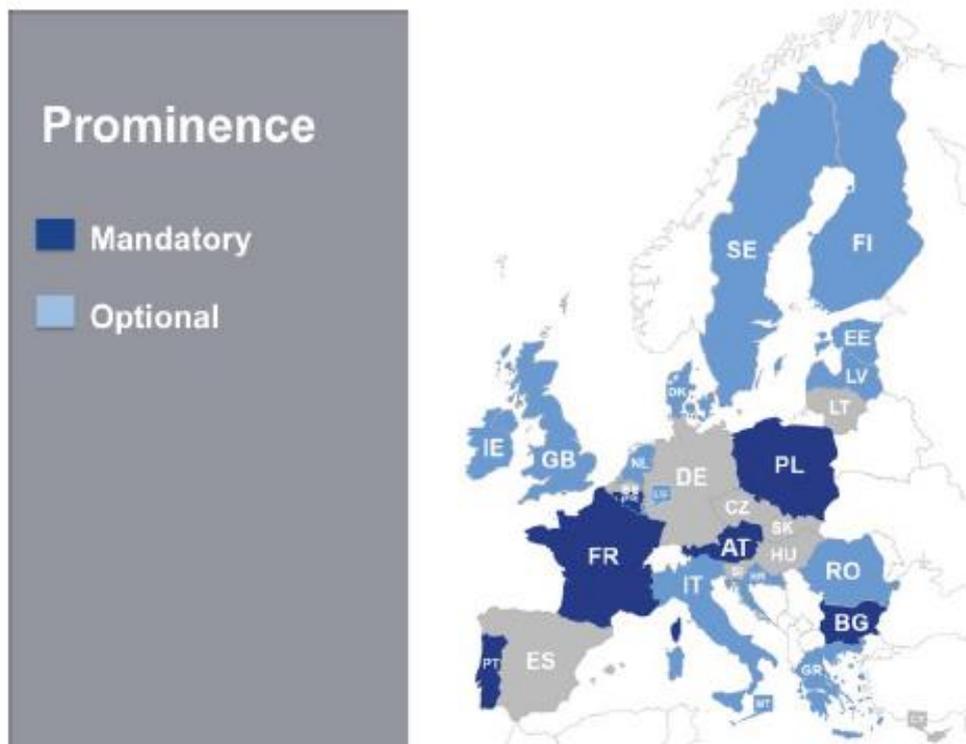
“Prominence online is one of the biggest and thorniest issues. The question is what does it actually look like? [...] How does that translate into those promotional areas or content aggregation areas before downloading an app? Or how does that work across devices? It is quite easy in an EPG world – you are just [a] number [...] on the on the EPG. But there are problems in the digital space. [...] and you not only have to get companies to pick that [i.e. your service/channel/app] up, but you have got to figure out how you want that presented, and then how you monitor that, especially with areas like personalisation.”

(Public service media representative 8, 2020)

“It is quite interesting to see that in terms of the hierarchy of policy issues, this [i.e. prominence] has absolutely been a central priority for us over the last couple of years, and in every engagement we have had with policymakers, we said “this is the number one thing that we need to talk about. [...] If digital and online media is the future that we want to get to, then it really matters that people can find us, because if people are consuming only in an on-demand space on their smart-TVs and if they do not see us, we are not prominent in their lives, they will just go and watch Netflix or Amazon or whatever provider has paid for that prominence. Therefore, our brand gets eroded and our relationship with young people gets eroded, and we cannot get that back. This is also why this issue [i.e. prominence] has become a priority across the organisation, because once you lose that relationship, that brand relationship and that trust, it is very difficult to get back to the same level.”

(Public service media representative 1, 2019)

Figure 8. Mandatory and optional prominence obligations in the European Union (EU 28).²⁵



²⁵ Source: (i) European Audiovisual Observatory AVMSD Database; (ii) European Audiovisual Observatory, VOD, platforms and OTT: which promotion obligations for European works? 2016, pp. 48-49.

Germany: the Inter-State Media Treaty

In Germany, measures addressing intermediaries and platforms to promote diversity and regulate opinion forming power are implemented as behavioural duties in media regulation, and the central instrument is the Rundfunkstaatsvertrag (RStV) or Interstate Broadcasting Treaty, which is currently being updated and rebranded as the new Medienstaatsvertrag, the Inter-State Media Treaty negotiated between the German Länder (MStV) (Hartmann and Holznagel, forthcoming). Intermediary regulation in Germany has been part of the RStV since 2000, when the Treaty sought to regulate distributors like cable TV operators, which controlled the gateways and access points to consumers. Subsequent amendments broadened the scope to cover aggregators in gatekeeper positions, which have led to the inclusion of certain types of platforms in the latest MStV. The overall objective of this new regulation is to have both negative and positive safeguards to secure pluralism through non-discrimination and findability and prominence of general interest content (Article 84 MStV). These obligations are applied also to internet gatekeepers, therefore covering both broadcasting and broadcasting-like services, as well as software-based applications that serve primarily to provide access to such content (Medienstaatsvertrag, 2019). The German proposal innovates in several ways. Firstly, the starting point is to privilege neutrality and non-discrimination, which implies that in the absence of legitimate reasons, similar services and content items may not be discriminated against in relation to their order and location on the user interface. Secondly, they introduce a two-tiered form of positive discrimination of content through a “must-be-found” rule that prescribes the following: a) all broadcasting content must be prominently placed and easily accessible within the interface, and b) within the available broadcasting content, programmes of PSB and private programmes that contribute to plurality must be placed more prominently than other broadcasting programmes (Article 84 MStV). Prominence therefore prevails over the neutrality and non-discrimination principles when it comes to the content of public interest. The determination of public interest content is not ex-ante limited to PSB channels and services, but it is delegated to the media regulatory authorities, with considerations such as the proportion of political and regional news, accessibility and the quota of European works (Hartmann and Holznagel, forthcoming).

UK: EPG Prominence Rules

In the UK, the question of prominence in a linear television industry was firstly introduced in 1997 by the former media regulator, the Independent Television Commission (ITC), to deal with a question of abundance of offerings and ensure diverse and quality programming (Van Der Sloot, 2012: 139). Subsequently, the Communications Act 2003 required Ofcom to draw a more detailed Code of Conduct for “appropriate prominence” permitting measures of positive discrimination in favour of linear public service broadcasting channels (Ofcom, 2010). Thus, while initially the rationale was the equal division of scarce transmission capacity, later it was also the fear that commercial broadcasters would not serve those commercially unattractive groups and minorities and provide the desired diversity of content (Mazzoli, 2020b; Van Der Sloot, 2012). The EPG Code is currently under revision, and in July 2019 Ofcom proposed the extension of the rules to keep PSB prominent also on on-demand services, across a range of “connected TV platforms” (smart TVs, set-up-boxes, and streaming sticks) (Ofcom, 2019). Even though it is unclear whether the UK Government will intervene with primary legislation, Ofcom’s proposal shows the advantages and limitations of a new legislative and regulatory framework informed by traditional media law instruments (i.e. EPG prominence

rules). On the one hand, this proposal ensures easy access and enhanced visibility of PSB content and apps on all those services that a significant number of viewers use as one of their main ways of watching TV content (Ofcom, 2019: 1, 4). The regime therefore supports the relevance and presence of PSM, which are recognised also by the Council of Europe as pillars of our democratic societies, as they uphold the fundamental right to freedom of expression and information and contribute to a diverse and pluralistic media environment (see Annex 2 – Rec(2007)3).²⁶ On the other hand, the proposed regime does not address the deeper structural changes that the media industry is undergoing and that are impacting PSM and local providers alike. However, Ofcom has highlighted that this framework should be flexible so that it can adapt to technological innovation and changes in viewer behaviours, and that it should include order-making powers for the Secretary of State to adapt the framework without the need for further primary legislation. Finally, the new framework should protect prominence of not only the PSM’ apps and online players (such as BBC iPlayer, All4, and ITV), but also PSM’s content that is distributed outside the player environment in this more ‘disaggregated’ way. In this sense, issues related to the prioritisation of public interest content online are primarily dealt with interventions in media content policy and public service broadcasting regulation.

Council of Europe: promotion of public interest journalism

The Council of Europe is working on a draft Recommendation on promoting a favourable environment for quality journalism in the digital age, which includes a guideline specifically on due prominence. While the details of the text may still undergo changes in the process of adoption, the underlying objective is to guarantee effective access and visibility to quality media content to all individuals, irrespective of income levels and any other barriers. To that end, the Council of Europe recommends that independent and transparent self-regulatory media initiatives, open to multi-stakeholder participation, should develop criteria for identifying reliable content that could be applied, whether through human or automated means, in the process of media distribution and consumption. It further argues that online platforms and other relevant digital intermediary services should make use of those criteria to promote compliant providers of news and quality journalism, for which purpose they should continually improve their internal processes and operations, including by ensuring their enhanced transparency.

1.2.4. Discoverability

Another key term used in recent policy debates on content prioritisation is discoverability. **Discoverability can be understood as an outcome of prioritisation processes, but it concerns the likelihood of discovery of content, and therefore the likelihood of its consumption, depending on industry dynamics, negotiations and organisational strategies** (Hesmondhalgh and Lotz, 2020; Mazzoli, 2020b). **It therefore draws attention to the relations between institutions and how they might influence the discovery of certain content by audiences.** As audiovisual content increasingly moves online, media industry experts hail “content discoverability” as the next biggest challenge for content creators and providers, as the competition over audience’s attention becomes fiercer (Desjardins, 2016a: 10;

²⁶ Council of Europe’s Recommendation CM/Rec(2007)3 of the Committee of Ministers to member states on the remit of public service media in the information society.

McKelvey, 2016). Typically, in industry discourses, discoverability is therefore seen as a problem for content creators to find an audience for their services, applications or programmes, within an abundance of choice and an increasingly competitive and globalised market. In this context, the rise of new internet gatekeepers has a significant impact over the existing power structures in the industry, giving rise to new aspects of control and dependence and a handful of powerful actors whose services act as gateways to content (Evens and Donders, 2018; McKelvey and Hunt, 2019; Moore and Tambini, 2018).

From a regulatory perspective, **issues of content discoverability speak more of structural problems of our contemporary media environment that go beyond content regulation, as they concern competition law, media ownership and concentration rules, and transparency obligations. In particular, discoverability concerns how different actors can exert more or less control over a users' journey to content and the serendipitous discovery of content online (Mazzoli, 2020b). In other words, who gets to decide what content is deemed worthy - economically, culturally, or socially - to the final users, and therefore should be easier to discover.** In this sense, investigating how different organisations participate more or less unequally in such decision-making processes is important as it ultimately reflects whether there is a lack of level playing field between them. Thus, some of the issues that should be looked at when considering any regulatory intervention in this area concern intermediaries' accountability and responsibility over content distribution; potentially anti-competitive behaviours and uneven bargaining power over commercial negotiations; transparency over organisational decisions and media ownership; and impacts on a plurality of media organisations independent from undue private and market interference (Mazzoli, 2020b).

As also highlighted in the Council of Europe Recommendation on media pluralism and transparency of media ownership (see Annex 2)²⁷, to ensure a plurality of voices and diversity of content online, including public interest content, we need to consider a variety means. These include, but are not limited to, enhancing exposure diversity (Helberger et al., 2018; Napoli, 2011) and improving transparency of automated processes (Guideline 2); implementing media-ownership regulation that restricts horizontal, vertical and cross-media ownership; and enforcing effective competition law to prevent the concentration of power and control over content and information in the hands of few powerful actors (Guideline 3). With regard to the latter though, it should be noted that problems do not simply stem from ineffective enforcement of existing media ownership and competition rules, but it is necessary to rethink the way competition policy can be applied to today's internet gatekeepers. An increasing number of researchers have indeed highlighted the limitations of current competition regimes, calling for new approaches that are more suitable to our contemporary media environment (see for instance Coyle, 2018; Evens and Donders, 2018; Moore and Tambini, 2018; Wu, 2018). Thus, when addressing the politics of discoverability, policymakers need to acknowledge the multiple ways in which policy solutions – on competition and content regulation; on tax and on social externalities - are interwoven, and require solutions that will depend on broad cross-party and civil society support (Tambini and Moore, 2019).

²⁷ Recommendation CM/Rec(2018)1 of the Committee of Ministers to member states on media pluralism and transparency of media ownership.

Canada: proposed interventions on discoverability of Canadian content

The Canadian Broadcasting and Telecommunication Legislative Review Panel highlighted the necessity to support “production and discoverability” of Canadian content online with the intent to ensure “Canada’s cultural sovereignty and democracy” (ISED Canada, 2020: 9). To do that, they recommend a number of intertwined measures, including the needs to: a) introduce discoverability obligations to positively discriminate Canadian content on all audio and audiovisual entertainment media services, through for instance exhibition requirements, prominence obligations, must-offer and algorithmic transparency (ISED Canada, 2020: 147–148); b) introduce funding quotas for both producers and distributors to ensure sustained investment in Canadian content that reflects the diversity of languages, ethnicities and cultures of the Canadian population (127-128); c) revise intermediaries’ responsibilities and liabilities in view of their changing role in curating and aggregating content online (130-131); d) revise and update ownership rules to redefine the current media and telecommunication ecosystem (62-64). These recommendations come from an independent review panel; thus, they are not part of any regulatory proposal at the moment, but they are under discussion in the context of a broader revision of the broadcasting and telecommunication legislative framework.

Australia: proposed promotion and discoverability requirements for Australian content

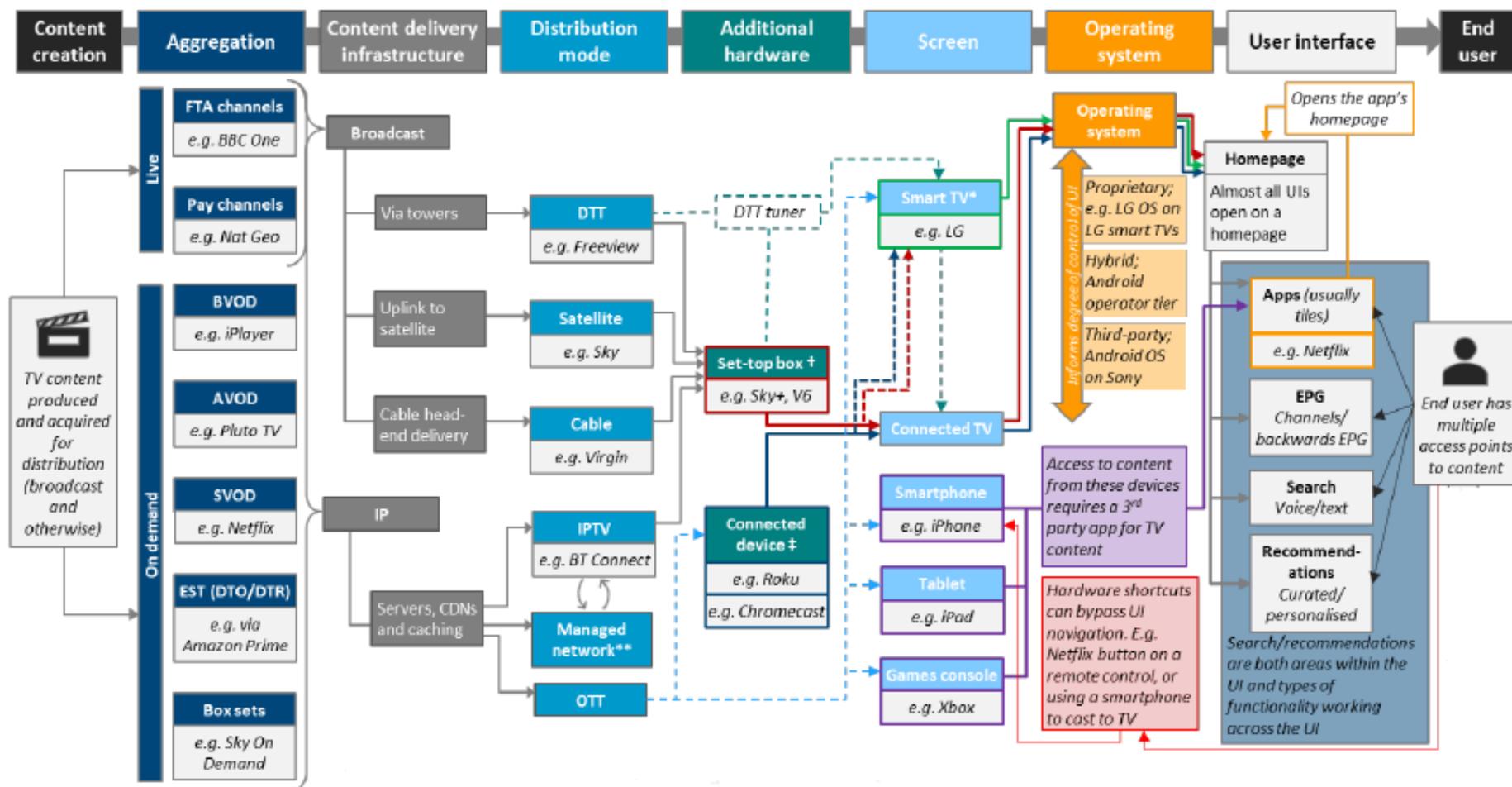
In April 2020, the Australian Government has released the “Supporting Australian stories on our screens options paper”, co-authored by Screen Australia and the ACMA at the request of government in response to the Australian Competition and Consumer Commission’s Digital Platforms Inquiry (ACMA, 2020). The paper is part of the government’s media reform agenda and it concerns potential content obligations of free-to-air television broadcasters examining whether there should be Australian content obligations, such as promotion and discoverability requirements on VOD services. The paper outlined several options, ranging from keeping the status quo to deregulation. These are designed to prompt industry feedback to assist in the development of a regulatory framework that promotes the government’s intent to support Australian stories on our screens. It is anticipated that these matters will be explored in consultations with the industry. Despite the initial aspirations of this paper of the Australian media industry stakeholders, the Australian government has in the end opted for deregulation, reinstating sub-quota requirements on commercial broadcasters but in a much more flexible and less prescriptive way and without addressing any of the issues around discoverability requirements for Australian content (Fletcher, 2020). There are plans to increase public support for Australian content with additional funding, however, they do not intend to intervene in the sphere of exposure diversity and “the market will determine where this content is best shown, be it on commercial television, the ABC or SBS, subscription television or streaming platforms” (Fletcher, 2020). It therefore emerges the presumption that increasing diversity of content and sources will as a consequence promote diversity of exposure. However, scholars of selective exposure have argued that this is not often the case; on the contrary, given the abundance of choice in today’s globally convergent media ecosystem, users might tend to be exposed, more or less voluntarily, to less diverse content. Without the right incentives in place, this tendency could be exacerbated by current industry dynamics (Helberger, 2018; Helberger and Moeller, 2018; Möller et al., 2018).

2. A Changing Landscape: Industry Practices and Implications

As mentioned in the introduction, this study addresses issues that concern the cultural and creative industries as a whole, but for the purposes of this exploratory and conceptual report we have primarily focused on audiovisual media content and news, which present specificities and sensitivities that are particularly relevant for the policy debate on prioritisation of public interest content. Within this context, media distributors and content providers have always had the power to influence audiences' viewing experiences, and to do so, they have long had to negotiate with other stakeholders for access to audiences' attention. Mechanisms to channel viewer's attention and to establish different forms of conditional access to content began already with practices of scheduling that were represented in printed channel listing and then significantly developed through Electronic Programme Guides (EPG) in the 1990s and 2000s. The telecommunication sector and its regulatory regime has also influenced the ways in which content was accessed via Internet Service Providers, through for instance zero-rating practices which were positively discriminating certain services over others.²⁸ In Net Neutrality regulation, the concepts of "reasonable network management" and "justified traffic management" have been seen as one means of ensuring priority distribution for public interest content. However, nowadays media markets are experiencing a period of drastic change and development as the penetration and quality of broadband has improved, providing a high-quality distribution platform of audiovisual media services alongside digital terrestrial television (DTT), cable and satellite. Thus, even though significant audience segments continue to watch linear television, others consume only internet-distributed services, or a combination of both. Indeed, the increasing availability and popularity of internet-connected devices, from smart-TVs to smartphones and tablets, is multiplying users' routes to content. At the same time, the rise of on-demand and streaming services is not only allowing users to have access to a much broader range of content, from both national and international players, but it is profoundly changing the way content is distributed and aggregated through different screens (Figure 9).

²⁸ Zero-rating is the practice of providing Internet access without financial cost under certain conditions, such as by permitting access to only certain websites or by subsidizing the service with advertising or by exempting certain websites from the data allowance.

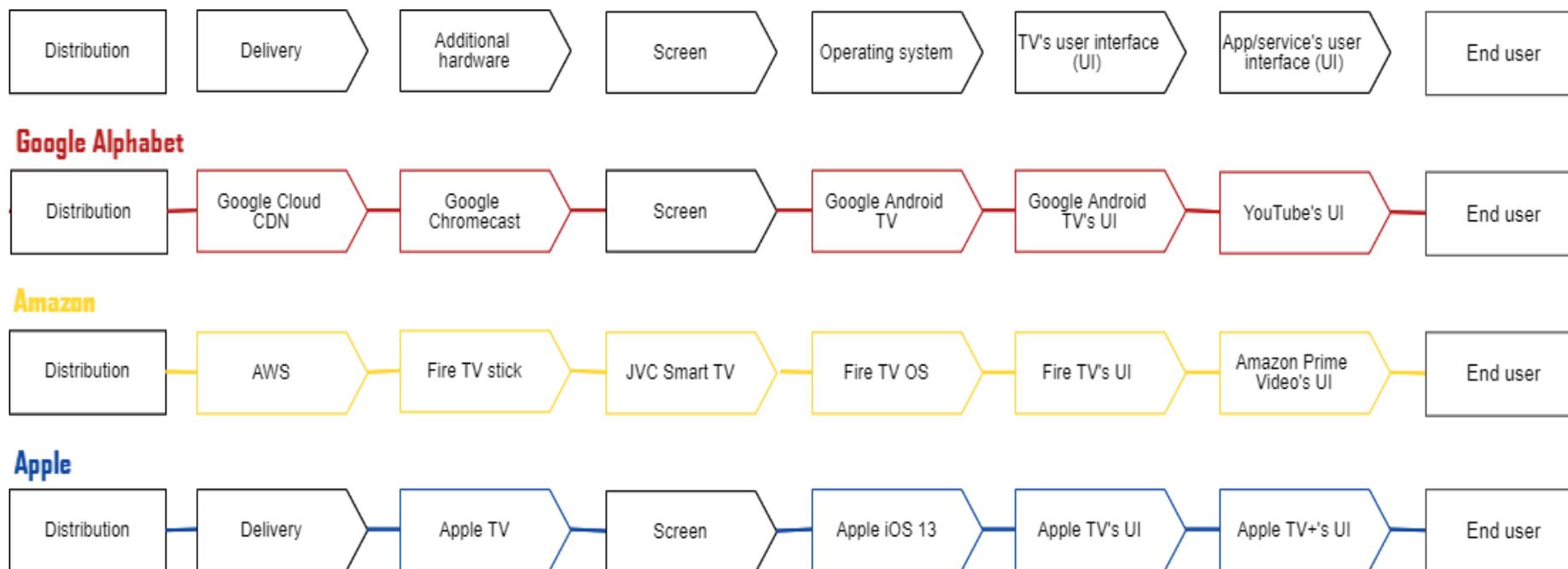
Figure 9. Internet-distributed audiovisual media industry: illustrative supply chain with examples taken from the UK media market (Mediatique, 2020: 13).²⁹



²⁹ © Mediatique Ltd 2020.

Even though audience fragmentation varies from country to country (European Audiovisual Observatory, 2019) people are generally faced with an abundance of content and a growing array of technologies and services through which they can discover content (Johnson et al., 2020). On the one hand, this mix of distribution technologies and aggregation services leads to viewing experiences that are governed and controlled by a range of devices, web browsers, video interfaces and apps (Hesmondhalgh and Lotz, 2020: 387). On the other hand, companies owning such crucial digital intermediary services are also rapidly expanding their services along the value chain, as they seek end-to-end vertical integration to secure control over the ways in which content is distributed and circulated online (Figure 10). Indeed, major global players like Google Alphabet, Amazon and Apple, have been the main drivers of integration in the connected TV marketplace, achieving strategic partnerships with content providers as well as manufacturers, or integrating their own service offer in valuable areas (Mediatique, 2020: 46). In this context, these changes in industry structures have also an impact on who has the power to decide over content curation and prioritisation processes, and ultimately who can exercise control over users' access to content on different devices. Based the literature review and insights gathered from the qualitative interviews, we have identified four main categories of factors that can influence content prioritisation processes with varying degrees: (i) regulatory context, (ii) technological architecture; (iii) users' agency; and (iv) commercial negotiations. Since the previous section contextualises the policy debate on prioritisation of public interest content within the regulatory environment (see Section 1.2.), the following section will discuss the other three factors.

Figure 10. Illustration of end-to-end vertical integration and synergies across the audiovisual media value chain at various companies³⁰



³⁰ The graph has been made by the authors based on data and information gathered from Ofcom's industry reports (Mediatique, 2020; MTM and Ofcom, 2019)

2.1. Technological Architecture

Individuals do not make choices in a vacuum, but they make them in a technological environment that is not neutral and where many features of both hardware and software components can influence their decisions, as they are confronted every day with a myriad of choices and cues. The myth of neutrality of digital intermediary services has been debunked and it is now widely recognised that such services and their technological architecture play a significant role in shaping what content and information is made more or less visible online (see for instance Bucher, 2012, 2018; Gillespie, 2010, 2018; Roberts, 2019; Woodard and Jason, 2008; Yeung, 2017). Research has shown that the design of hardware and software technologies inevitably carries certain biases, which in turn are related to the objectives of the designers and the interests of the organisations behind them (e.g. Möller et al., 2018; Napoli, 2014; Powell, 2016). Thus, human autonomy and freedom is inevitably constrained when it comes to content prioritisation, because prioritising a service or a provider over others is a deliberate decision and it constitutes to some extent a form of influence and censorship. We should therefore always reflect and investigate on what basis something is being prioritised, why, by whom and for whom.

When it comes to content prioritisation online, there are different factors and aspects that should be taken into account. Given the growing complexity of the content supply chain, these factors also vary depending on the influence of different gateways that intervene along the supply chain, from the aggregation services level to the hardware and software level of the devices used to access content (Desjardins, 2016a, 2016b; Johnson et al., 2020; Mediatique, 2020; MTM and Ofcom, 2019). Furthermore, the technological architecture that shapes users' choice is not simply influenced by a technical necessity, but also by the interests, strategies and objectives of the organisations that are developing it (Napoli, 2014). Broadly speaking, examples of this technological architecture encompass, but are not limited to, traditional programme guides like EPGs, recommendation systems, search functions (text and voice) and related ranking systems, user interface design, location of apps/programmes titles, content descriptions, and hardware short cuts of internet-connected devices (Desjardins, 2016a, 2016b; Johnson et al., 2020). Commercial negotiations and economic interests of the organisations developing this architecture and those using it come into play and also shape what will be developed and how. Describing and discussing the different technical features and the economic and commercial strategies driving them is beyond the scope of this report. However, at the end of this section, we provide an overview of three concrete examples that emerged during the research, regarding respectively content prioritisation on smart-TV systems, on smartphones, and on smart speakers (see section 2.5).

2.2. Users' Agency

Alongside the influence that prioritisation has on nudging users' behaviours and choices, there are also factors beyond the control of any organisation, institution or policymakers. Users make the final call, and decide whether to watch the recommended content, whether to change the apps' location on their smart-TV homepage, whether to delete the pre-installed apps, or add new services that they like better. These users' decisions can be influenced also by the desire to watch a specific programme, sometimes combined with a fan interest in a particular genre, talent or buzz on social media (Johnson et al., 2020). Professional reviews and ranking on magazines, social media and dedicated websites are often combined with recommendations from friends, family and colleagues, and they are both crucial in raising awareness about programmes and making decisions about what to watch when browsing or searching (Johnson et al., 2020: 6). Furthermore, a growing number of scholars argue that these

decisions can also be shaped by the prioritisation mechanisms that were described above. The extent, however, to which these various forms of prioritisation impact users' access and consumption of content, is unclear. Gatekeepers might have a more comprehensive understanding of the impacts of choice architecture on users' behaviours, thanks to the gathering and processing of behavioural and consumption data. Researchers, however, have practically no access to such information and empirical and academic research in this area is still very limited.

Evidence gathered by independent regulatory authorities like the UK Competition Markets & Authority does indicate that content curation and prioritisation techniques like default and prominence position on search engines' results display do have a significant impact on users' behaviour in search (Competition & Markets Authority, 2020: 101–102). For example, when a consumer buys a new mobile phone, search queries typed into the pre-installed browser or search widget will be served by the default search engine, unless the consumer makes an active choice to move away from the default (Competition & Markets Authority, 2020: 79). Evidence shows that these default settings on mobiles are likely to exert a more powerful influence on users' choices and behaviours than desktop defaults because users are less likely to take active steps to change or bypass defaults when faced with a smaller screen (Competition & Markets Authority, 2020: 102). However, patterns and influences become even more complex and hard to predict when users rely on an increasing number of devices. Furthermore, active personalised settings are becoming more popular as they allow users to pre-select specific apps, service providers, or genres they would prefer to consume, thus most digital intermediary services actually offer a combination of both options. In conclusion, users' agency and control over their journey to content are always dynamically shifting and it can be influenced by a number of factors. Both users' tech proficiency as well as media and digital literacy levels are pivotal to increase users' awareness and knowledge of content prioritisation strategies and mechanisms. The crucial question that we still have to answer though is to what extent individuals can maintain their freedom of choice, within a constraining technological architecture and the limitations of their tech and literacy skills.

2.3. Commercial Negotiations

The ongoing developments in the ways content can be accessed and discovered also impact the existing market structures and power dynamics, giving rise to new aspects of control and dependence between different industry actors. Indeed, from an industrial and economic perspective, prominence affects how broadcasters, and more broadly content creators, can stay relevant online and find an audience for their apps, channels, and programmes and advertisements on different digital intermediary services. Thus, the current moment is one of considerable complexity as content providers, pay-tv operators, internet platform organisations, software and hardware manufacturers, are competing to control access to content, viewers and data (Johnson et al., 2020: 2). Commercial negotiations in this space are often complex, yearly deals involving various terms and negotiating points. They can involve both payments for placements or sponsorship agreements, but also trading-off of non-monetary benefits, such as data sharing deals of content metadata, in-app viewing data and general data on the users' journey to content (MTM and Ofcom, 2019: 27–29).

When talking about trade-offs between key aspects of prominence and content availability [...] availability of apps and data sharing are big things. When you go to an app from the homepage of a connected TV, only the provider's app sees who you are, what you're watching, what you've watched in the past, etc. And what that means for platforms is that you can follow a user's journey up until the point they went into the app and then you lose them. [...] And there's quite a big tension there. Because obviously the broadcasters want to be prominent, but they also want to be important, have some power and really understand their audience in a way that lets them provide the best service they can. What is not a great situation for them, or something that they are scared of, is something like a Google search, where users are searching for what to watch on TV, but there is no protection anywhere to say that a certain broadcaster has to be more prominent in the Google search results, it just comes from anywhere at all. They want to avoid that as much as they can in the TV environment by making you associate their content with their app, by controlling your journey once you get inside their app, etc. So, there are some trade-offs for both, and some of it might be purely commercial.

(External expert 2, 2020)

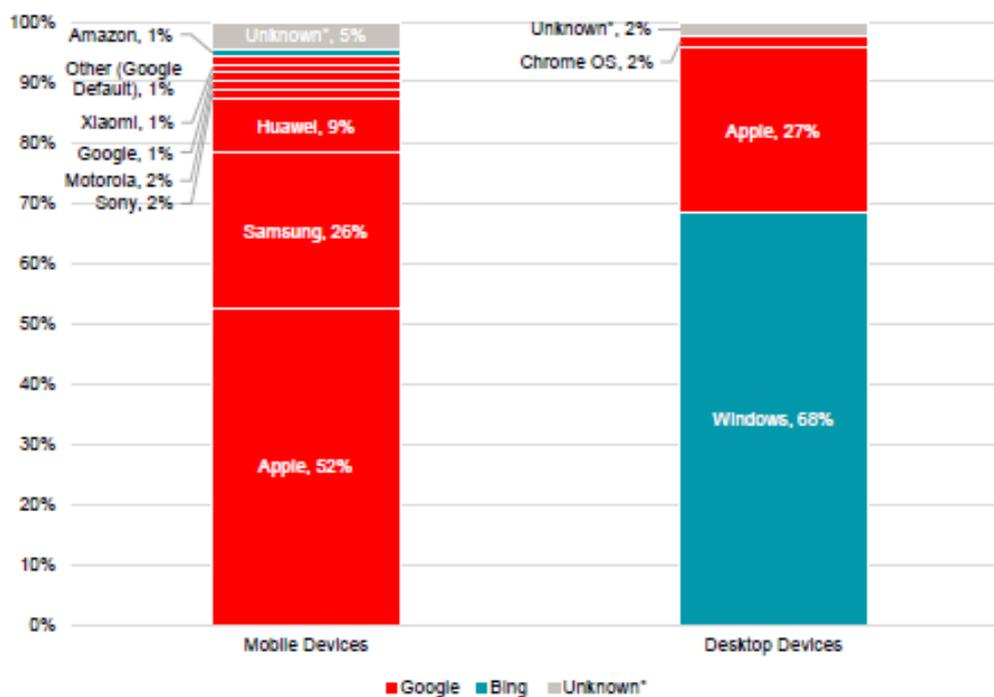
The participation of different industry organisations in those deals is however not evenly distributed (Hesmondhalgh and Lotz, 2020; McKelvey and Hunt, 2019). On the contrary, bargaining power often tips towards internet platforms and international hardware and software manufacturers that are able to strike global deals at the expense of local and national operators (MTM and Ofcom, 2019: 27; Interview data). Organisations like Google Alphabet, Apple and Amazon, which are vertically and horizontally integrated along the internet-distributed value chain, can indeed exercise a stronger bargaining power in striking deals with content providers on the inclusion and prominence of their content (MTM and Ofcom, 2019: 27).

Further, since these organisations operate in multiple markets, they tend to strike global deals with both hardware and software manufacturers, to maximise profit and efficiency for both (Mediatique, 2020). Indeed, the default settings of different devices are not random or neutral choices (Hesmondhalgh and Lotz, 2020: 394). As argued by some research participants, interface placement on smart TVs or streaming devices is the result of yearly negotiation processes, and it is an important revenue stream for manufacturers, as it is often an expensive paid placement agreed with the service provider (PSM representative 2 2019; PSM representative 6 2019). Evidence has also shown that default positions in search are an important feature of the search sector. Competition over access to these default positions featured on different devices is fierce, since the defaults have a strong influence on the search engines that consumers use and, in turn, act as main gateway to content and information (Competition & Markets Authority, 2020: 98–99). Thus, if Amazon Prime Video or Netflix is pre-loaded on a smart TV screen; if the remote control has buttons that direct users to these services just with a 'click'; or if Google's apps are in default prominent positions on smartphones and table devices (Figure 11), it is because these organisations were able to pay significantly more than their competitors for such prominent position (Competition & Markets Authority, 2020; PSM representative 6 2019).³¹

³¹ For example, Google makes very large payments to Apple in particular in return for being the default search engine on its devices, and it has had a default agreement with Apple for over 15 years. It also has default agreements with many of the largest Android mobile phone manufacturers and mobile phone networks, holding default positions on smartphones, tablet and smart speakers. In combination, these agreements mean that Google Search is the primary default on the vast majority of mobile devices in several national markets, such as the UK one, making its services and apps crucial gateways to content and information for the final users. For a more detailed see: Competition & Markets Authority (2020) Online platforms and digital advertising. Market study final report. London. Available at: www.nationalarchives.gov.uk/doc/open-government-

Compensation for such default and prioritisation deals might vary and it could, for example, take the form of a fee or search advertising revenue share, when for instance a device manufacturer opts to pre-install Google Chrome and Google Search (Competition & Markets Authority, 2020: 100). For instance, in 2019, Google paid around £1.2 billion for default positions in the UK alone, which is more than 17% of Google’s total annual search revenues in the UK (Competition & Markets Authority, 2020: 103). All of these payments were in return for Google being set as the primary default, and the substantial majority of them went to Apple, while a smaller proportion to Android mobile phone manufacturers or other partners (Competition & Markets Authority, 2020: 103). The business models and advertising revenues of digital intermediary services partially depend on commercial negotiations around content prioritisation at different levels, from default settings to rankings and recommendation systems. There are therefore strong commercial and economic interests at stake as a greater value is given to the strategic positioning and prioritisation of their apps, rather than to those organisations who actually produce the content and information.³²

Figure 11. Search default positions on mobile and desktop devices, based on device usage, UK market, February 2020 (Competition & Markets Authority, 2020: 101)³³



³² Such data demonstrates what default prominence currently costs in the free market, and it prompts us to reflect that without any kind of intervention, the current functioning of the market could create serious distortions, as very few companies would be able to spend similar amount of money to be set a default in a prominent position. Proposals to consider in this area would be to look at funding models for public subsidy for providers that respect public interest objectives and criteria, which could help them in being set as default on certain digital intermediary services. However, more information on the costs of default prominence positions on different devices are often matters of commercial sensitivity, thus, they are confidential data that were not accessible for the researchers.

³³ Source: CMA analysis of Statcounter Global Stats data. The data for mobile devices represents shares amongst mobile device manufacturers (including tablet devices), calculated on the basis of ‘page referrals’. The data for desktop devices represents shares amongst desktop operating systems (including laptop devices). ‘Unknown’ consists of all device manufacturers and operating systems that accounted for a share of less than 1% and for which we were unable to identify the default search engine. Google or Bing may hold additional default positions on these devices and browsers. See Appendix H for further details.

Similarly, deals over apps on smart-TVs are rather opaque and unbalanced; there is no transparency over the business-to-business relationships. The prices of prominent slots are estimated to be extremely high and very competitive. As a result, they disadvantage smaller, local and national content providers and broadcasters, as this has already been the case with EPG slots sales as the valuation of positions became a matter of very considerable commercial interest (Figure 12). Further, in the video-on-demand and streaming world, there are monthly auctions of shopping airtime and channel positions on user interfaces that have led to high prices of EPG positions by historic standards; this is because the buyers outnumber sellers by three to one (Klein et al., 2012: 34). The experience of EPG brokers like Canis Media has also shown that good channel positions have significant value even if they are carrying poor quality content (Hall and Lawson, 2012; Klein et al., 2012: 34). Hardware and software manufacturers can also exert influence on certain user interface design decisions, especially when they are able to strike multi-territory prominence deals, like in the case of certain smart-tv manufacturers and international streaming services.

Figure 12. Indicative valuation of Sky EPG using estimates of top and bottom slot values in £m by genre ³⁴

Genre	Number in genre	Value of top slot (£m)	Value of bottom slot (£k)	Total for genre (£m)
Entertainment	113	20	150	464.50
Lifestyle & Culture	26	2	150	18.9
Movies	40	1	150	18.1
Sports	32	5	150	45.5
News	16	2	150	11.8
Documentaries	31	2	150	22.5
Kids	28	2	150	20.4
Music	29	3	150	28.2
Shopping	30	10	150	73.2
Religion	17	1	150	5.0
International	61	2	150	43.9
Gaming & Dating	7	1	150	2.1
Specialist	3	0.15	150	0.5
Adult	38	3	150	36.8
Total	471			791.40

³⁴ A report commissioned by Technologia and I2 Media Research from Canis Media provided first-hand experience and data of trading in EPG slots, specifically of Sky EPG as Canis Media is the UK's largest broker of EPG slots on the Sky platforms that specialises in the valuation and trading of these positions. With the data provided by Canis, Technologia and I2 Media Research have made a speculative projection, based on the limited data available, of the total value of the entire Sky EPG. Canis estimated the current value of the top and bottom slots in each genre. These are somewhat artificial because the top slots are either occupied by PSBs or by commercial incumbents who would be unlikely to sell. Assuming that the value of slots declines geometrically from top to bottom of a genre (i.e. by a fixed ratio) and using Canis' figures, they have calculated that the value of the entire Sky EPG is upwards of £700 million. Source: Klein, J., Freeman, J., & Lambert, R. (2012). The value and optimal management of channel position and prominence on electronic programme guides, Technologia and I2 Media research.

2.4. Zooming in: Content Prioritisation Case Studies

To exemplify some of the aforementioned industry practices and the implications that they have on the prioritisation of public interest content, we present three salient examples that emerged from the literature review and interviews' data.

2.4.1. Content Prioritisation on Smart-TV Systems: the case of audiovisual media content

Type of gatekeeper	Example	Content prioritisation mechanisms
Devices manufacturer	Smart TV set provider: LG	Channel Priority, EPG prominence, homepage design, apps location, search functions (voice/text), additional hardware shortcuts like dedicated buttons on remote controls
Content aggregators	Subscription Video-on-Demand services: Netflix	Promoted titles (generally in a carousel at the top of the home screen); recommendation rows and titles; personalised user interface; catalogue's ranking system and dedicated subcategories (to order different rows, and within the same row), popularity rankings (e.g. "top 10" or "top picks for you"); 'up next' features; auto-play functions; search functions (text/voice)

The impact of the EPG positioning in a linear world has been demonstrated by a number of studies. Indeed, without it being the only influence on users' choice, evidence has shown that high EPG positions are acknowledged by both PSM and commercial broadcasters to lead to higher potential audiences and therefore higher viewing reach (Expert Media Partners, 2018a; Klein et al., 2012; Ofcom, 2018). Indeed, work conducted for Ofcom largely supported the proposition that EPG position affects users' reach and audience performance. The FEH Media Insight report has shown that there is generally a sharp decline in reach occurring between the first and the fifth EPG slots, followed by a more gradual decline from slot 6 onwards (Ofcom, 2018: 21). Another example from the UK media industry has shown that in 2017, when the channel E4 moved up from the Virgin Media's EPG slot 144 to slot 106, its weekly reach increased by 68%, while its share of viewing increased by 44% (OfCom, 2018: 21).³⁵

Similar observations have been made for the video-on-demand space, as recent evidence showed that the position of content and apps on a smart-tv interface is one of a range of factors that drives users to click on a particular VoD service or programme (Ofcom, 2018: 3). Further, once the user has accessed a specific VoD service through the related app, content prioritisation takes different forms. For instance, as shown by a recent Australia-based study on SvoD and discoverability of local content, roughly all services have design features enabling the strategic promotion of titles on the homepage and through their catalogues' rows (Lobato and Scarlata, 2020; Scarlata and Lobato, 2019). The specifics, though, vary significantly. While some offer country of origin searching and dedicated categories for national

³⁵ Source: BARB. Following a public auction for EPG slot 106 on the Virgin Media platform in 2017, Channel E4 bought a higher EPG position (and moved from 144 to 106). For the period from 29 May to 8 October 2017, E4's average weekly reach (3 minutes +) on Virgin Media was 1.475m, for the period 9 October 2017 to 3 June 2018 its average weekly reach was 2.485m. In the same period, its share increased from 1.34% to 1.94%

television and cinema, others do not; for example, Netflix makes extensive use of personalised recommendations, while Amazon Prime Video is less personalised (Figure 13). Overall, though, it is difficult to generalise because not only are there differences between the user interface design of the leading VoD services, but UIs are often personalised and geo-localised, thus, they also change depending on the location and profiles of the users.

Figure 13. Discoverability features for local Australian content in major SvoD service (Lobato and Scarlata, 2020: 5)³⁶

						
Australian content searchable	Yes	Yes	No	No	No	Limited
Australian cinema drop-down category	No	Yes	No	No	No	No
Australian TV drop-down category	No	Yes	No	No	No	No
Australian cinema recommendation row	Yes	Sometimes	No	No	No	No
Australian TV recommendation row	Yes	Sometimes	No	No	No	No

Software solutions often leverage integrated and interoperable hardware offers, which can have lock-in effects, meaning creating dependency on individual providers, that advantage those vertically integrated providers that offer both software and hardware. For example, users using a smart TV will typically be offered the prospect of accessing content via a series of apps on the home screen (Figure 14), whose order could be decided by the TV set manufacturer and/or the provider of the TV set's operating system. Whether these two are different players depend on whether the manufacturer has its own OS, or it has adopted one from third parties. Smart TVs and connected TVs increasingly present customised remote controls with pre-installed service buttons, most commonly Netflix, Amazon Prime Video and Roku's buttons (Figure 15). These bring the user directly to the homepage of those apps, bypassing all other channels and services. In some cases, users might not have a smart TV nor a pay-tv subscription but have attached hardware to their screen. Overall, interoperable offers from the vertically integrated providers like internet platform organisations are able to offer a smoother and easier user experience, while concentrating the influence over the users' journey in the hands of fewer actors.

³⁶ Source: Scarlata A and Lobato R (2019), Australian Content in SVOD Catalogs: Availability and Discoverability. Submission to the Australian and Children's Screen Content Review. Melbourne. DOI: 10.4225/50/58225b7d49d1a; and Lobato R and Scarlata A (2020) Response to ACMA / Screen Australia Options Paper, June 2020. Melbourne. Data collection between 2017 and 2019.

Figure 14. App prominence in a Samsung smart tv's user interface.³⁷



Figure 15. Shortcut button on smart TV remote controls.³⁸



³⁷ Source: Samsung.

³⁸ Source: manufacturer website.

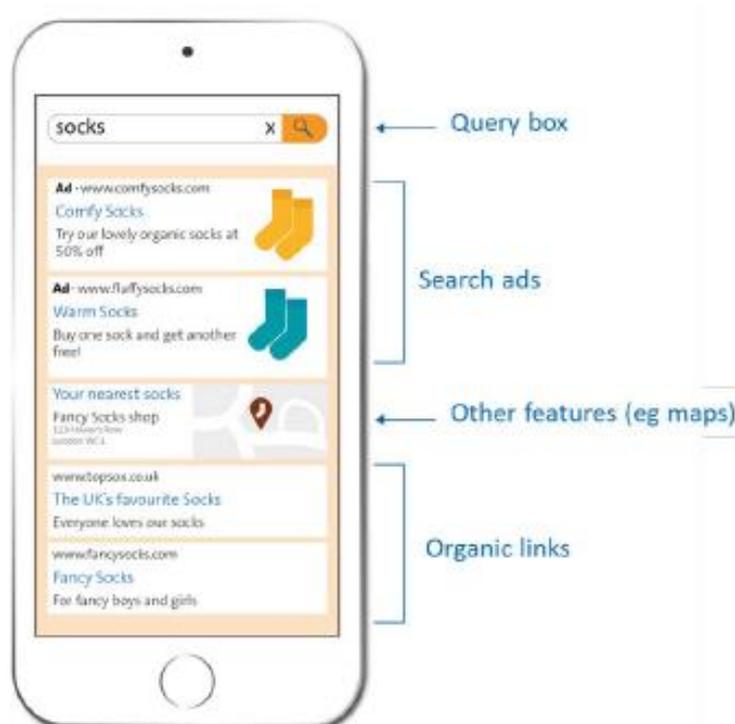
2.4.2. Content Prioritisation on Smartphones: the case of news content

Type of gatekeeper	Example	Content prioritisation mechanisms
Device manufacturer	Smartphone provider: LG Operating system provider: Google Android	Google’s pre-installed apps, integrated Google Assistant system for search
Content aggregators	Search engine app: Google Chrome app	Prominence of search results, ranking systems (within the same page, between different pages, and within the thematic sub-tabs on videos, images, news etc.); dedicated and sponsored boxes
	Social media app: Facebook	Flagging and tagging, personalised ranking of newsfeed, instant articles, recommendation algorithms, pushed notifications, personal settings

Alongside broadcasters and newspapers, people are increasingly finding their news via content aggregators like search engines and social media, which are increasingly accessed through mobile operators and offered by US-based platform companies like Google and Facebook (Nielsen, 2017). The 2019 Reuters Institute Digital News Report has indeed shown that in several countries smartphones and their mobile apps are becoming the main gateway to access news, overtaking television or print in terms of reach for “first contact with news” (Newman et al., 2019: 15–16). The ongoing fragmentation and disaggregation of the news market is also leading to weaker connections between people and specific news websites or apps, especially among people aged 18-24 (so-called Generation Z) who are more likely to prefer to access news via social media (Newman et al., 2020). Thus, even though during the Covid-19 pandemic people identified television as their main source of news (Newman et al., 2020), the general trend of the past few years is that search engines and social media have become an integral and essential part of how people find and access news all over the world. However, the prioritisation principles and content curation criteria of these systems are in most cases unknown to users and hard to negotiate for the providers and publishers (Phillips and Mazzoli, forthcoming). Yet, evidence suggests that search engines and users generally see relevance of results and related ranking as the most important aspect of quality (Competition & Markets Authority, 2020).

Taking the market leader in search, i.e. Google Search as an example, we broadly know that its algorithms look at many factors, including users’ previous search history, words of the queries, relevance and timeliness of pages, location and settings, attributing different weight to each factor (Google Search, 2019). Moreover, Google Search also states that to ensure high standards of “relevance and quality,” they have a rigorous process involving trained external “search quality raters” around the world who assess a page’s “quality”, based on the types of content and information, authoritativeness and trustworthiness of the page, its purposes, its reputation and/or the reputation of its creator, etc. (Google, 2020; Google Search, 2019). To some extent, this seems like an attempt to include public interest principles in the ranking system promoted as part of its corporate social responsibility strategy. However, there are still a number of questions regarding for instance possible criteria that could ensure diversity and pluralism of news; any underlying commercial and marketing agreements that also influence what appears more or less prominent on the rankings; and how human curation and automated and federated search are combined in these systems (Phillips and Mazzoli, forthcoming) (Figure 16).

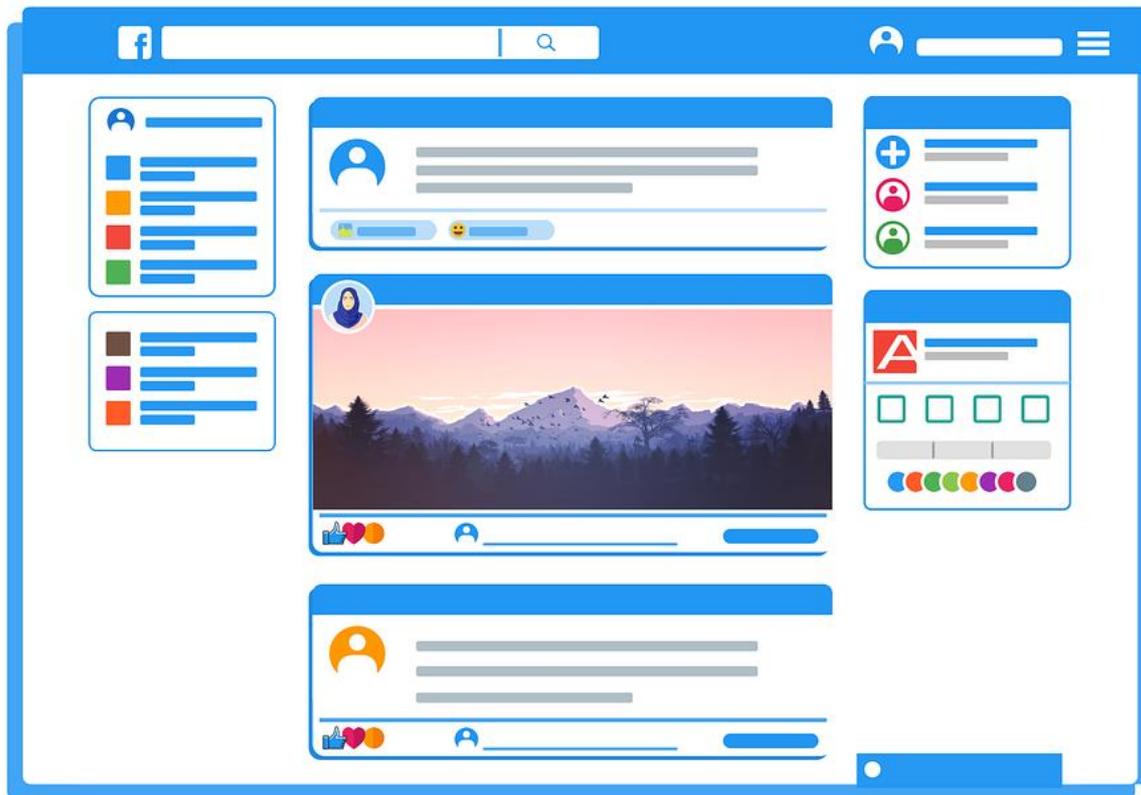
Figure 16. Illustration of a search engine results page (Competition & Markets Authority, 2020: 74)³⁹



On social media apps, one of the most influential prioritisation mechanisms of these services is their personalisation systems, whose recommender algorithms can work on the basis of (i) data on users' preferences, interests and consumption habits (content-based filtering); (ii) insights into what other users like to read (collaborative filtering); (iii) data on their users (knowledge-based filtering), or (iv) a combination thereof (Helberger, 2019; Jannach et al., 2010; Karimi et al., 2018). Depending on the outlet and the metrics used for optimisation, these systems can be used to increase time spent, advertising revenues and user satisfaction, but also to actively guide readers and match individual readers with the news they will receive (Helberger, 2019: 994). As further argued by Prof. Helberger, the power to actively guide and shape individuals' news exposure also brings fundamental questions about the values and guiding principles of these systems as they impact the media's democratic mission (2019: 994). Such power is even more concerning when popularity, advertising interests and commercial agreements become primary drivers for content prioritisation, rather than integrity and diversity of news information. The implications of such prioritisation for users and for our news media ecosystem are far-reaching (Phillips and Mazzoli, forthcoming). The ability to serve individual users better and more effectively is also the source of some of the most prominent concerns about the impact of recommenders on democracy (Helberger, 2019: 995). Not only academics but also regulators warn that there is at least "a risk that recommendations are used in a manner that narrows citizens' exposure to different points of view, by reinforcing their past habits or those of their friends" (Ofcom, 2012). This has been a heated debate for years now (see also Pariser 2011, Sunstein 2001, Gitlin 1998), and yet there are still informational asymmetries and a lack of transparency over these content curation processes and prioritisation mechanisms.

³⁹ Source: UK Competition Markets & Authority

Figure 17. Illustration of Facebook news feed ⁴⁰



2.4.3. Other forms of Content Prioritisation: smart speakers, VR, game consoles, and new services

As the market for media interfaces remains hugely innovative, there are a number of other access points, any number of which entails potential for gatekeeping power on content prioritisation. One current example is a smart speaker, which is a type of speaker and voice command device with an integrated voice assistant system. Popular examples include Alexa from Amazon, Google Assistant from Google Alphabet, Siri from Apple, Cortana from Microsoft and Bixby from Samsung. What content is delivered when a user for example says: “Alexa, play the news”, or “Siri, play a documentary about the elections”, is of course a form of content prioritisation. As shown by recent studies, only a small number of consumers chose to access content in this way, but the penetration of voice-activated speakers is growing rapidly and is now reaching mainstream audiences (Newman, 2018a, 2018b). Currently most usage is at a basic level and there is still little data available about the usage of these devices and their impacts on the way that content circulates online. Finally, games consoles, VR services, and other new services could rapidly achieve prominence power.

⁴⁰ Source: Picture by 200 Degrees from Pixabay. Link: <https://pixabay.com/it/vectors/social-media-internet-facebook-web-3553807/>

3. Potential Problems Related to Online Content Prioritisation

The question of whether law and policy should create regimes of prominence, or rather step back from the ongoing process of an ad-hoc private construction of a new prominence regime, raises complex issues at the intersection of freedom of expression and media pluralism. This section aims to address this question and prompt reflections on the problems and policy implications of the ongoing changes of the internet-distributed audiovisual media value chain. In particular, based on empirical observations and insights gathered from the analysis of relevant documents and the interviews with stakeholders, here we discuss six key issues that may have industry and policy implications both for the future development of our online media ecosystems, as well as for the fundamental values upheld by the Council of Europe. The identified problems arise from the changes in the media landscape and current content prioritisation practices described in Section 2, which might require a form of regulatory intervention. However, issues related to forms of propaganda and censorship (see 3.2 and 3.3) are concerned with both private interests capture and state capture, addressing the risks of both in those areas.

3.1. Threats to Media Pluralism and Independence

The transformations we have described are relevant for the key and intertwined dimensions of media pluralism, intended as a plurality of sources, content and exposure. The first refers to a plurality of independent content and information sources, which focuses on the structure of the market and is sometimes referred to as ‘external pluralism’. The second is defined as plurality of diverse content, which can also be described as internal pluralism and is used to refer to instances where different views, genres and opinions are available (Craufurd Smith and Tambini; Napoli 1999). These two dimensions have also been evoked in the Court’s case-law which regards media pluralism as an integral part of media freedom protected under Article 10 of the Convention, and States as its “ultimate guarantors”⁴¹. For example, in terms of pluralism in the audiovisual sector, it is not enough to provide for the existence of several channels or the theoretical possibility for potential operators to access the market. Rather, effective access to the market must be allowed to a multitude of operators in order to guarantee “diversity of overall programme content, reflecting as far as possible the variety of opinions encountered in the society at which the programmes are aimed”.⁴²

The third component has been more marginalised in policy debates, but it is of great importance for content curation and prioritisation because it concerns the extent to which audiences are exposed to, and therefore are able to find, discover and access a diverse range of content (Helberger et al., 2018; Mazzoli, 2020b; Möller et al., 2018; Napoli, 2011). Indeed, also this third component is firmly established in the Court’s case-law. Protecting not only the individuals’ realisation of the right to freedom of expression and information as such but also as a precondition for a functioning democracy, the Court has clearly stated that citizens should be able to receive “a variety of messages, to choose between them and reach their own opinions on the various views expressed, for what sets democratic society apart is this plurality of ideas and information”.⁴³

⁴¹ *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Series A no. 276.

⁴² *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 130, ECHR 2012.

⁴³ *Çetin and Others v. Turkey*, nos. 40153/98 and 40160/98, § 64, 13 February 2003.

The transformations we have described could lead to the emergence of new concentrations of opinion-forming power that contravene the spirit of established principles and standards of media pluralism, but not the specific legal instruments in broadcast licensing and media merger rules. The existence of powerful gatekeepers of public opinion historically has led to conflicts of interest between private owners of such gateways, and a weakening of trust in democracy and social deliberation. Not addressing an uneven distribution of control and power over search and discovery of content might lead to further distortions in the market and to the concentration of media circulation power in the hand of a few powerful actors. Furthermore, thanks to their scale and their diversification strategies, these organisations are able to leverage on their core technology services and revenue streams to strengthen their gatekeeping role, while further expanding their services along the whole value chain. In a distribution network that is mainly privately organised and run by media conglomerates, commercial interests might supersede public interest objectives, leading to content prioritisation decisions that evaluate content based on a neo-classical liberal notion of the market and economic value, rather than taking into account also its public and societal value (Mazzucato, 2018).

Furthermore, as argued by scholars of selective exposure, despite today's abundance of choice, users might tend to be exposed, more or less voluntarily, to less diverse content (Möller et al., 2018; Napoli, 2011). Further, without the right incentives in place, this tendency could be exacerbated by users' interface design, search, and discovery functions that are primarily driven by an interest to keep their customer base, rather than ensuring audiences' diverse consumption of content. A much-commented feature of YouTube, for example, is the 'next up' feature which features a recommendation system based on previous consumption. This feature has been criticised for leading users down 'rabbit holes' of niche content such as conspiracy theories, rather than providing serendipitous exposure to a range of views. However, we should not simply blame the discovery algorithm and automated recommendation systems, as their nature and purpose is – and should be – to organise and rank content. Content prioritisation decisions, though, are a primary source of contestation and negotiation between different organisations with diverging interests and **objectives, as well as different degree of power and control over the decision-making processes (Mazzoli, 2020b: 309)**. Some research participants have argued that thanks to the vertical and horizontal integration along the audiovisual value chain, companies like Amazon or Google Alphabet might have more control over the way content is accessed and shown to the final user and therefore stronger bargaining power vis-à-vis content creators that depend on its devices and intermediation services (PSM representative 2 2019; PSM representative 6 2019). **Not addressing this uneven distribution of control and informational asymmetries over content discovery might contribute to undue market and private influences over the independence of media and content providers that have to rely on these gatekeepers (Mazzoli, 2020b: 311)**. This is indeed the trend that we are currently seeing, as access to content heavily depends on those gateways that are owned by fewer internet platform organisations (Evens and Donders, 2018; Hesmondhalgh and Lotz, 2020).

3.2. Forms of Soft Propaganda

Undue power or interference on a users' content diet could come not just from private market actors, but also from the state and government agencies. This is the case especially if a prominence regime is implemented in countries with authoritative governments and state-administered broadcasters, like China Central Television (CCTV) and some members of the Council of Europe with former state broadcasters. When platforms take decisions about which government agencies' content should be presented unfiltered and prominently, there is a danger that such communications might breach the ethics of media independence, and the division between media and government information. It is possible to imagine – and in some cases actually see – public service announcements that are made directly by ministers seeking re-election, or situations where normal protocols and limits on government communication spending are breached when new communications gatekeepers are offering prominence for free, on the basis of their (subjective, opaque and potentially automated) assessment of “public interest”. Such control of potentially significant segments of national media environments is wholly incompatible with the principle of media independence from political interference and control.⁴⁴

Controlling media outlets and using them as a propaganda tool is as old as the history of media; thus, as boundaries between media and digital intermediary services increasingly blur, controlling the latter through regulatory intervention could also lead to a soft form of propaganda. Such interventions could be used to impose prominence to only approved forms of discourses and approved channels while moderating away others.⁴⁵ The potential of authoritarian countries and also mature democracies to blur the boundary, particularly during emergency conditions, raises questions about whether new rules, ethical guidelines or transparency requirements might be necessary.

3.3. Forms of Soft Censorship and Threats to Freedom of Expression

If some forms of content are made prominent, it logically follows that others are being downgraded. For example, we have seen this during the Covid-19 pandemic new theories about the virus' transmission, or immunities are reported as fact, then later dismissed as fake and then reinstated as trustworthy (see for instance Europol, 2020; Italian Ministry of Health, 2020). A situation in which prominent channels are monopolised by one point of view would arguably impede the plural, evidence-led debate about such claims and blur the boundaries between the views of political decisionmakers and those of scientists that may contradict them.

To the extent that prominence decisions are decisions to act against the economic self-interest of gatekeeper companies, changes in the prominence regime could be used to manipulate media. Removal of EPG prominence for public service content, for example, could result in an economic failure, and new obligations to give prominence to content that is not popular with consumers could result in a decline in users for a given social media platform. All such changes should be subject to due public scrutiny. This is particularly relevant when it comes to the prioritisation of news and information online. As also highlighted by the Journalism Trust Initiative and its CEN Workshop Agreement, regulatory

⁴⁴ More on the issue can be found in the Court's case of *Manole and Others v. Moldova*, no. 13936/02, § 95, ECHR 2009, and the Council of Europe instruments cited therein.

⁴⁵ By using the term “soft”, we intend to differentiate this possible form of indirect state and/or private influence on what discourses and information should be prioritised, from what is traditionally associated with state propaganda i.e. material prepared by government that is distributed to a mass audience with a manipulative approach aimed to influence and further a political agenda. Thus, we refer to the tools and strategies used to amplify and prioritise certain content and/or content providers over other with the more or less indirect effect of shaping public opinion and users' preferences.

interventions on due prominence that intervene by ranking individual pieces of content or individual content providers could be easily misused and turned into censorship (Journalism Trust Initiative, 2019). The selective interventions that promote and prioritise quality and trustworthy content, making it more easily searchable and discoverable, are as important as the removal and filtering mechanisms. They also require a careful balance between freedom of speech, “freedom of reach” (Baron Cohen, 2019; Mandese, 2019; Wolfe and Ries, 2019), and equal representation of voices and opinions. It is indeed a matter of ensuring that everyone has the freedom to express her/his opinion, while ensuring that they can also access, discover, and be reached by a variety of sources and content (Multi-stakeholder forum on the Code of Practice, 2018: 3–4).

3.4. Threats to the Sustainability of PSM and Local Providers

As highlighted also by the Council of Europe, independent and sustainable public service and not-for-profit community media can serve as a counterbalance to increased media concentration, since by virtue of their remit and organisation, PSMs are particularly suited to address the informational needs and interests of all sections of society, as is true of community media in respect of their constituent users (Council of Europe, 2018: 2). However, as the online audiovisual media ecosystem increasingly moves towards a globalised and digitally convergent market, PSMs and local providers are under growing pressure to maintain their relevance and reach of large audiences (European Broadcasting Union, 2018; Radu, 2018). Further, those regulatory benefits like EPG prominence rules that protect PSM on linear TV and ensure access and discoverability of their services, are not applicable online. As a result, PSM are challenged by vertically and horizontally integrated players that are able to buy prominence on connected TV devices through international deals.

Further, there is a lack of level playing field in the internet-distributed audiovisual industry, since global deals between manufacturers and internet platform organisations are often made at the expense of local and national operators. These operators cannot compete with that scale (e.g. small community media organisations) and/or are not allowed to pay for prominence due to their public service remit and legal restrictions (PSM representative 2 2019; PSM representative 6 2019; Community media representative 1 2020). For instance in the UK, until now the main PSM organisations have still managed to negotiate their presence online by launching their own apps and streaming services and leveraging on their strong brands and existing relationships with audiences (Expert Media Partners, 2018b). However, the negotiation processes are getting more difficult, as they cannot compete on equal terms. Thus, as the number of online audiovisual services grows, there are warning signs that national and local players will be the first ones to “drop out of the users’ screen”, as they do not have the scale, resources and capacity to compete (Public service media representative 6, 2020).

“The problem is not now too little competition to the PSM, but it is the PSM’s ability to compete in a viable market [...] You look at the success of our content in our national markets, and we are not scared to compete on equal terms, but it is not equal terms if a connected TV rises in our national market and it has preinstalled YouTube, and Netflix and Amazon, and suddenly we are all gone. [...] There are structural issues and asymmetries we cannot do anything about even if we tried to, as the option will simply not be available to us. This is about not only unfair competition, but more about structural market that we simply cannot do anything about, even by clubbing together and doing our best.”

(Public service media representative 6, 2020)

Unequal bargaining power can have negative repercussions also on the economic sustainability of national players, especially those relying on advertising revenues. Distribution and content prioritisation agreements often include clauses on the percentage of advertising revenues that should go to the different actors, i.e. advertisers, content providers and companies owning the digital intermediary services. Given the sensitivities of such information, details on the shares and revenues split remain unknown. Overall though, the market power of organisations like Google Alphabet and Facebook on digital advertising is now protected by strong incumbency advantages – including network effects, economies of scale and unmatched access to user data – that potential rivals and content providers can no longer compete with on equal terms (Competition & Markets Authority, 2020: 5). Weak competition in digital advertising and unfair revenue split may in turn undermine the ability of content providers to produce and distribute valuable content, to the detriment of the broader society.

Finally, another problem for PSM and local providers enhanced by the increasing level of disaggregation of the supply chain (Figure 6) regards the loss of control of content providers over the dissemination of their content and the related risks for the integrity of their offer. In a world where routes to content multiply, audiences are increasingly fragmented, and broadcasters often do not have direct access to audiences, it is a challenge for them to come up with meaningful technical and legal solutions that apply across all these various ways to access content and that could allow these actors to maintain the control over their content and offer (public service media representative 7, 2020). Thus, it is not just about being first on a search result, but it concerns both the potential loss of editorial control over what is considered public interest content on their services, as well as the negative impacts on their integrity of the content offer of a given provider (public service media representative 7, 2020).

3.5. Threats to Users' Autonomy and Perpetuation of Inequalities

Communicative resources and competencies are not equally distributed and prominence regimes may result in some groups, for example older or younger groups, being less able to make informed choices. As previously argued, behavioural nudges and technological architecture can influence users' choices and the types of content that surfaces on their searches, feeds and interfaces, in this way challenging the often-claimed users' empowerment through digital technologies. Distributional effects could have implications for media pluralism and wider democratic processes if the opinion of such groups is more easily manipulated and controlled.

Further, as advanced, digital technologies are used to curate and prioritise content online, they may generate serious threats and risks to our individual and collective interests and values, and may perpetuate the commission of substantial and systematic wrongdoing, including human rights violations (Yeung, 2019: 44–45). An expanding body of research is looking into the ethnic, gender, social, and racial biases that can be more or less explicitly embedded into automated systems of prioritisation and recommendations, which in turn may reinforce existing structural and systemic inequalities (see for instance Powell et al., 2010; Yeung, 2017, 2019). Access to audience data is also not equally split between different providers and there is an overall lack of transparency over who can and is monitoring a users' journey to content, and how such data is in turn use to feed processes of algorithmic curation and recommendation systems. The Council of Europe and its Expert Committee on human rights dimensions of automated data processing and different forms of artificial intelligence has also been looking into these issues (Council of Europe, 2020).

3.6. Lack of Intermediaries' Organisational Transparency and Accountability

It should be clear by now that the reorganisation of the architecture of prominence is fundamental to democracy, media pluralism and freedom of expression, as it is fundamental for the future evolution of the media ecosystem. Yet these systems and their prioritisation criteria remain closed to public scrutiny, and there are strong information asymmetries also between digital intermediary services and media organisations. In this sense, the intermediaries not only act as gatekeepers to content but also as knowledge and data gatekeepers. Information over the criteria used to prioritise and circulate information online, as well as data on how users' behaviour is impacted by such decisions, is a source of great competitive advantage. Thus, the companies running these digital intermediary services choose when and how to share such information with public authorities, researchers, or users, but also with content providers and media organisations. This is a particularly concerning issue when those gatekeepers' function also as ad tech intermediaries, like in the case of Google. Content providers and publishers have expressed concerns over a lack of transparency and competition in ad tech intermediation. This allows intermediaries to extract a large share of advertisers' expenditure, reducing the amount that is ultimately paid to publishers (Competition & Markets Authority, 2020: 63). If content providers and publishers earn lower revenues than it would be the case in a fairer and more transparent market, this might negatively impact their ability and incentive to invest in higher-quality content that ultimately benefits users. (Competition & Markets Authority, 2020: 64) Further, as curation becomes more automated and personalised with the use of ever more sophisticated search and recommendation systems, it will become even harder to shed light on these matters.

At the moment of writing, a few organisations have started to make some efforts to explain in a user-friendly manner how and why content is displayed in certain ways on their interfaces (Mazzoli, 2020b). Netflix for instance presents on its "help centre" webpage a brief overview of how its recommendation and ranking system works (2020). In addition to a general description on how the interface is visually organised – i.e. with rows, titles and ranking – Netflix vaguely tells us that prominence of content is determined by a combination of past consumption choices, users' profiling and contextual searching (Netflix, 2020). While there is a strong assumption among the users that these are the main drivers of content curation online, there are also other decisions and criteria used by Netflix to distribute and rank its content. Marketing, sponsorship and commercial deals also play a crucial role in determining what content, and how, is made more easily discoverable through, for instance, auto-play trailer functions, a specially highlighted and more visually attractive section of Netflix Originals, or a geolocation-based "Top 10" sections of recommended titles (Hesmondhalgh and Lotz, 2020: 398). Thus, more transparency on the criteria, principles and types of arrangements driving these decisions is needed to understand whether there are primarily commercial interests at stake, or there is still place for public interest objectives behind these processes.

"There are different regulations for transparency on social media and search engines, with non-discriminatory principles, stuff like you cannot discriminate one media type, or one news media outlet compared to others, or social bots should be marked in some way. But this is very vague at present, thus, the media authority or regulator has to redefine or write some explanations and interpretation."

(Policymaker representative 3, 2020)

Finally, in an increasingly internet-connected environment, the net impact of the changes in technology, consumer behaviour and business models across the online audiovisual media industry has rendered it far more complicated to identify which players influence content prioritisation in which gateway. In this context, the current lack of transparency and accountability frameworks leaves space for vague corporate social responsibility (CSR) guidelines, which ultimately do not provide sufficient clarity over the responsibilities of different gatekeepers. Market-led self-regulatory frameworks that are not legally binding, such as the Facebook Oversight Board, can provide enhanced transparency on content decisions but they also aim to service the company's own legitimacy purposes (Mazzoli, 2020a). Further, recently proposed industry solutions often scrape the surface of the content curation strategies that internet gatekeepers carry out on a daily basis. Thus, the crucial questions of who decides what should be made relevant to whom, and who should be held accountable for the potential negative impacts of such decisions still remain open.

4. Conclusions

This report has provided a framework for analysis, highlighted emerging problems and raised some potential policy challenges. While growing concerns around the ways content can be searched, discovered and accessed online have attracted the interest of media researchers, the literature on this topic is still limited. At the same time, regulators are struggling to set out appropriate definitions and frameworks that can address issues related to content prioritisation, prominence and discoverability online, leading to narrow and piecemeal policy approaches. We have discussed the policy tensions and pressing concerns regarding content prioritisation online, with particular focus on the internet-distributed segment of the audiovisual media value chain. In light of the issues addressed in the previous sections, it is necessary for the Council of Europe and its member states to lead a debate on this important set of policy issues.

The Council of Europe plays a particularly important role in the protection of democracy, the rule of law and human rights including freedom of expression. The question of content prioritisation poses concerns for each of these, and they are particularly pernicious because of the lack of transparency and public understanding around these processes. The public needs clarity about the process of public information, and the difference between public and private content governance systems that influence what content should be considered of 'public interest', and what regulatory regime should shape such decisions. Further, as this study has argued, there is an interest and a need to reconsider the existing regulatory frameworks to cater for the ongoing changes in the media landscape, and to address the potential impacts of current content curation and prioritisation practices. We indeed believe that this a matter of great importance for policymakers, but regulatory interventions should also address crucial questions regarding (i) the appropriate degree of prominence, (ii) the types of devices and digital intermediary services that should be covered; (iii) the enforcement and monitoring mechanisms required; and (iv) the careful balance between regulatory interventions and the infringement of freedom of expression and freedom of choice.

Resolution of the problems will require a continuing open dialogue between established journalism, platforms, civil society and democratic representatives, and a variety of actions by those bodies in coordination. Efforts in this direction have been made by industry associations and cross-sectoral initiatives, but the Council of Europe and member states still have an important role to play in shaping

the debate and advancing possible solutions. Until now, policymakers' attention has been primarily focused either on introducing negative content regulation online or extending traditional instruments of positive content regulation typical of the linear world, such as the EPG prominence rules discussed in the report. Indeed, on the one hand, it is important to revise existing regulation to ensure that PSM services still remain relevant and easily accessible online and are able to fulfil their public service mission that is vital for our democratic societies. On the other hand, simply shifting traditional regulatory instruments to a narrow set of internet-connected devices does not adequately address more structural problems of our contemporary media industry (Mazzoli, 2020b). We therefore call for complementary actions and for a more coordinated approach to these problems that are of transnational nature. Such actions could include a combination of minimum legal, operational and technical standards over content curation processes that are introduced with a co-regulatory approach; regulatory obligations and voluntary incentives to promote exposure while respecting consumers' freedom of choice; targeted media literacy initiatives; and sector-specific ownership and independence rules that can foster fair industry practices and avoid undue market and state power over content discovery. If such rules are not successful in creating a pro-democratic regime of prominence that is genuinely independent and serves the public interest, further structural solutions will be required to shape the market and stronger incentives will need to be introduced.

i. Transparency requirements

More transparency on the criteria, principles and types of arrangements driving content prioritisation decisions is needed to foster public trust, and to understand whether there are primarily commercial interests at stake or there is still place for public interest objectives behind these processes (Mazzoli, 2020b). This is not to argue that transparency is any sort of panacea, on the contrary it often shifts the burden of understanding information about complex systems on individuals. Nevertheless, having minimum standards of organisations' decisional transparency can be a first step forward, as it has been regarding the process of content moderation (Ananny and Crawford, 2018; Gorwa et al., 2020; Mazzoli, 2020b).

The rules on content curation and prioritisation must thus be made more transparent and publicly accessible, not only to content providers that rely on digital intermediary services but also more broadly to users. At the very least consumers should be able to access reliable information about the content curation and prioritisation criteria used by internet information gatekeepers. Ideally, this would also prompt such organisations to ensure that expectations of consumers are reflected more adequately through clear opt-in or opt-out mechanisms. A user-friendly way to explain the "prominence score" that these companies offer to their partners and content providers could shed clarity on how these decisions are made and on which principles they are based. Failure to achieve real active transparency and literacy will lead to further mistrust.

ii. Standards

Industry-led initiatives like the CEN Workshop Agreement of the Journalism Trust Initiative (2019) have already proposed a co-regulatory approach involving the development of technical standards for journalistic practices. The standards take into account existing Council of Europe standards and reflect the institution's approach to media pluralism and freedom of expression. While this initiative is moving in the right direction, the standards are primarily focused on news and information and are meant to be applied by media organisations to foster the creation,

circulation and prioritisation of public interest journalism (Journalism Trust Initiative, 2019). Such multi-stakeholder initiatives should be extended to include more institutions, relating to a wider range of actors, including non-news genres in collaboration with civil society organisations and international institutions such as the Council of Europe. In time such institutions may ensure that not only media organisations respect these standards but that those intermediary services that have control over content curation and prioritisation also comply. Self-regulation has indeed shown limited effects on the ways in which digital intermediary services moderate and curate content. Self-regulatory industry standards should be incentivised and sustained by a co-regulatory framework.

iii. **Audit of Prioritisation Processes.**

This report has established that various intermediaries, platforms and providers now award prioritisation on the basis of both commercial and non-commercial criteria. It has also established that there are potentially far-reaching implications of these processes for freedom of expression, media pluralism and democracy. Award of distribution and prioritisation privileges should be subject to independent scrutiny and audit, in order to prevent the use of prioritisation for propaganda and or censorship purposes. This could take the form of an audit of how publicly available criteria for recognising providers of public interest content, including journalism quality marks, are used by editorial and automated processes of content prioritisation. Such frameworks of scrutiny should be subject to tests of legality, necessity and proportionality. They could be carried out by bodies such as: independent regulatory agencies for the communications sector; international self-regulatory bodies established by civil society, academic institutions with expertise in the monitoring of freedom of expression and media pluralism.

iv. **Separations principle**

The Council of Europe's commitment to media pluralism also aims to prevent the danger of opaque conflicts of interests between state or private interests and points of control of public opinion. Further, when it comes to issues around content prioritisation, there is also a potential danger of complicity of state or private interests with powerful actors influencing public opinion. Alongside principles of freedom of expression, media plurality, and media freedom, the Council of Europe should through its instruments reinforce the principle that whilst powerful online gatekeepers should be accountable to the public, at the same time their operation should be independent of the government. Any relationships should be made transparent, and any state-mandated obligations, both for negative and positive content regulation, should be prescribed by law. This reflects the post-war consensus that control of public opinion could undermine trust in democracy and the ability of citizens to freely form opinions. In the past, the Council of Europe standards on media pluralism and free flow of opinion were implemented through media ownership controls and broadcast licensing. Authors, such as Tim Wu, have argued that a broader "separations principle" and a principle of transparency should be implemented to ensure that state and private interests are not able to effect control over content and opinions that circulate in society (Wu, 2018). We have argued in this report for a wider conception of pluralism and freedom of expression that takes into account emerging gatekeepers of opinion, and one policy principle could be that their decisions about what constitutes 'public interest content' should be separated in particular from the state.

v. Targeted media literacy

The resolution of the questions related to the prioritisation and public interest will ultimately require a combination of user agency and public intervention to shape the users' autonomy and choice architecture. A solution that empowers consumers to make informed choices about public interest content, in a condition of transparency about what lies behind the choices that are presented, should be at the centre of the new regime. But such a framework may leave certain categories of vulnerable consumers less well served if they lack the resources to benefit from choices. Thus, there is an important role for monitoring and assessment of the extent to which different groups of consumers benefit from sufficient public interest content, which can in turn inform for targeted media literacy initiatives.

Finally, alongside the development of such approaches to prioritisation, Council of Europe countries also need to find an accommodation with the market power of online gatekeepers. If procedural regulation and self-regulatory approaches are not sufficient, member states should reflect on the need for more structural regulatory interventions in key areas, such as competition, anti-trust, advertising and data. Moving to more structured co-regulation and primary regulation may prove to be more effective in certain cases, as observed also by ERGA, the European Regulators Group for Audiovisual Services in reference to the Code of Practice on Disinformation (ERGA, 2020b). When enforcing a new regime of concentration thresholds, merger rules and potential undertakings, parliaments should seek to introduce incentives to maintain not only obligations to provide prominence for public interest content but also transparent and procedurally fair and open processes for agreeing and reviewing – with civil society input – the criteria for process-based rather than content-based standards of the public interest.

Annexes

Annex 1- Definitions

A consistent set of definitions and concepts is used to refer to different types of industry participants, and technical functionalities of online distribution and content prioritisation. The following definitions, listed in alphabetical order, are primarily based on academic literature and relevant industry publications which have been reviewed and referenced in the report.

App: an application or programme, typically a small, specialised programme downloaded onto mobile or other connected devices.

Connected device: an internet-connected device which offers access on third party streaming apps and content via the television screen through a proprietary UI. For instance, a smart-TV is an internet-connected TV set, which offers access to free-to-air linear channels, pay-tv services and third-party streaming apps.

Content curation: act of gathering, selecting and presenting digital media content. Content curation is the other side of the coin of content moderation and filtering, as it can dictate what should be prioritised on different devices and related user interfaces.

Content prioritisation: a process that makes part of content curation activities. More specifically, prioritisation processes refer to the range of design and algorithmic decisions that positively discriminate and promote content by making it more discoverable or prominent on different devices and related user interfaces. Prominence and discoverability are therefore outcomes of prioritisation processes.

Deep linking: the process of using a hyperlink that links to a specific, generally searchable or indexed, piece of content, linking the users' search to a website home page, or from a user interface of a connected-device to in-app content.

Digital intermediary services: software- and hardware-based services that influence the flow, content and accessibility of content information online.

Discoverability: an outcome of prioritisation processes which concerns the likelihood of discovery of specific content, and therefore the likelihood of its consumption. It depends on industry dynamics, negotiations and organisational strategies and therefore draws attention to the relations between institutions and how they might influence the discovery of certain content by audiences.

Electronic Programme Guide (EPG): a menu-based and ordered list of linear channels displaying scheduling information for current and upcoming broadcast programming (commonly live TV programmes).

Gatekeeping: control over information and content which takes place for example by selection, addition, manipulation, shaping, deletion and localisation of thereof. A gatekeeper is therefore an organisation, intermediary service, person or government with the discretion to control this process.

Hardware shortcuts: buttons on a remote control or connected device leading the user directly to a specific user interface or third-party app.

Home page: the first screen visible to the user when they turn on (or restart) their devices.

Internet information gatekeeper: organisations and their digital intermediary services that have control over the flow, content and accessibility of information online. Relevant examples for the purposes of this report include both software and hardware-based services, such as video and audio content aggregators, technology manufacturers of internet-connected devices, search engines, social media, and app stores. With their content policies and prioritisation mechanisms, these services can influence to some extent consumers' ability to judge what is worthy accessing and watching.

Operating system (OS): the back-end software that acts as an intermediary between the hardware (e.g. screen, connected device etc.) and the user. It controls the device and shapes the user interface design. The OS "sits between" the device and apps and it allows end users to choose between different apps and between different content or services within the same app. It is possible for both manufacturers (e.g. Samsung, Sony, LG etc.) and developers (e.g. Android) to control OS behaviours. For instance, Android can develop the entire back end of its OS and cede control to Sony for its day-to-day management.

Prominence: an outcome of content prioritisation processes that concerns the "physical" i.e. virtual or visual location and prioritised placement of a channel/app/service compared to others in time and/or space on a given interface. Thus, it concerns the degree to which certain kinds of channels and services (and therefore content) stand out from others in electronic programme guides, video interfaces, catalogues' listing etc. From a regulatory perspective, prominence rules are part of traditional content regulation instruments that have a positive or promotional approach, rather than a negative or prohibitory one.

Public interest: as an objective, it is intended as an ideal and normative outcome best serving a social collective. It is the complex of supposed informational, cultural and social benefits to the wider society which go beyond the immediate and individual interests of those who produce and receive them. To codify and operationalise the ideal outcomes, public interest objectives should be translated into implementable criteria and values that should be met to achieve the ideal outcomes. Related assessment frameworks therefore look at such criteria and values.

Public interest content: a normative-driven definition of media and information content that is produced by organisations or providers that strive to achieve public interest objectives.

Recommendation systems: it is an information filtering system that seeks to predict the rating and preferences of users regarding specific items, be it a piece of content, an app, a service or a channel. Recommendation system can be the result of editorially curated recommendation where the content selection is done by content editors (e.g. Sky's "Top Picks"), or automated and personalised recommendations driven by recommender algorithms (e.g. Netflix's "Most popular" row, or YouTube's "Recommended" section on the home page). We can identify at least four types of news recommender algorithms, namely algorithms that make personalised recommendations on the basis of metadata (content-based), insights into what other users like to read (collaborative filtering), data on their users (knowledge-based), or a combination thereof (Helberger, 2019; Karimi et al., 2018). In addition, there can be also self-selected recommendations where users determine the selection criteria and feed their preferences in the system, or pre-selected recommendations where news providers or distributors determine the selection (Thurman and Schifferes 2012).

Search: The process by which users find content through either manual text entry or voice command.

Set-up-box (STB): An information appliance device that generally contains a TV-tuner input and displays output to a television set and an external source of the signal, turning the source signal into content in a form that can then be displayed on the television screen or other display device. They are used in cable television, satellite television, and over-the-air television systems as well as other uses.

User interface: the front-end of a TV platform, through which the user can search for and navigate channels, apps and content. This is the consumer-facing segment of the OS and it acts as the main consumer gateway to content.

Voice assistant: a voice-activated piece of software that can supply information and perform certain types of tasks, such as Amazon Alexa and Google Assistant.

Web feed (incl. news feed): a data format used for providing users with frequently updated content on their home page(s).

Annex 2 – Methodology

For this study we have used a qualitative methodological framework. Data and information have been gathered through a combination of semi-structured expert interviews and document analysis. The documents reviewed and analysed for this report included a wide range of texts, from relevant academic research, which were part of the broader contextualisation and literature review of the research; industry publications, from market reports to selected publications, and legal and policy texts. These texts provided a contextual understanding of the industry practices, trends and emerging issues. A full account of the documents reviewed is included in the bibliography.

The theoretical and methodological frameworks and the work carried for this study has been informed by the PhD project of one of the authors, Eleonora Maria Mazzoli, who is carrying a UK-based study and a comparative analysis at organisational level of the industry practices and policy needs in the area of content curation and discoverability.

Further, semi-structured experts' interviews were conducted to deepen the knowledge and understanding of the problems and policy needs of different organisations involved in the online distribution of audiovisual content. In particular, the researchers carried out 16 interviews with key representatives of the sector, including public service media, community media, pay-tv operators, internet platforms, policymakers, and industry trade associations. The sampling has been done through a combination of purposive and snowball sampling, which was used to identify and select interviewees based on their profile, expertise and functions within each organisation. The interviews focused primarily on content policies and distribution strategies of different media organisations, and on possible challenges and issues that might rise in today's online media environment. A thematic analysis was carried out on interviews' transcripts to gather relevant insights and information. In respect of the research participants' privacy and of the researchers' ethical guidelines, quotes and information collected through interviews are kept anonymous, and related data has been treated in the respect of current data protection regulatory frameworks.

Annex 3 – Summary of Relevant Council of Europe’s Instruments

The Council of Europe adopted a number of instruments pertaining directly or indirectly to media content regulation, and relevant for the discussion on content curation and prioritisation. These instruments speak to a broad range of issues that are ultimately related to the ongoing evolution of the internet-distributed media system and the future sustainability of a plurality of independent and diverse media. Hereby we have provided a brief overview of those instruments that are relevant for the discussion of prioritisation practices and public interest content online.

Promotion of quality news content and public service media

a) The Council of Europe broadly recognises the important role of public service media in upholding the fundamental human right to freedom of expression and information, in accordance with Article 10 of the Convention, enabling people to seek and receive information, and promoting the values of democracy, diversity and social cohesion. In particular, in Recommendation CM/Rec(2007)3 of the Committee of Ministers to member states on the remit of public service media in the information society, it is highlighted how PSM are expected to fulfil their remits and support our democratic societies by:

- providing a forum for democratic debate – thus fostering democratic participation, and constituting a factor in the social cohesion and integration;
- being sources of impartial, independent and diverse information, high-quality innovative audio-visual content that complies with high ethical and quality standards, which should also be adapted and available on digital platforms (calling for an extension and diversification of the PSM remit), and
- contributing and investing in the production and distribution of local, national and European content.

b) Draft Recommendation⁴⁶ of the Committee of Ministers to member States on promoting a favourable environment for quality journalism in the digital age provides guidance to member states and media stakeholders on how to fulfil their various obligations regarding funding, ethics/quality and education through a combination of legal, administrative and practical measures conducive to a favourable environment for quality journalism. As regards dissemination of content, the aim of the text is to prioritise quality content on search and social media platforms, while introducing a form of independent oversight over the platforms’ distribution practices. The draft recommendation includes guidelines on:

- Cross-industry collaboration between key stakeholders that represent the whole diversity of society
- Transparency of criteria for the visibility, findability and accessibility of news and other media content
- Monitoring and oversight by independent actors through for instance regular reporting by the relevant online platforms about how decisions relating to content curation are made

⁴⁶ To access the full text of the Draft Recommendation, pending adoption by the Council of Europe’s Committee of Ministers: <https://rm.coe.int/msi-joq-2018-rev7-e-draft-recommendation-on-quality-journalism-finalis/168098ab76>

Ensuring media pluralism and transparency of media ownership

Supporting media pluralism is a key priority of the Council of Europe and a major part of defending human rights, free expression, and democracy. Media pluralism directly correlates to freedom of thought, ideas, and expression, all of which are protected by Article 10 of the ECHR. The Recommendation CM/Rec(2018)1 of the Committee of Ministers to member states on media pluralism and transparency of media ownership deals with one of the key priorities of the Council of Europe, supporting media pluralism as a major part of defending human rights, free expression, and democracy. The Recommendation acknowledges that media content is today not only distributed but also increasingly curated, edited and even created by various internet intermediaries. Accordingly, it calls on States to recognise the variety of roles that online platforms have in the media content production and dissemination, and the varying degrees of their impact on media pluralism. In particular, the Recommendation sets out the following:

- Guidance on how to enhance content diversity and exposure to the public, and on the types of media that should be promoted and supported by states in order for a plurality of voices to be heard
- Principles of compliance with the requirements of Article 10 of the Convention
- Support for the development of multi-stakeholder initiatives involving social media, media actors, civil society, academia and other relevant stakeholders which are aimed at improving effective exposure of users to the broadest possible diversity of media content online, in order to improve the transparency of automated processes, assess the impact on users' diversity of exposure, implement privacy by design principle, and provide user-friendly information on how to find, access and derive maximum benefit from the wide range of available content (guideline 2.5)
- The requirement to ensure that the broadest possible diversity of media content, including general interest content, is accessible to all groups in society, particularly those which may have specific needs or face disadvantage or obstacles when accessing media content, such as minority groups, refugees, children, the elderly and persons with cognitive or physical disabilities. This implies that such media content should be made available in different languages and in suitable formats and that it should be easy to find and use. (guideline 2.6)

Human rights and fundamental freedoms in online media systems

Recommendation CM/Rec(2020)1 of the Committee of Ministers to member States on the human rights impacts of algorithmic systems provides a set of guidelines calling on governments to ensure that they do not breach human rights through their own use, development or procurement of algorithmic systems. In addition, as regulators, States should establish effective and predictable legislative, regulatory and supervisory frameworks that prevent, detect, prohibit and remedy human rights violations, whether stemming from public or private actors. The set of guidelines formulates the responsibilities of the private sector in this regard.

- Responsibilities of states:
 - i. Levels of transparency with regard to the public procurement, use, design and basic processing criteria and methods of algorithmic systems implemented by and for states, or by private sector actors
 - ii. Data protection, privacy and security safeguards by design
 - iii. Development of standards, frameworks, indicators, and methods, through public-private cooperation, for advanced procedures of human rights impact assessment
 - Advancement of public benefit by supporting independent research aimed at assessing, testing and advancing the potential of algorithmic systems for creating positive human rights effects and advancing public benefit. Responsibilities of private actors:
 - i. Consent rules and privacy settings
 - ii. Continuous evaluation also through the implementation of human rights impact assessments
 - iii. Access to data
 - iv. Users-friendly terms of services and transparency on nature and functionality of the algorithmic systems
 - v. Human rights impact assessments, which should be conducted as openly as possible and with the active engagement of affected individuals and groups
- b) The Recommendation CM/Rec(2018)2 of the Committee of Ministers to member states on the roles and responsibilities of internet intermediaries argues that intermediary services may carry out several functions in parallel, including moderating and ranking content, mainly through algorithmic processing. They may thereby exert forms of control which influence users' access to information online in ways comparable to media, and they may also perform other functions that resemble those of publishers. It is primarily the obligation of states to make sure that laws, regulations and policies applicable to internet intermediaries safeguard the human rights and fundamental freedoms of users effectively. However, internet intermediaries have the responsibility to respect the internationally recognised human rights of their users and third parties affected by their activities. States and intermediaries therefore have to work together. This recommendation also addresses both states and the private sector, by introducing:
- Shared responsibility of states and internet intermediaries to respect the internationally recognised human rights of their users and third parties affected by their activities
 - Principles of compliance with the requirements of Article 10 of the Convention with regard to the different functions and activities performed by the intermediaries, including their content moderation practices
 - Transparency requirements on terms of service agreements, community standards and data processing techniques

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Whilst the freedom of expression implications of content takedown, “privatised censorship” and down-ranking of content have been much discussed in recent years, content curation practices like up-ranking and prioritisation have been under less scrutiny. Yet content moderation and curation are two sides of the same coin and they both determine which content is circulated and accessed online. In contemporary media systems, routes for accessing audio-visual media content online are more complex than the channels and electronic programmes guides (EPGs) typical of linear distribution. As media consumption shifts onto a range of on-demand, mobile, social and streaming services, the role of hardware devices, operating systems, users’ interface design, and related search and discovery functions becomes pivotal in nudging audiences’ choices and ultimately driving access to and consumption of content. The aim of this report is to provide a clearer understanding of what prioritisation of public interest content means in an internet-distributed ecosystem, discuss emerging issues with current industry practices in this area, and highlight related policy needs, and potential avenues for intervention.

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