Subgroup 3

**Ensuring Prominence and Access of
Audiovisual Media Content to all Platforms
(Findability)**

**Deliverable 2: <u>Overview document in relation to Article 13(1) of the
Audiovisual Media Services Directive</u>**

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1. Introduction

The notion of prominence of European works was introduced for the first time in 2007, by the AVMS Directive 2007/65/EU[1]. On that occasion, as well as on the occasion of the consolidated version of 2013 (2010/13/EU)[2], the prominence of European works was mentioned as one of the possible, non-binding measures Member States could adopt to promote, where practicable and by appropriate means, the production of and access to European works, together with the possibility to financially contribute to the production and rights acquisition of European works or to secure them a share of the catalogues.

The new AVMS Directive 2018/1808/EU[3] brought significant novelties, making the adoption of prominence measures mandatory for all Member States, as an addition to the obligation of securing a share of 30% to European works. Ensuring prominence of such works is an integral part of new obligations imposed on providers of on-demand audiovisual media services in the context of promotion of European works under Article 13(1).

The Directive was approved on 14 November 2018 and published in the EU Official Journal on 28 November 2018. Since then, Member States had 21 months to transpose it into their national legislations.

Article 13, paragraph 1 of the new AVMSD states that:

> *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.*

While the above mentioned article does not provide a definition of prominence, Recital 35 provides some insights on the interpretation of the term "prominence" and sets out a list of possible measures through which prominence can be achieved:

> *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.*

This Report aims at identifying the various measures that Member States may prescribe in the transposition of Article 13 (1) of the AVMSD[4]. This should enable the development of a best practice approach, in order to

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[1] Directive 2007/65/EU of the European Parliament and of the Council, of December 11, 2007, amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, in OJEU L 332 of December 18, 2007, pp. 27–45.

[2] Directive 2010/13/EU of the European Parliament and of the Council of March 10, 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States regarding the provision of audiovisual media services (Audiovisual Media Services Directive), in OJEU L 95 of April 15, 2010, pp. 1–24.

[3] Directive (EU) 2018/1808 of the European Parliament and of the Council of November 14, 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States, relating to the provision of audiovisual media services (the Audiovisual Media Services Directive) that result from changing market realities, in OJEU L 303 of November 28, 2018, pp. 69 et seqq.

[4] The topic of prominence was already partially addressed by ERGA in 2018. In particular, the present work fully considers the outcomes and findings of the report "ERGA *Analysis & Discussion Paper to contribute to the consistent implementation of the revised*

strive for the highest possible degree of consistency when implementing such measures as regards audiovisual media services. The goal is to design an effective pattern for collecting data from MS on European works in the catalogues of on-demand audiovisual media services and to develop guidance on how regulators can appropriately control compliance with those measures.

The report tries to bring together the views expressed by the regulators and the industry's perspective. To this aim, the National Regulatory Authorities (NRA)s were asked to describe the current legal and regulatory framework, and, where appropriate, to provide detailed information on the procedure for collecting data from the VODs who are in charge of this procedure, what information is already required from the on-demand media service providers and how the NRAs verify that the provided information is correct.

On the other hand, in order to gather the most relevant information about current developments in this area, the media industry was asked to provide relevant insights into their approach to the prominence of European works through a survey.

The Report is the result of the answers the Subgroup collected between May and September 2020 both from the NRAs and the VOD providers. In particular, the Report includes:

➢ 14 contributions from the NRAs on their views concerning the implementation of prominence measures[5];

➢ Answers to the survey from VOD providers based in 20 Member States (and collected by the relevant regulatory body in each MS)[6], plus two contributions directly from cross-border providers and one from an association.

Audiovisual Media Services (AVMS) Directive Towards the application of the revised Directive by National Regulatory Authorities (NRAs) prepared by a dedicated Subgroup.

[5] CSA (Belgium – French Community), VRM (Belgium – Flemish Community), CRTA (Cyprus), RRTV (Czech Republic), DLM (Germany), BAI (Ireland), AGCOM (Italy), NEPLP (Latvia), ALIA (Luxemburg), CvdM (the Netherlands), KKRiT (Poland), ERC (Portugal), CBR (Slovakia), SPBA (Sweden).

[6] Belgium (French Community and Flemish Community), Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg, the Netherlands, Poland, Portugal, Slovenia, Spain, Sweden.

2. State-of-the-art implementation of prominence measures within ERGA members

2.1 Current amendments to national laws

The above-described analysis was carried out by the Subgroup in a quite particular moment, due to the ongoing transposition process, on the one hand, and the impact of the COVID-19 pandemic crisis, on the other one. Consequently, the implementation of prominence measures within national legal and regulatory frameworks is – at the moment of writing – still relatively inhomogeneous. Whereas several countries have already completed the transposition procedure, some have not. And even in those cases, where the transposition was accomplished, national laws need to be detailed into specific regulations, in order to make the new legal provisions concretely applicable.

In some cases, the paradigm shift, from a principle of non-binding nature to a mandatory obligation, forced – or is forcing – national legislatures to important changes in the national law. In the **Flemish Community of Belgium**, the Media Act (Article 157) was amended to consider more compelling and binding rules on prominence. However, no further guidance or details about how 'prominence' should be ensured are given. The Flemish Media Act obliges VOD-providers to submit, each year before 31 March, a report to VRM about how the provisions have been complied with. The first report was submitted in March 2020, and the results are still being processed.

Similarly, in **Latvia**, the Electronic Mass Media Law was modified to incorporate the new AVMS provisions, including those concerning VOD providers, and in particular prominence. Currently, the Latvian regulator NEPLP has not yet developed a specific procedure for examining whether on-demand services comply with the specified requirements.

The **German** media legislation was also modified, so as to take into account the provisions of the revised Directive. In particular, Art. 77 sentence 3 of the new Interstate Media Treaty (Medienstaatsvertrag, MStV, replacing the Rundfunkstaatsvertrag) contains the obligation to ensure the prominence of European works. The proposed criteria follow the ones indicated in Recital 35 of the AVMS Directive. The German Media Authorities will issue guidelines as foreseen by Art. 77 MStV. Currently, they are in the process of elaborating the first draft. In any case, there will be no adoption before the entry into force of the MStV.

In **Sweden** on 28 May 2020, the Government presented a government bill proposing amendments to the Radio and Television Act, in order to transpose the revised AVMSD. The changes are suggested to enter into force on 1 December 2020. In the bill, the Swedish Government states that the obligation to give European works prominence can be fulfilled in a variety of ways, for example by a dedicated section on the service's homepage or by using search tools. The Swedish Government underlines that presentation and prominence of content is a publicist decision which is inappropriate to subject to detailed regulation. Instead, it should be the provider who determines, in each individual case, how prominence should be given. How content is given prominence in a service, and the forms for this, vary depending on the content and structure of the service and is constantly evolving.

In the **Netherlands,** the revision of the Media Act 2008 in order to transpose the revised AVMSD, including Article 13, came into force per 1 November. This implementation bill adds four new paragraphs to Article 2.115 of the Dutch Media Act and includes the 30% minimum requirement for on-demand services of the public audiovisual media service providers, hence a direct implementation of Article 13 of the AVMSD. As for

the prominence of these works, the third paragraph of Article 2.115 states that the European works shall be brought to the attention of the public by the audiovisual media provider of this service.

In the Netherlands, the on-demand commercial media services are regulated separately under Title 3.2a of the Dutch Media Act. The legislative proposal aims to rewrite Article 3.29c in order to implement Article 13 (1) of the revised AVMSD, covering the on-demand commercial media services. The legislative proposal concerning Article 3.29c of the Dutch Media Act contains the same rules as the ones mentioned above for the on-demand services of the public audiovisual media service providers. In policy guidelines of the Dutch media authority CvdM dealing with the programme quota, which are currently in a revision process, certain provisions will be further elaborated and detailed to provide more guidance to the media service providers

2.2 Possible measures to be adopted

As far as possible measures to enhance the prominence of European works in on-demand catalogues are concerned, several NRAs seem to converge on some common solutions that could be adopted. In some cases (e.g. Germany, Belgium/FL), reference was made to the criteria enshrined in Recital 35 of the AVMS Directive. The recurring mentioned means to secure prominence of European works described by the NRAs are:

- ➢ A dedicated section/area, accessible from the homepage of the service.

- ➢ Organise content into dedicated European or national content collections. The collections can be customised on the basis of viewer preference and habits.

- ➢ Search tools. Content could be tagged in order to allow to search works by geographical origin or merely as "European works" as such.

- ➢ Labelling or any other solution to distinguish European and non- European works, so that the former can be easily recognized.

- ➢ Recommendations that ensure that viewers are presented with European content.

- ➢ Promotional initiatives, mentioning European works in advertising campaigns of a given service, through social media, newsletter, spots on radio and TV.

In some cases, the solutions reported by NRAs also derive from the concrete experiences of the providers under their jurisdiction. The Luxembourgish provider Tango is mentioned by the regulator ALIA as a best practice, because of a number of measures adopted to give prominence to European works, that proved to be effective[7].

2.3 Already existing provisions

In a smaller number of countries, provisions to secure prominence of European works already existed even before the approval of the new AVMS Directive.

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[7] In the the "Top 20" category, which lists and strengthens the visibility of the 20 most watched movies every week, shows that 35-40% of those movies are European productions. Other measures include "Coin des cinéphiles", that gives prominence to new movies to be discovered every month: 60% of those movies are European productions; "Cinéma européen": access to all European productions of the catalogue; "Cinefeel films": movies awarded at the festivals of Cannes, Berlin and Venice: 70% of the movies are European productions.

In **Portugal**, According to Art.45, paragraph 3 of the Law on Television Services and Services On Demand (Law No. 8/2011 of April 11), providers shall "give particular visibility to European works in their catalogue, implementing features which enable the public to search for such works by origin". The fulfilment of such obligation is submitted to an annual review led by the national regulator ERC.

Article 47f (1) of the **Polish** Broadcasting Act provides for some criteria according to which providers shall promote European works in their catalogues. Annual reports are submitted to the national authority KRRiT, containing a description of the manner of promoting European works, including works originally produced in Polish, applied by the given provider, including the share of these programmes in the catalogue in terms of volume and time. Such description includes all ways to promote European works used in practice (designation, search options, promotional materials, other) and the proportions between these various ways of promotion.

Prominence is already a mandatory obligation in **Wallonia Brussels Federation**. Article 46 of the Coordinated decree for audiovisual media services of the FWB states that provider VOD must ensure a specific prominence of European works in their catalogues, highlighting the lists of European works in an attractive manner.

The commentary relative to the article by the legislator states that the prominence will be ensured by the reinforcement of the visibility of European works in the provider's catalogue by using all possible promotion techniques, for example:

➢ Advertising inserts of European works contained in the provider's catalogue on the electronic program guide's homepage and the provider's internet site;

➢ Creation of a specific category dedicated to European works in the catalogue;

➢ Offering information on European works in detailed articles in providers magazines / folders destined to the clients, for example articles about European actors or directors or specific events ensuring promotion of European works (such as festivals of EU films: Namur, Liège, Cannes, Berlin, Venice etc.);

➢ Mention of European works available in the catalogue of the provider in programs promoting on-demand services.

Periodical self-declarations are annually submitted by operators through a form provided by the regulator. On-demand services are periodically monitored to observe specific measures applied to promote European works to supplement the declarations of the provider.

Italy introduced legal provisions to secure prominence of European works in on-demand catalogues since 2015. In December 2017 – thus before the AVMS Directive reform process came to an end – the Italian government amended (by Legislative Decree 7 December 2017, n.204) the AVMS Code (Legislative Decree 31 July 2005, n.177), introducing important changes to the prominence regime. The new Article 44-quater, paragraph 3, of the AVMS Code prescribes that VOD providers shall secure prominence to European works in their catalogues and delegates AGCOM to adopt a new regulation in this respect. The latter was approved in December 2018 (Resolution 595/18/CONS, as amended by Resolution 24/19/CONS), reflecting the mandatory nature of the new regime. The 14 technical and editorial criteria through which providers could award prominence to European works in their catalogues, already existing in the previous regulation, remain unchanged. However, they are now divided into two groups: Type A: dedicated section on the home page or specific category to search for European works; Type B: reservation of a share for European works in

advertising campaigns or in the promotion of the services provided. Providers must achieve a minimum score for each of the two groups.

3. Survey with media industry on the existing or planned prominence measures in relation to European works in on-demand catalogues

3.1 Question #1 – Most effective measures and solutions to secure prominence

1. *Which of the following measures or solutions do you consider to be the most effective to secure prominence of European works in on-demand catalogues? Please, elaborate.*
    - ➢ *Measures related to the "visibility" of the works in a dedicated section or in the main/most attractive sections of the catalogue.*
    - ➢ *Marketing solutions, related to the "promotion" of European works through banners, clips, trailers, advertising campaigns, social media, etc.*
    - ➢ *Technical solutions, related to the usage of algorithms and other similar tools, such as recommendations, search tools, etc.*
    - ➢ *Other.*

a. General remarks

Several respondents underlined that all solutions described in Question 1 are of crucial importance as far as prominence of European content within the catalogues' interfaces of VOD providers is concerned[8]. According to many of them, there is no single best method to ensure prominence of content, as none of the said measures alone might suffice to enhance the visibility of European works. Instead, a combination of all the above-mentioned measures would be more effective.

However, a significant number of contributions highlighted the importance of adopting flexible means. Such an approach is considered to be consistent with the constantly changing nature of any online catalogue, the diversity of ways that viewers can use to access content, the different architecture of each service, as well as the need to leave room for innovation. According to some German operators, providers are best placed to determine the most effective approach to securing prominence of content in a manner which is consistent with the overall user experience. Dutch providers emphasised that there is no one-size-fits-all solution: some services, as the Irish players observe, have a greater focus on human editorial curation whilst others concentrate on algorithm-driven curation and, in some cases, there will be a combination of both processes. Most French respondents underline likewise that prominence measures should take into account the diversity of market players. Therefore, each provider should have several options to choose from in order to promote European works and may choose one or the other tool according to its editorial positioning, market strategy, size, structuration level, etc.

Irish and Italian providers cautioned about over-prescribing regulation remarking that restrictions on the free organisation of the catalogue by the audiovisual media service provider should be avoided. In the same vein, an association of providers calls upon National Regulatory Authorities to be flexible, non-prescriptive and principles-based in order not to favour a certain business model over another. In the view of a German

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[8] This was in particular reported by Belgium (Flemish Comm.), Estonia, Germany, Greece, Hungary, Ireland, the Netherlands, Poland and Spain, while Bulgarian providers they give their support for the first two listed measures.

provider, a prescriptive approach mandating particular measures would effectively require the relevant regulatory authority to be involved in the functioning of every service and surface. Some providers pointed out that European content should not be made elitist and niche and that any measures to ensure prominence of this content should remain flexible in order to create a level-playing field.

Moreover, according to some respondents, a milder approach would be in line with the AVMS Directive, as the latter does not provide a concrete obligation concerning prominence, while Recital 35 gives examples of alternative ways to concretely achieve it, which can be freely used by VOD service providers. Thus, according to a German provider, any requirements aimed at ensuring prominence of European works should take advantage of the broad variety of measures referred to in Recital 35 of the Directive.

One operator suggests that it would be helpful (from a level playing field standpoint) if the measures imposed to secure the prominence of European works were harmonised at European level, for example based on ERGA guidance.

b. Visibility of the works

A smaller, though significant number of respondents claimed that measures related to the "visibility" of the works in a dedicated section or in the main/most attractive sections of the catalogue could be considered the best ones to secure prominence[9]. An Italian and a Dutch provider consider such measures as valuable and fairly simple to implement, and Latvian operators highlight that they would also make the user experience more friendly to assess prominence of European works.

The adoption of a dedicated section was indicated by most as a valid solution, that is able to raise the awareness of viewers about the existence of European works as options for viewing/purchasing. A pan-European provider considers that a key way to make European works more visible is the creation of dedicated areas where customers can easily identify and access such content. Another one would be open to increasing the visibility of European works in a dedicated section of the catalogue, whereby the viewer is offered the possibility to select the genre "European" in a manner similar to the manner in which other genres are presented. A Greek respondent observes that from a marketing point of view it is essential to have a special category that is visible to the customer and is dedicated to European content (movies, series, documentaries etc). Many pointed out that this is already a current practice. A Luxembourgish provider reports that a 'European Cinema' section is already available, while a Portuguese one reports that it offers users shortcuts from main section to easily access European works.

Nonetheless, a certain number of providers raised some concerns about the possibility of dedicating a specific section to European works. Most Swedish operators maintain that measures related to visibility seem less effective, as users do not actively look for European content and therefore do not actively visit/look for sections dedicated entirely to European works. Furthermore, for those players whose offers focus on European/local content, it could be useless to yet again point out the origin of content by means of a tab or a specific section. Two French providers indicate that the origin of works as "European" is not a relevant category when users are looking at what content to watch. Therefore, they argue that gathering works of various types and genres under a section dedicated to "European works" would not make sense from an editorial perspective. According to a cross-border operator, a fixed local content section and especially prescriptive requirements on its presentation would not lead to the desired outcome of more enjoyment of

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[9] In particular Croatia, Cyprus, Italy, Latvia. To a certain extent also Belgium (Flemish Comm.) and Poland.

European content. A Spanish respondent observed that grouping works (category, collection) would be so extensive that, in practice, it would be useless.

A few providers expressed some doubts concerning the visibility of European works on the homepage. One would consider any idea of highlighting European content on the homepage to be ineffective, as the layout is dynamic and changes several times per day. A French TVOD provider underlined that its homepage strongly depends on the amount of European productions in the last releases, and the provider therefore suggests that prominence should be ensured through a wide range of evidence and not just what is 'visible' on the homepage. However, all other French respondents consider that the homepage (or the main pages) is the best place to ensure any content promotion, as the browsing experience of a large proportion of users is concentrated on these pages.

More in general, a multinational operator believes that market-led solutions, incentivized by customer demand, would ensure European works are discoverable, as customers are consistently presented with prominent and readily available access to local content, including through feature placements. In Spain, one provider warns that any measure should not determine the look and feel of the service and no investment should be mandatory on this aspect.

Interestingly, a small number of operators mentioned the possibility of labelling content. Cypriot providers point out that such a practice is believed to increase the visibility of European works. A Croatian provider indicates that in its catalogue the "Hit film" label has been used to promote certain European films. According to French operators, metadata about contents' origin, mandatory for such a measure, appears to be already available although one of them underlines the costs that the labelling implies for a small structure that provides a large catalogue of works.

c. Marketing solutions

A certain number of respondents[10] looked at marketing solutions, such as banners, clips, trailers, advertising campaigns, social media, as valuable tools to secure prominence of European works.

Among possible, or tools already in use, the respondents mentioned the following:

- The use of video-aided promotional campaigns such as clips, trailers, promos on YouTube, etc. This kind of solution was mentioned by some Greek providers, as well as by a Hungarian one, as useful means to enhance subscribers' awareness and increase VOD service users' engagement with regard to European works, provided that these marketing solutions do not undermine the undertakings that content operators have made to promote audiovisual works in their agreements with content licensors.
- Direct marketing tools, such as newsletters. These could be a good solution, according to an Italian provider, while another one mentions the usage of B2C & B2B newsletters about their content library refreshments and results.
- Banners on the website.
- Social media. An Italian operator highlights that these solutions are an important contact channel with customers and are widespread both among enterprises and users.
- The promotion of works by means of events and promotions. An Italian provider believes that such a criterion, already included in the Italian regulatory framework, is particularly suitable to attract the attention of the public. A Portuguese respondent remarks that, according to their experience,

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[10] Mainly, providers of France, Greece, Estonia (one in particular), Italy, Luxembourg, the Netherlands.

marketing actions such as promoting events like Portugal National Day (10th June), highlighting Portuguese works are fruitful initiatives. The participation at film festivals, special screenings, or competitions was mentioned by Dutch providers as a viable initiative to promote European works.

Many underlined that it is crucial to combine most of the above mentioned tools (TV spots, social media campaigns ad hoc videos, etc.) through cross-media marketing strategies. The importance of advertising campaigns intended to further raise users' awareness was also highlighted.

In some cases, it has been observed that marketing solutions would work better if they were associated with other measures[11]. According to Irish providers, such measures may not yield positive results if additional stronger supports are not also implemented. Latvian operators recognized that marketing techniques could be effective, though they observe that market research is required in advance, to take into account the particularities of each audience because specific ads are targeted to a specific audience that will pay attention to them and achieve the goal of the ads.

d. Technical solutions

Technical solutions related to the usage of algorithms and other similar tools, such as recommendations, search tools, raised some polarised reactions within the respondents. On the one hand, some providers consider such solutions as the most appropriate to secure prominence of European works in on-demand catalogues[12].

The role of algorithms to enhance prominence of European titles through recommendations was highlighted by some as a key tool in assisting with the prominence of European works[13]. Thus, the adoption of algorithms as a method to increase visibility of European titles could be considered an appropriate solution. However, some Irish providers stressed the importance of transparency and that services should clearly highlight what algorithms are being used and how they operate. The same position is shared by Polish operators, even though they emphasize the relevance of such tools with regard to the SVOD model. Belgian providers (French Community) observe that recommendation tools could use metadata referencing the country of origin of the work to periodically ensure promotion of European works. However, it was also noted (by Latvian providers and a Dutch one) that recommendations should not be perceived as artificial by users and should be felt in line with their habits.

Algorithms are also crucial in the functioning of search engines and other search tools available in the service. According to a Greek provider, search tools by name, genre, category or awards are highly recommended. Another Greek respondent maintain that search engines and filtering of results that can be tailored to subscribers' preferences are already integrated in its service. In this sense, a Swedish respondent concludes that users might enter the VOD service using search engines and social media, and in these cases, the important aspect is that the content is searchable and available, not where it is showed.

On the other hand, here too, worries about the usage of technical tools were expressed by several providers. According to Italian providers, technical solutions are in general considered to be less effective as compared to visibility and marketing tools. Actually, such solutions are hard to monitor and it is more difficult to measure their effectiveness.

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[11] This remark was raised in particular by Belgium (Flemish Comm.), Ireland and the Netherlands.
[12] France (along with marketing solutions), Latvia, Slovenia, Spain (one operator).
[13] In particular, such an assessment was shared by Hungary, Ireland, as well as by a Dutch and a Swedish provider.

Another element of concern is the possible impact of algorithms/recommendations/search tools on users' behaviours. One provider observes that displaying content to members which they are not interested in watching will affect trust of the customers and harm the reputation of the service in the long term. Similarly, it was noted that a recommendation algorithm may end up hampering the success of a title if many of the users it is being recommended to do not play it or abandon it shortly after beginning. Finally, according to a Spanish operator, the usage of algorithms has no sense, since they must be based on previous consumption to be effective.

e. Other

A few additional suggestions were added under the option "other", within Question 1 of the Survey.

Portuguese operators consider that further initiative to foster the prominence of European works could encompass:

➢ Incentives (such as subsidies) to additional marketing campaigns aimed at promoting European works;

➢ Fostering promotional campaigns, e.g. weekly promotions of a given European work whereby providers would allow the viewing of such work free of charge for a 24-hour period;

➢ Fostering "bundling" initiatives whereby providers would grant the viewers the opportunity to watch a European work free of charge whenever they buy a given content (e.g. a blockbuster).

In order to encourage the adoption of the measures described above, the providers could, for instance, benefit from a decrease on their financial contribution/investment obligation to the production of European work.

Irish providers suggest that it would be recommendable that, for the sake of consistency, the provisions to ensure prominence and access for European works will be addressed also in light of the forthcoming European Electronic Communications Code (EECC), which is due to be implemented by December 2020.

Latvian providers suggest the possibility for content creators themselves to upload the created content to the on-demand catalogue, therefore no additional work should be invested in content processing.

According to a pan-European respondent, Member States may wish to encourage European content producers to incorporate a pre-roll explaining the values of locally produced content into each of their productions. They may also wish to encourage producers to use a European works certification mark in the promotional material (e.g. film covers/posters) that they licence to content distributors, as this would help viewers identify the European origins of works included in any given VOD catalogue.

3.2 Question #2 – Main challenges in the implementation of prominence measures

2. What are the main challenges that providers could meet in the implementation of tools, measures or solutions aiming at securing prominence of European works in on-demand catalogues?

Question 2 of the Industry Survey asked Video On-Demand Providers to elaborate on the main challenges they anticipate to meet in implementing tools, measures, and solutions to comply with the provisions of the

AVMS Directive 2018/1808 regarding their obligation of securing a minimum share of 30% of European works in their catalogues and ensuring prominence of these works. The main challenges that video on-demand providers consider can be classified in three main categories, namely, technical challenges, financial challenges and operational ones, which are nonetheless interrelated and merged.

The overwhelming majority of providers see that the implementation of sophisticated (and hence more promising) technical solutions, such as recommendation tools, essential infrastructure, and algorithms in order to meet their obligations is both costly and technically complex, let alone that there is hardly any feedback on the satisfaction of the objectives that these tools are about to pursue. Less resourceful providers expect to face more difficulties than bigger and more affluent ones in developing and adopting sophisticated technical systems and tools to ensure prominence. Czech, Italian and Latvian providers remark that technical solutions are costly and require significant investment. At this stage, algorithms and other similar tools, if subjected to a cost-benefit analysis, do not seem adequate to achieve the objective of the promotion of European works in on-demand catalogues.

Some providers also mentioned that the development of new tools and/or functionalities in order to increase visibility of certain works is a very challenging technical issue considering that each video on-demand provider has its own specificities that need to be taken into consideration and, further, operates in different countries and/or regions. Providers in smaller markets may have a more difficult task.

Ensuring, maintaining, and labelling accurate, reliable and consistent content metadata has been indicated by providers as another key challenge to be addressed. Missing data and lack of recognized standards regarding metadata are main concerns for them. In addition, providers expressed their concern regarding whose responsibility this should be (producers or distributors should provide metadata). Providing visibility metrics in a coherent way across the 27 Member States is yet another challenge.

Almost all providers indicated the significant cost and man-power labour (including time needed) that the development and launch of different technical tools and/or marketing campaigns and tools will have for them in order providers to ensure the prominence of European works. In particular, Czech operators, as well as a cross-border one, warn about possible costs related to marketing solutions. For the same reason, French providers recommend not to impose obligations of investments in these costly operations. A Spanish provider cautioned that it is not possible to standardize a type of campaign or a marketing solution, since forcing to invest in certain defined actions makes difficult to create different and innovative ways to promote these works. Swedish Public Service providers highlight that marketing measures also face comparison problems when it comes to measuring effects between providers.

Limited marketing strategies for promoting European works are also considered as a challenge by various providers. Any marketing campaigns, as mentioned, should be based on material available in the European Union.

In addition and in relation to the financial challenges the cost of buying adequate quantity of European works that would also stimulate the interest of viewers to watch it has also regarded as another key challenge to be addressed. Issues of adequate availability of European works have been raised. Providers stressed that buying content, which does not appeal to viewers' attention and/or preferences will not help to fulfil their legal obligations. In relation to this, numerous providers pointed out that viewers' habits and preferences and users' choices are not necessarily influenced by the origin of the production. In this line, they see an emerging danger for promotion of unpopular content which will result in loss of subscribers and subsequent adverse impact on providers' revenues.

Some providers alluded to the negative consequences of the <u>COVID-19</u> pandemic and that these have aggravated the financial difficulties of providers endangering the sustainability of the business model. Moreover, they mentioned that technical and financial challenges are even greater for smaller markets and smaller providers of limited audience.

Numerous providers stated the lack of a simpler <u>definition of</u> <u>what constitutes an European work</u> is a key challenge to be addressed. According to the answers the complex definition provided in the Directive and the difficulties in determining the origin of a specific work may create obstacles in compliance. Within this context main issues to be addressed are, among others, the following: who should be responsible to indicate the origin of the works (licensors, producers, or providers/distributors); searching of the indication is sometimes difficult and costly especially for older productions and for productions that are the result of cooperation.

Some providers expressed the view that burdensome bureaucratic tasks and <u>administrative burdens should be minimized</u> when providers report to regulators.

3.3   Question #3 – Tools, KPIs and methodologies to assess the concrete implementation of prominence

3.   *What kind of tools, KPIs and methodologies do you consider the most appropriate and easy-to-use means to assess the concrete implementation of measures and solutions adopted to secure prominence of European works in on-demand catalogues?*

Question No 3 of the survey was dedicated to the most appropriate and easy-to-find means to assess the concrete implementation of measures and solutions adopted to secure prominence of European works in on-demand catalogues.

Some VOD providers mentioned that distinctions need to be made between the type of VOD services (SVOD or FVOD or TVOD, etc.) and the size of the VOD content providers when thinking of setting up requirements on the prominence of the European works.

In their responses, they also warned against attempting to create a "tick-the-box" scheme that would not allow for a more flexible approach and thus reflect the particularities of various types of individual services. The issue of the administrative burden already placed on companies was also raised. Several responses called for reporting obligations to be consistent with measures adopted by each service.

Several providers mentioned marketing campaigns as an appropriate measure to ensure prominence. This would not only encourage viewing of the marketed titles but are likely to, in turn, further promote the prominence of other European works because of personalization of the service. It should be, according to some, relatively easy to measure these campaigns from a regulatory perspective.

Sales numbers related to promotion in specific corners during a defined period could, according to several respondents, constitute an effective KPI. Other responses were even more specific and define KPI as a comparison of total views of European works to other works' total views. To be able though to assess the implementation of any measures, access to data mining tools is a necessary precondition.

Some VOD services providers suggested European and Non-European tagging of the content to calculate the results on a yearly basis.

Market research through customer feedback was highlighted as an effective measure to assess the implementation of measures ensuring the prominence of European works. The outcome of such feedback could lead to developing benchmarking and proposals for best practices.

Some VOD providers also pointed to potential risks related to methods or tools assessing the effective implementation of prominence measures jeopardizing commercially sensitive information.

Regular reporting solutions (by title and by marketing action/strategy/tool) allow, according to several providers, refining marketing, and editorial campaigns. Data collection and treatment is essential for this. However, local providers lack quality metadata and resources to ensure proper data. The normalisation of a standard European classification by universal identification codes for local works (instead of letting every platform interpret metadata as they can), alongside support to implement such classification tracking, would be extremely effective according to the VOD providers.

Some VOD providers also stressed that any system aimed at ensuring that prominence obligations are secured should be principle-based and give each fast-evolving VOD service the possibility of making European content attractive. Responses also suggest that NRAs should be mindful of the administrative burden placed on companies. Such reporting measures should consider the breadth of ways in which a VOD service may comply with this obligation and therefore allow reporting consistent with the measures adopted by each individual service.

Several respondents stated that there may not be one metric that can define prominence for all services and measures. Also, these metrics should be dynamic given the speed of progress in this area. According to some providers, there is a need to differentiate between general transparency (for example sharing viewing data with content creators) and reporting/evaluation of compliance.

A possible KPI, according to some providers, was the option of monitoring whether viewers can search specifically for European works as a genre in the VOD player and in a manner that is similar to other genres that are offered on the VOD player.

Another provider suggested the use of compliance targets for minority languages in multi-language jurisdictions while yet another provider proposed the measurement of time spent on main interface or homepage/EPG/ as a possible useful tool.

The importance of limiting exclusivity of works (partly) financed with European public funds was also stressed. The industry, together with the NRAs should, according to respondents, strive for optimal availability to all platforms based on revenue-shared arrangements. The need for adequate and reliable European works labelling systems was mentioned as well. Frequent calculation and monitoring were also mentioned as a critical success factor.

In conclusion, the following KPI's, as indicated by the industry, can be considered:

> ➢ Sales numbers related to promotion in specific corners or recommendations during a defined period;

> ➢ "European Works Total Views" Versus "Other Works Total Views" in a given period;

> ➢ "European Works Total Sales" Versus "Other Works Total Sales" in a given period;

> ➢ Clicks, view duration, or increase of viewers/subscriptions, what is the number of the user outside the VOD country of origin;

- ➢ Can viewers search specifically for European works as a genre in the VOD player and in a manner which is similar to other genres which are offered on the VOD player?;

- ➢ KPIs and other methodologies can be considered appropriate, especially when they are used as part of API or other automated interfaces and data protocols and if these build on standardized metrics/parameters (preferably agreed upon within the industry);

- ➢ The number of European works included in a given VOD catalogue, the total numbers of assets/titles that compose said catalogue, and the number of times European works in the same catalogue have been viewed.

3.4   Question #4 – Initiatives to further broaden the adoption of prominence measures

4. *What kind of initiatives could be undertaken to further broaden the adoption of prominence measures (e.g. awarding mechanisms where the achievement of a certain threshold in respect of prominence could be exchanged with the mitigation of other obligations)?*

a.   Regulation and financial matters

A number of respondents highlighted some regulatory and financial initiatives to consider in order to broaden the adoption of prominence measures. According to these subjects, providers who prove their commitment in the promotion of European works by giving them visibility in their catalogues could receive some kind of award of economic nature. When considering licences or funding applications, compliance with prominence measures could be taken into account. Also, some underlined that prominence and the quota requirement need to be considered together to ensure the availability of high quality European works.

A Greek provider suggests that actions could be taken under the form European or state financial programs to support the audiovisual service providers in the production of European audiovisual works and/or obtaining distribution rights of such works, the acquisition of appropriate technological equipment, which will serve the adoption of technical solutions for the promotion of European audiovisual works (including subtitling), in-house productions of European audiovisual works as well as the strengthening of transnational marketing, branding and distribution of audiovisual works on audiovisual platforms.

According to a Luxemburgish provider, another solution could be to grant subsidies for the VOD service providers covering partially or fully the copyright remunerations collected by copyright management organisations. These subsidies should not count into the 'de minimis'. Similarly, in the view of a Spanish provider, government subsidies could be awarded to VOD providers who run campaigns aimed at promoting European work.

Similarly, a financial support system could be developed to provide translations / subtitles / dubbing, so as to supply VOD providers with access to works that have not been broadcast in a given country in the language of that country. In the opinion of one provider, ERGA should therefore encourage European Member States to give extra weighting to dubbed or subtitled (localised) European works when calculating the 30% quota for European works.

A supporting fund could also be envisaged to ensure technical and campaigning developments around European works. A such fund could give local players incentive and means to perform such evolutions.

Indirect financial sustain was also advocated as another possible means to support "virtuous" providers (i.e. providers particularly engaged with the promotion of European works). For example, it was suggested to consider the adaption and adjustment of a value-added Tax on European works to allow both pricing reduction when applicable, better margin for editors and distributors, and such benefits to be invested in initiatives around platforms development/specific campaigns on European titles. The reduction of license fees and the simplification of the rules for investing in co-productions were also mentioned as valuable tools.

From another prospective, one provider evokes the possibility to reduce the level of the financial contributions that content distributors are required to make towards the production of European works, in exchange for:

- Allowing customers to view a European title for free, or at a reduced cost, over specific – promotional – periods; and/or

- Allowing customers to view a European title free of charge whenever they buy non-European content;

- Allowing customers to subscribe to a European VOD service provider proposition at a reduced cost.

b. Promotion / marketing activities

As a part of the proposed promotional and marketing activities, VOD providers mentioned:

- Joint marketing campaigns;

- Promotion of European content in the media;

- Better commercial conditions for European works could be defined by content providers to incentivise a bigger promotion effort by the VOD Platforms;

- More promotional actions related to European content to increase the number of rentals (e.g.: season discounts like Christmas, Summer Vacations or Easter Vacations);

- Incentives (such as subsidies) to additional marketing campaigns aimed at promoting European works;

- Launching communication strategies for promoting European works;

- Creating "European film on-demand day" (such as implemented in France with the "VOD Day");

- Promoting European works should be based more on a market approach instead of quotas or prominence obligations;

- Extension of the obligations to promote European works to other entities (even if they are not engaged in on-demand activity, they can contribute European works promotion trough social media networks, search engines, TV channels, etc.).

c. Provider's reward systems

Awarding mechanisms to reward (in exchange with the mitigation of other obligations) is also one popular initiative suggested by providers to be undertaken to further broaden the adoption of prominence measures. Some providers expressed the view that depending on the degree of adoption of measures for the display of European works, a point system could be introduced where different initiatives can be assessed differently on the award scale. The first criterion proposed is to introduce a mechanism according to which a proportional reduction of the share of catalogue quota is allowed in cases when a certain score is reached by the VOD provider, on the basis of the values respectively attributed to each prominence goal. In that way the provider could have more incentives to extend the use of prominence beyond the legal requirements. Another subject suggested to adopt a mechanism whereby the share of catalogue quota remains unchanged in nominal terms (i.e. 30% of European works in the catalogue) but compensations can be made between different years. This means that if a provider reaches 40% of European works in a year, the following year a share of 20% could be deemed sufficient. Considering the average value over several years is a flexibility tool that allows adapting the quota system to the different market scenarios.

In the opinion of some VOD providers, a distinction between those platforms that base their catalogue on European cinema (share higher than 50%) and those that only fulfil the obligation is also necessary, as these are two very different scenarios.

d. Concrete actions to implement the suggested measures

To implement the above initiatives, one of the VOD providers proposed to establish a European institution consisting of broadcasters, platform owners and licensors, which would develop a production grant scheme. According to the VOD provider, also a local institution could be responsible for introducing and disseminating the standards and best practices for the display of European titles. Such an institution should be consultative for broadcasters / owners of VOD platforms.

VOD providers agree that they face several challenges related to the adoption of prominence measures In the providers' view, any kind of measure must aim at securing the right, delicate balance of all interests involved; as a starting point, it cannot be assumed that user preferences always coincide with the regulator's interest of increasing the consumption of European works (through increasing the latter's prominence in services or their user guidance/ information tools, respectively).

Some of the providers also believe that allowing some flexibility for the service providers through the introduction of measures related to the prominence of the works in a dedicated section rather than introducing strict threshold measures accompanied by a mechanism for mitigating other obligations, would be better. By contrast, another mainstream service provider expresses strong reservations about any possibility to substitute obligations which are aiming at different objectives of regulation.

In conclusion, it is worth pointing out that many of the VOD providers – who represent small companies – insist on the necessity to keep such initiatives as simple as possible.

For some VOD providers, reducing the time between the public launch of European works in movie theatre and their availability in on-demand catalogues would be also a good tool to improve prominence of such works. Similarly, increasing the content that is made available to viewers with subtitles or sign language support could also be considered as a valuable solution.

4. Conclusions

As discussed in the introductory part of this document, the present Report aimed first of all at providing Member States with concrete measures that could be adopted in the implementation of the new provisions of Article 13(1) of the Directive. There is a need to enhance the common understanding of the meaning of "prominence", in order to strive for the highest possible degree of consistency when implementing such measures. Secondly, the report tried to provide some factual indications for the NRAs to design an effective pattern for collecting the relevant data and appropriately control compliance with those measures.

From a regulatory perspective, the situation in the EU Member States concerning the implementation of measures related to the prominence of European works in on-demand catalogues seems to be quite fragmented. In some countries the paradigm shift, from a principle of non-binding nature to a mandatory obligation, forced, or is forcing, national legislatures to important changes in the relevant laws. Such a process, though, is either still not concluded or waiting for concrete guidance from regulators.

Some regulators, though, pointed out that measures concerning prominence of European works are already in force in their legal frameworks. In most of the cases, the information is collected through self-declarations. However, the possibility to verify the fulfilment of such obligation varies from case to case. When applicable, monitoring activities are conducted either on a yearly or on a regular basis.

As far as possible or as concerns measures already in use, regulators seem to prefer qualitative solutions, not directly linked to precise thresholds. These include the presence of search tools, the organisation of a dedicated section, the labelling or any other tool to distinguish European and non- European works, the use of recommendations, promotional initiatives. Quantitative methods prescribing the respect of specific quotas (e.g. a minimum percentage of works in the homepage) appear to be less popular.

From the industry perspective, many agreed that the proposed solutions are effective tools to grant visibility to European contents. Moreover, a wide spectrum of additional and innovative suggestion emerged from the responses to the survey. However, reference was also made to possible challenges that providers could face while implementing such measures. A cautious approach was recommended, and concerns were expressed about excessively binding measures, considering that one-size-fit-all solutions should be avoided.

A number of providers consider the adoption of a dedicated section or collections for European works within the catalogue as a valid solution. According to these operators, the creation of a specific area exclusively consisting of European content can contribute to raise the awareness of viewers about the existence of European works as options for viewing/purchasing. Furthermore, a few operators made explicit reference to the possibility of works in the home page, while some mentioned the possibility of labelling content.

Marketing solutions were mentioned by a fair number of providers as possible means to promote European works. Among possible, or already in use tools, the respondents mentioned the use of video-aided promotional campaigns direct marketing tools, banners on the website, the use of social media and the promotion of works through events and promotions. The combination of these tools, through cross-media marketing strategies is highly recommended by the industry. Nonetheless, some pointed out that such solutions would work better if they were combined with the other ones (i.e. visibility of works and technical measures).

Some argued in favour of the adoption of technical solutions. In particular, the importance of algorithms was underlined by many, both in respect of the advertising of European works in recommendations and in the functioning of search engines and other search tools. In this case, it would be important to find a balance

between the promotion of European works and the viewer preferences. In general, for recommendations to be effective, they should be customised on the basis of the consumers' habits. In addition, providers also urged transparency over the use of algorithms.

Nevertheless, when implementing the described measures to enhance the visibility of European content, providers face several challenges. The definition of what constitutes a European work is a key challenge to be addressed. The complex definition provided in the Directive and the difficulties in determining the origin of a specific work may create obstacles in compliance.

Some argued that the creation of specific areas devoted to European contents risks to be ineffective, as users do not actively look for European content and therefore do not actively visit/look for sections dedicated entirely to European works.

Economic challenges were mentioned by many stakeholders, especially regarding technical and marketing solutions. The development of new tools and/or functionalities related to recommendation, essential infrastructure, and algorithms is both costly and technically complex, also if one considers that each provider has its own specificities that need to be taken into consideration and, further, operates in different countries and/or regions.

The cost of buying a suitable quantity of attractive European works was also regarded as another key challenge to be addressed. Some fear that displaying content to viewers that they are not interested in watching will affect the trust of the customers and harm the reputation of the service in the long term.

In terms of possible KPIs and methodologies to measure the concrete implementation of prominence measures, several suggestions have been pinpointed, even though several respondents argued that there may not be one single metric that can define prominence for all services.

According to some, the comparison of sales or total views of European works to other works, could be a useful KPI. This could be achieved for a given period, for example, in the light of marketing and promotional campaigns, in specific corners, during a defined period.

Market research through customer feedback was highlighted as an effective measure. Another possible KPI, according to some providers, is the option of monitoring whether viewers can search specifically for European works within catalogues.

Many underlined the importance of adequate and reliable European works labelling systems. Regular reporting solutions (by title and by marketing action/strategy/tool), based on the availability and collection of quality metadata allow, according to several responses, refining marketing, and editorial campaigns.

As concerns the initiatives that could be undertaken to further broaden the adoption of prominence measures, the suggestions pointed out by the industry covered a quite broad range. Many evoked the financial support that the EU and/or the Member State could provide in exchange for prominence. Such a support could take different forms, covering several items: distribution rights, acquisition of appropriate technological equipment, coverage of copyright remuneration, in-house production of European works, provide translations / subtitles / dubbing. Alternatively, the level of the financial contributions could be mitigated where providers offer European content on their catalogues at discounted prices or for free.

Awarding mechanisms to reward, in exchange with the mitigation of other obligations, is another initiative considered suitable by providers. This could be done either through a proportional reduction of the share of

catalogue or investment quota in cases when the VOD provider meets a certain level of prominence, or by adopting flexibility mechanisms allowing compensations of the quota between different years.

In any event, providers maintain that even further initiatives should be kept flexible and as simple as possible, taking into due consideration the delicate balance of all interests involved.

Final suggestions

In light of what was exposed in the report and discussed in the conclusions, the following suggestions are presented for consideration:

There is not a "one-size-fits-all" solution, as there may not be one metric that can define prominence for all services in every context. A combination of different tools and measures would be more effective. Furthermore, these metrics should be dynamic, given the rapid progression in this area.

Ensuring prominence of European works should take advantage of the broad variety of measures referred to in Recital 35 of the Directive.

A flexible approach by the regulators is recommended. Provisions should be kept as simple as possible, avoiding over-prescribing regulation, in order to minimize administrative burdens.

The promotion of European works in a dedicated section can be considered as a valid solution – already adopted by several providers.

The labelling in metadata of audiovisual content, especially in respect of European works, as suggested by Recital (35 AVMSD), is valuable practice to increase the visibility of European works. Recognised standards regarding metadata, by universal identification codes, should be encouraged, taking into due consideration the different size of providers.

The opportunity to incorporate a pre-roll explaining the values of European content into productions could be evaluated.

It may be worth to encourage producers to use a European works certification mark in the promotional material (e.g. film covers/posters) that they licence to content distributors, as this would help viewers identify the European origins of works included in any given VOD catalogue.

Marketing solutions, such as banners, clips, trailers, advertising campaigns, social media, should be considered valuable and effective tools to secure prominence to European works. However, the cost of marketing campaigns should be considered. The adoption of such promotional tools could perhaps be encouraged using some compensation mechanism.

Technical tools may play a key role in the promotion of European works in on-demand catalogues. Algorithms could be beneficial both for recommendations and in the functioning of search engines and other search tools available in the service. Even in this case, the budgetary aspect should be duly taken into account, given the cost and the technical complexity of such tools, especially if one considers the high level of customisation of on-demand catalogues.

Sales numbers related to promotion in specific corners or recommendations during a defined period or "European Works Total Views" Versus "Other Works Total Views" in a given period could be considered relevant indicators to assess the performance of marketing tools.

Market research through customers' feedback could be an effective tool to assess the implementation of measures ensuring the prominence of European works.

Without prejudice to the obligations of VOD providers to ensure prominence of European works in their catalogue in accordance with Article 13(1) of AVMSD, prominence awarded to European works could be further reinforced in duly and justified cases through mitigation of quotas of programming and investment. This could be done either through a proportional reduction of quotas, while ensuring, however, that the minimum 30% share of European works is secured, or by adopting flexibility mechanisms allowing compensations of the quotas between different years.

Without prejudice to the obligations of VOD providers to ensure prominence of European works in their catalogue in accordance with Article 13(1) of AVMSD, prominence of European works could be further reinforced in cases where providers are supported in specific areas such as the distribution rights, the acquisition of appropriate technological equipment, coverage of copyright remuneration, in-house production of European works, provide translations / subtitles / dubbing.

Alternatively, the level of the financial contributions could be mitigated where providers offer European content in their catalogues at discounted prices or for free.

The role of ERGA issuing guidance in the practical implementation of prominence measures should be emphasized, to guarantee a higher degree of harmonisation and a level playing field.