

s a n o m a

Legal assessment of State aid incompatible with the internal market

**Funding for online learning services and video-on-demand (“VOD”) to
the Finnish public service broadcaster Yleisradio Oy (“Yle”)**

Before the European Commission

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GERADIN

PARTNERS

EU COMPETITION LAWYERS

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I. Introduction

1. The present complaint (the “Complaint”) explains how Yle, Finland’s public service broadcaster, exploits the public funding it receives from the Finnish State as a compensation for its public service activities to engage in activities that fall outside its public service remit, namely the provision of online learning services and video on-demand (“VOD”) services, thereby distorting competition in the relevant markets. The State funding for these activities constitutes aid incompatible with the internal market.
2. Yle is vested with the task of providing a “*versatile and comprehensive television and radio programming with the related additional and extra services for all citizens under equal conditions.*”¹ Yle is to provide such public service programming and “*other content services related to public service*” in “*public communications networks nationally and regionally.*”² To this end, Yle offers a variety of free-to-air (“FTA”) TV channels, radio channels, as well as online platforms that are free for Finns to use, are provided without advertising, and which offer content that is, to a large extent, similar to what commercial operators offer. Such a broad definition of Yle’s public service remit has its roots at a time where the volume of commercial TV content supply was clearly more limited and where the available media provided logical boundaries: FTA TV and FM radio used to be the channels through which the public service broadcaster would discard its public service obligations, and the “*related additional and extra services*” comprised mainly the provision of teletext. However, in recent years, with the media transformation and the increasing reliance on the internet as a channel to reach viewers, such a broad definition allows Yle (according to its own view) to do anything and everything.
3. Since 2013, Yle is financed by the Finnish State through the Yle tax – an annual broadcasting tax (*Yle-vero*) paid by any natural person aged 18 or more living in Finland, as well as any legal person engaged in business operations, vocational practice or agriculture in Finland.³ The average household pays €346 of Yle tax per year (which is significantly higher than the €160 per year spent on newspaper subscriptions and the €94 per year on commercial SVOD services).⁴ The revenue produced by the Yle tax is transferred from the State Budget to an extra-budgetary “State Television and Radio Fund” (the “**Fund**”) managed by the Finnish Transport and Communications Agency (“**Traficom**”) that reports to the Ministry of Transport and Communications. Assets from the Fund are then transferred to Yle based on a budget of €500 million yearly set in 2013, which can be reviewed (i.e., increased) annually on the basis of an index taking into account the general cost of living and cost of labour.⁵ Yle is then free to allocate the money it receives by the Finnish State internally as it deems fit to finance its activities.

1 Act on the Finnish Broadcasting Company 1380/1998 (“Yle Act”), Section 7 (**Annex 1**).

2 Ibid.

3 Before 2013, Yle’s activities were financed through license fees.

4 Source: TNS Mind 2020 database.

5 See Act on the State Television and Radio Fund (*Laki valtion televisio- ja radiorahastosta*, 745/1998, as amended) (**Annex 2**). For a detailed discussion on Yle’s financing, see Section II.B.3 below.

4. Yle has been following an expansive strategy, broadening its operations to cover new activities over the years, moving away from the traditional FTA TV and FM radio channels offered by the public broadcaster in carrying out its public service mission. Instrumental in this regard has been the expansion of Yle’s online presence and diversification of its portfolio. The unclear definition of Yle’s public service remit, which refers to “*comprehensive*” programming, has been used as a justification by Yle for the expansion of its offering to cover services that are outside its public service remit.
5. Now, let us be clear about what this Complaint is about. Sanoma does *not* contest Yle’s ability to offer the services forming part of its public service remit through any – including online – means. In this regard, Sanoma does not contest the offering of TV catch-up services by Yle – i.e., the availability online of content *already* broadcasted on Yle’s TV channels for a clearly limited duration (such as 7 days after the broadcast). It also does *not* contest Yle’s offering insofar as this covers those services that commercial players cannot provide and is directly related to the democratic, social and cultural needs of the Finnish society.
6. What Sanoma does take issue with is the fact that Yle, taking advantage of its stable, guaranteed and considerable revenue flow from the Finnish State and the lack of controlling mechanisms to ensure that it only receives and uses public funding for services that do fall within its public service remit, uses public money to enter into markets that are *unrelated* to the public service obligations vested upon it by the law. This Complaint focuses on Yle’s activities in the online learning services market, where Yle is active mainly through its Arbitreenit (offering exam preparation digital materials) and Oppiminen (offering digital learning materials) websites / portals, and the VOD segment, where Yle is active through its Yle Areena offering (which goes far beyond mere catch-up services of Yle’s FTA public service offering).⁶ In doing so, Yle engages, funded by State resources, in activities that are not related to its public service and competes with commercial operators already active in these highly competitive markets.⁷
7. Yle tries to justify its expansive strategy by distorting the purpose of public service broadcasters, which is to offer programs that meet the “*democratic, social and cultural needs of each society*”.⁸ Yle seeks to convince the Finnish people that, as it is financed through the Yle tax and it is Finland’s public broadcaster, it must engage in the provision of a comprehensive offering covering all content types, for all target groups and across all distribution channels. Yle claims that this is to the benefit of Finns and democracy.⁹ Yle has set the ambitious goal of having 100% – i.e., every Finn using its services during the year

6 The distinction between catch-up services and (commercial) VOD is explained in Section III.A.2 below.

7 While this Complaint focuses on Yle’s online learning services and VOD offering, Yle’s expansive strategy also concerns other fields, such as the organization of live events.

8 See Treaty of Amsterdam Amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts - Protocol annexed to the Treaty of the European Community - Protocol on the system of public broadcasting in the Member States (“**Amsterdam Protocol**”), *OJ C 340*, 10 November 1997, page 109.

9 See “Yle’s strategy”, 19 May 2020, available at <https://yle.fi/aihe/strategy>, last accessed on 18 December 2020.

and 80% of Finns using its services on a daily basis.¹⁰ This ambition does not sit well with the rationale of State aid law and the regime of services of general economic interest (“SGEI”). Generally, the State funding of public services should work the other way round than it does in Finland with respect to the funding of Yle: the Member State should, first, clearly define the missions that fall under the public service remit of the undertaking that is to receive the public funding. The Member State can then fund these public service activities to the extent that is necessary. However, the funding of Yle does not follow this logic: Yle receives a set amount of public funding that is unrelated to the actual costs of carrying out a defined public service and then decides for itself which activities it deems worthy to be a public service.

8. In addition, Yle’s uncontrolled expansion – and to be more precise, its involvement in commercial activities (e.g., the provision of VOD and online learning services) relying on funding by State resources – threatens the existence of private Finnish media and online learning service providers. Yle, backed up by State resources, offers its services at zero price, attracting users to the detriment of commercial operators who are struggling to survive and continue their operations in the digital age. Commercial operators have to compete with Yle (and its stable and significant revenue flow which allows it to offer its services for free), while at the same time adapting to the changing media landscape and the increased competition by international players.
9. As media consumption shifts away from FTA to online services and subscription income from online services grows in importance, commercial media providers see their ad-funded FTA business being under tremendous pressure and have to increasingly rely on their online offering to reach their user base and generate consumer-paid revenues. Finnish media providers compete with international players (such as Netflix and Disney+) for viewers, which impacts not only their VOD subscription revenues, but also their advertising revenues. At the same time, private Finnish media see their ad revenues shrinking as tech giants, such as Google and Facebook (which already capture approximately 60% of online advertising and more than a fifth of the entire advertisement sales in Finland),¹¹ increasingly attract advertisers’ ad spend. On top of that, the Covid-19 pandemic gave another blow to the sales of advertising, deteriorating further the already difficult financial circumstances of Finnish media providers. In 2020, media advertising revenue in Finland dropped 17% compared to 2019.¹²
10. In this dire situation, Yle’s State-funded expansion into markets that are not related to its public service obligations and in which private operators offer a comprehensive range of

10 See “YLEISRADIO OY: TOIMINTASUUNNITELMA 2015 – tiivistelmä ja sisältöpainotukset [Yle’s Action Plan 2015] (**Annex 6**). Yle has, since 2020, reformulated its strategy, removing the explicit numerical targets. However, these numbers have been the targets guiding Yle’s operations for many years. What is more, Yle still follows a very ambitious strategy, aiming to be a provider of services “for the entire nation.” See, e.g., Ibid.

11 Yle, “Board of Directors’ report and financial statements 2019”, page 4.

12 This concerns the ad spend in domestic media, and thus excludes the ad spend on Google and Facebook. Source: Kantar TNS.

services to Finnish consumers cannot be deemed compatible with the internal market. Quite the contrary, it disproportionately distorts competition in the relevant markets to the detriment of commercial operators, innovation, competition, and ultimately consumers. When it comes to VOD, commercial operators already face competition from Yle, which has developed its comprehensive Areena VOD offering in a manner that directly competes with commercial operators, especially when it comes to domestic content. The negative effects of Yle Areena's presence in the VOD segment are, therefore, only set to increase.

11. Most importantly, as the FTA and VOD businesses are to a large extent based upon fixed costs (as content costs represent around [REDACTED] of the total costs), any loss in sales directly impacts the profitability of the business. [REDACTED]

12. In the market for online learning services, Yle has been steadily growing its offering, with the ultimate objective of creating an offering that is similar to that of commercial operators. Yle has already done so in respect to the preparatory materials for the Matriculation Exam and its foreign language materials. At the same time, Yle has been building its offering with regards to digital materials for primary, secondary and vocational education, and it is expected that it will, in the near future, compete directly with commercial operators offering online learning materials for these levels of education.

13. The Commission should, therefore, intervene and put an end to the public funding of Yle's provision of online learning services and VOD, as it is incompatible with EU State aid rules. The Commission's intervention is all the more necessary as it seems that Yle's current offering of online learning services and VOD, in competition with commercial operators, will not mark the end of Yle's expansive strategy. Yle has publicly commented that it is planning on becoming active in new sectors, such as live events, and on extending its educational material offerings even further,¹³ wishing to be a "*provider of services for the entire nation.*"¹⁴ Yle's pattern of behaviour is to identify successful services developed by private media companies, such as Sanoma, to target specific customer groups and launch its own services in direct competition with private operators. The systemic failure of the current system to curb Yle's use of State resources to fund its non-broadcasting activities, needs to be remedied before it causes irreparable damage to competition in the relevant markets and consumer welfare in the longer term.

14. Sanoma would like to emphasize at this stage that State-funded media is not a purpose in itself. Yle's duty is not to establish an all-encompassing selection of services, competing with

13 The wording of YLE's strategy makes it clear that YLE's plans are far-reaching, and YLE wishes to expand as much as possible to reach and appeal to the interests all audiences in Finland. See "Yle's strategy", 19 May 2020, available at <https://yle.fi/aihe/strategy>, last accessed on 18 December 2020.

14 Ibid.

private media on unequal terms due to its continuous, stable and guaranteed flow of income through State resources. Yle's purpose – as is the purpose of any public service – is to act in the public interest, eliminating inefficiencies created by market failure. Thus, Yle's activities should only be funded through State resources in so far as they fall within Yle's public service remit.

15. This Complaint is divided in four parts. **Part II** provides the factual background, briefly introducing the Complainant and providing an overview of Yle, Finland's public service broadcaster. This Part presents Yle's public service remit, its corporate governance and supervisory structure and its financing, before describing Yle's broadcasting offering and the non-broadcasting online activities that are the subject of this Complaint, namely online learning services and VOD. **Part III** comprises the legal assessment of this Complaint. It contains a description of the relevant markets and an overview of the applicable legal framework. It then assesses the public funding of Yle's provision of online learning services and VOD and explains that it constitutes State aid incompatible with the internal market. This part also discusses why such funding constitutes new aid, which ought to have been notified to the European Commission. **Part IV**, finally, concludes and respectfully requests the Commission to take appropriate measures.

II. Factual background

16. In this Part, we first provide an overview of Sanoma and its activities (Section A), before discussing YLE's financing, its supervisory structure, its broadcasting activities and its expansive strategy into non-broadcasting online activities (Section B).

A. Overview of Sanoma

17. Sanoma Group is Finland's largest private media and learning company and is listed on the Helsinki Nasdaq stock exchange. It consists of two divisions: (i) Sanoma Media Finland, a multi-channel Finnish media company offering newspapers, magazines, TV and radio channels, live events and music publishing, as well as online and mobile media, and (ii) Sanoma Learning, offering educational publishing and services. Sanoma Learning operates in 11 European countries.¹⁵
18. Sanoma Media Finland offers a comprehensive media portfolio.¹⁶ Its audiovisual offering comprises four TV channels, eight radio channels, one VOD service and one audio-on-demand service. Sanoma's business unit Nelonen Media is a broadcaster focusing on TV and radio, and Ruutu is Sanoma's VOD service, providing viewers with a wide selection of programming from the various TV channels of Nelonen Media, as well as other TV content.

15 See <https://sanoma.com>, last accessed on 31 December 2020.

16 See Sanoma Media Finland, "Our portfolio", available at <https://sanoma.fi/en/about-us/portfolio/>, last accessed on 31 December 2020.

19. Sanoma’s traditional broadcasting activities are based upon an FTA business model and generate revenues from advertising sales. Sanoma’s VOD services are provided both as ad-funded VOD (“**AVOD**”) (Ruutu) and as subscription-based VOD (“**SVOD**”) (Ruutu+).¹⁷
20. Sanoma Learning is a European provider of print and digital learning solutions in the K12 segment – i.e., in primary, secondary and vocational education. It comprises several companies operating, among others, in the Nordics, Belgium, the Netherlands, Poland, Germany and Spain.¹⁸ Sanoma’s learning products and services include print and digital course materials, as well as digital learning and teaching platforms for primary, secondary and vocational education.¹⁹ Sanoma Learning offers advanced multi-channel learning solutions, covering almost all subjects in each of the markets in which it operates and enhancing them with a wide variety of digital learning platforms to drive learning impact.²⁰
21. In the Finnish market, Sanoma Learning offers print and online educational materials and digital solutions (video, animations and text content) that cover the full curriculum of primary and secondary education and which can be used by students and teachers for further learning and practice opportunities. Teachers can use Sanoma’s online learning platform to plan and execute lessons and can find (and tailor to the needs of their students) materials for practicing, testing and assessment. Students can use the materials provided through Sanoma’s online learning platform for study, practice and self-assessment.
22. For upper secondary education, Sanoma offers a broad range of materials to prepare students for the Matriculation Exam (i.e., a national examination taken at the end of the Finnish upper secondary school, which entitles students to continue their studies at university or other institutions of higher education) covering all subjects taught in this level of education. Finally, Sanoma offers a broad range of materials for adult learning, including for foreign languages.

B. Overview of Yleisradio Oy and its activities

23. Yleisradio Oy (“**Yle**”) is a State-owned limited liability company acting as the sole public broadcaster in Finland. It operates within the administrative branch of the Finnish Ministry of Transport and Communication.²¹
24. Yle’s activities are governed by the Act on the Finnish Broadcasting Company (the *Laki Yleisradio Oy:stä 1380/1993* (“**Yle Act**”), as amended).²² According to the Act, the State of

17 For a detailed description of the different types of VOD, please see Section III.A.2 below.

18 See <https://learning.sanoma.com>, last accessed on 31 December 2020. See also Sanoma Learning, “Our learning companies”, available at <https://www.sanomalearning.com/companies/>, last accessed on 31 December 2020.

19 See <https://sanoma.com>, last accessed on 31 December 2020.

20 See <https://learning.sanoma.com/>, last accessed on 31 December 2020.

21 Yle Act, Section 1.

22 The Act is provided as **Annex 1**. The latest amendment was passed on 14 June 2017.

Finland shall own and control at least 70% of Yle's shares and the votes generated by such shares.²³ By the end of 2020, the Finnish State owned 99.9% of Yle's shares.

25. In this section, we will first present Yle's "public service remit" as defined by the law (Sub-section 1). We will then provide an overview of Yle's corporate governance and supervisory structure (Sub-section 2), as well as its financing (Sub-section 3). We will finally present Yle's broadcasting offering (Sub-section 4), and examine Yle's expansion into new, non-broadcasting online activities (Sub-section 5).

1. Yle's public service remit

26. Section 7 of the Yle Act defines Yle's public service remit: Yle is responsible for the provision of "*versatile and comprehensive television and radio programming with the related additional and extra services for all citizens under equal conditions. These and other content services related to public service may be provided in public communications networks nationally and regionally.*" In particular, Yle's public service programming shall:

- "support democracy and everyone's opportunity to participate by providing a wide variety of information, opinions and debates as well as opportunities to interact;
- produce, create, develop and maintain Finnish culture, art and inspiring entertainment;
- take educational and equality aspects into consideration in the programmes, provide an opportunity to learn and study, give focus on programming for children and young people, and offer devotional programmes;
- treat in its broadcasting Finnish-speaking and Swedish-speaking citizens on equal grounds and produce services in the Sami, Romany and sign languages as well as, where applicable, in the languages of the other language groups in the country;
- support tolerance and multiculturalism and provide programming for minority and special groups;
- promote cultural interaction and provide programming directed abroad; and broadcast official announcements and make provision for television and radio broadcasting in exceptional circumstances."²⁴

27. The definition of Yle's public service remit as set out in the Yle Act is quite vague and broad, and its limits are not discernible: Yle is vested with the provision of a "*comprehensive television and radio programming*" and allowed to offer "*related additional and extra services*". It is also allowed to offer "*other content services related to public service,*" even

23 Yle Act, Section 2.

24 Ibid [emphasis added].

though the law does not make it clear what types of services these might be. The reference to “*related*” additional and extra services entails that such services must be linked to Yle’s broadcast TV and radio programming in order to fall within its public service remit. Such services are, e.g., the provision of teletext or catch-up TV services. Services such as online learning services and VOD – that cannot be deemed “*related*” to Yle’s TV and radio programming – cannot be within Yle’s public service remit. Similarly, “*other content services*” have to be “*related to public service*”. Thus, the provision of a standalone commercial-like VOD catalogue and extensive online learning materials competing with the offering of commercial operators cannot be considered to be “*related to public service*.”

28. Yle seems to ignore the reference to “*related*” services and considers that it is entitled, by law, to offer any “*additional and extra services*” it deems fit, regardless of whether they indeed cater to the social, democratic and cultural needs of the Finnish society and whether they are related to its TV and radio programming and thus its public service remit. It also seems to ignore that any “*other content services*” also have to be related to public service. Yle’s activities so far, as well as Yle’s strategy for the future, show that indeed Yle is eager to “exploit” the unclear wording of Section 7 of the Yle Act to expand its activities even further and penetrate markets that are not – and were not intended to be – within its public service (or that of any other public service broadcaster).
29. Thus, the unclear definition of public service in the Yle Act negatively impacts commercial operators, as it allows Yle to substitute its own understanding of the boundaries of the public service for that of the regulator and engage in activities that are currently offered by commercial operators. In fact, considering Yle’s ambitious goals for the future, it is a valid concern of commercial operators that Yle will expand in more and more markets, competing with them on unfair terms, given its stable revenue flow, which allows it to offer its services to consumers for free. In this context, commercial operators’ investments into new, innovative services becomes a risky endeavor – and in certain circumstances, even an impossible task. The unclear remit thus has a negative impact on consumer welfare by reducing choice and innovation stemming from lacking private investments.
30. Moreover, there is no specified duration of Yle’s public service remit, which is thus in force for an indefinite period of time without any provision for periodic review. This is unlike other Member States where an agreement or other binding legal instrument is concluded between the Government and the public service broadcaster for a specified and limited duration, in which the public service obligations of the public service broadcaster are clearly defined and specifically entrusted to the broadcasting company.²⁵
31. On 17 December 2020, the Finnish Government submitted a legislative proposal to the Parliament proposing amendments to Section 7 of the Yle Act – i.e., the definition of Yle’s public service remit. The proposed text reads:

25 For example, in Belgium, a new management contract is prepared and concluded every five years between the VRT (the Flemish public service broadcaster) and the Flemish Government.

“The company's task is to provide a versatile and comprehensive public service television and radio programming with the related ancillary and additional services for all citizens under equal conditions. The above-mentioned and other public service content services must be provided on public communications networks nationwide and provincially. Content services’ main focus should be on publications with moving images or audio. Except as provided in subsection 3, textual content shall be related to a publication containing the company’s moving image or sound.

By way of derogation from subsection 1, the company may offer the following textual content on public communications networks without having to be associated with a publication containing the company's moving image or sound:

- 1) short textual news content published by the company on the basis of co-operation with the Finnish News Agency (Oy Suomen tietotoimisto – Finska Notisbyrå Ab) or another similar national news agency;
- 2) short textual news content related to fast and rapidly evolving news situations;
- 3) the textual announcements by authorities transmitted by the company in accordance with subsection 2(7) and the necessary textual content required to prepare for exceptional circumstances;
- 4) textual news content in Sámi and Romani, as well as in the language of other minority language groups in the country;
- 5) textual content related to culture;
- 6) textual content related to learning.”²⁶

32. The proposal mainly concerns text-based content published by Yle and is likely the result of a State aid complaint filed by the Finnish Media Federation in 2017 regarding the State funding for text-based journalistic online content to Yle, and the discussion with the European Commission that followed. While, if enacted, the proposed amendments will be a step in the right direction, in that they require that text-based online content published by Yle should be more closely linked to its audio or video content broadcasts (although providing for so many exceptions that the real impact on the actual remit is doubtful),²⁷ the proposed amendment still leaves Yle’s public service remit largely vague and broad, maintaining the reference to “*comprehensive television and radio programming with the related additional and extra services for all citizens,*” as well as to “*other public service content services.*” Thus,

26 See Hallituksen esitys eduskunnalle Yleisradio Oy:stä annetun lain 7 § n muuttamisesta [Government’s Proposal to Parliament to amend Section 7 of the Act on Yleisradio Oy], HE 250/2020 vp (**Annex 7**).

27 See Ministry of Transport and Communications Press Release, “Government proposes amendments to the Act on the Finnish Broadcasting Company”, 17 December 2020, available at <https://www.lvm.fi/en/-/government-proposes-amendments-to-the-act-on-the-finnish-broadcasting-company-1247369>, last accessed on 29 December 2020.

it cannot be expected to effectively limit Yle’s own interpretation of its public service remit which, according to Yle, allows it to offer comprehensive (in other words, potentially any) services – even if that means entering into competitive markets.

2. Yle’s corporate governance and supervisory structure

33. Yle’s administrative organs comprise an Administrative Council, a Board of Directors and a Director-General acting as Yle’s Managing Director. Yle’s Board of Directors shall comprise between five and eight members who are not members of the Administrative Council or Yle’s senior management.²⁸ It currently comprises eight members.²⁹ They are elected and dismissed by Yle’s Administrative Council.³⁰ Its role is to decide on the budget for the following year, to submit an annual report of Yle’s operations to Traficom,³¹ and to appoint Yle’s Director-General and other members of Yle’s senior management.³²
34. The Administrative Council comprises 21 members, elected by the Parliament in its first session of the electoral term.³³ In practice, the members of the Administrative Council are members of the Finnish Parliament. The Administrative Council is responsible for, *inter alia*, determining Yle’s strategy, deciding on “*issues concerning considerable restriction or expansion*” of Yle’s activities, overseeing that tasks under public service program activities are executed, carrying out a prior evaluation of (mainly new) services and functions relating to public service and the communications market as a whole when required, and determining whether the service or function is to be started or not, as well as setting out guidelines on Yle’s operation and finances.³⁴
35. More precisely, Yle’s Administrative Council is the body entrusted with Yle’s general supervision,³⁵ including the supervision of its public service activities, as it is responsible for “*oversee[ing] that tasks under public service programme activities are carried out.*”³⁶ The role of the Administrative Council in this regard is to carry out an “internal audit” rather than to supervise the impact of Yle’s activities on the markets in which it operates.

28 Yle Act, Section 6c.

29 See Yle, “Yle’s Board of Directors”, available at <https://yle.fi/aihe/sivu/about-yle/yles-board-of-directors>, last accessed on 18 December 2020.

30 Yle Act, Section 6.

31 Note that Traficom was established on 1 January 2019, merging the Finnish Communications Regulatory Authority (“**Ficora**”), the Finnish Transport Safety Agency and certain functions of the Finnish Transport Agency. In the Complaint we will thus refer to Traficom, while legislation (e.g., the Yle Act) and documents drawn prior to 2019 may refer to Ficora.

32 Yle Act, Section 6c.

33 *Id.*, Section 5. Their term of office begins as soon as the election has been completed and continues until the election of the new members of the Administrative Council.

34 *Id.*, Section 6.

35 *Ibid.*: “The duties of the administrative council are: [...] to supervise the administration of the company and issue a statement on the financial statement and the auditors’ report to the ordinary general meeting of the shareholders.”

36 *Ibid.*

36. The Administrative Council is required by law to submit yearly a report to the Parliament on the implementation of Yle's public service mission and on the Council's guidance and supervision activities.³⁷ However, the Parliament is not mandated to exercise a detailed oversight over Yle's public service activities.³⁸
37. Traficom has certain (financial) supervisory duties over Yle but these are *not* related to the monitoring of its compliance with its public service remit. Traficom's supervisory responsibilities are limited to the following four areas: (i) supervising Yle's cooperation with third parties (such as other media companies) in order to ensure that Yle's activities promote freedom of expression, high-quality journalism and pluralism of the media, (ii) supervising Yle's compliance with the prohibition on advertising and on the production of sponsored programs imposed on it by law, (iii) supervising that Yle is not engaging in price undercutting or cross-subsidization between its public service activities and the commercial activities Yle itself has defined as falling outside the scope of its public service remit (such as renting studio capacity),³⁹ and (iv) monitoring that, for accounting purposes, Yle's public service activities are separated from other activities, if any (this would be, e.g., renting studio or OB-van capacity, facilities etc.).⁴⁰
38. Consequently, Yle's Administrative Council is the only body responsible for ensuring that Yle acts within its public service remit. This situation raises concerns as it indicates a lack of independent and effective supervision of Yle's public service activities for the following reasons:
39. First, Yle's Administrative Council is not only responsible for supervising Yle and its activities to ensure that Yle carries out its public service tasks. As an administrative organ of Yle, the Administrative Council is also responsible for "*decid[ing] on issues concerning considerable restriction or expansion of [Yle's] activities*" and "*determin[ing] the company strategy*."⁴¹ The Administrative Council thus has a dual role, both as the organ defining Yle's

37 Ibid.

38 It is also important to note that given that Yle's Administrative Council is appointed by the Parliament and composed by Members of the Parliament, the Administrative Council cannot be considered as independent from the Parliament.

39 Yle considers that all "content" activities that it engages with, including, e.g., FTA broadcasting, Yle Arena and online learning services, are "public service" activities. Therefore, in practice this provision does not limit Yle's activities with respect to online learning services and VOD.

40 Yle Act, Section 12a: "**Financial supervisory duties of the Finnish Communications Regulatory Authority.** The Finnish Communications Regulatory Authority monitors that sections 7a, 8, 8a and 12 are complied with and that no price undercutting or cross-subsidisation is practised." If Yle violates the above provisions, Traficom is competent to obligate it to rectify its error or omission and may issue a notice of a conditional fine as a sanction. See also Section 12b: "**Report to the Finnish Communications Regulatory Authority.** By the end of April every year the company shall submit a report to the Finnish Communications Regulatory Authority on the service provided during the previous calendar year. The report shall include the information needed in the supervision of television and radio broadcasting by the Communications Regulatory Authority." This report is submitted by Yle's Board of Directors as per Section 6c.

41 Id., Section 6.

strategy and activities *and* as the organ supervising these activities. The Administrative Council is thus deemed to control its own decisions.

40. Perhaps the greatest concern, however, is the fact that the Administrative Council is only responsible for ensuring that Yle’s public service tasks are indeed carried out.⁴² However, it is not required by law to monitor Yle’s activities in order to ensure that they do not exceed what falls under Yle’s public service remit.⁴³ As mentioned above, the Administrative Council’s formal role is to carry out an internal audit of Yle’s activities, but not to assess the market effects of Yle’s activities. In any event, Yle’s public service remit is not clearly defined, as indicated in the previous Section, and it is thus impossible for the Administrative Council to measure Yle’s activities against previously defined obligations to effectively supervise compliance.

3. Yle’s financing

41. Since 2013, Yle is financed through the Yle tax – an annual broadcasting tax (*Yle-vero*) paid by any natural person aged 18 or more living in Finland, as well as any legal person engaged in business operations, vocational practice or agriculture in Finland in accordance with the Act on Yle Tax (the *Laki yleisradioverosta*, 484/2012, as amended).⁴⁴ The obligation to pay the annual Yle tax is personal and not per household. The Yle tax is due regardless of the ownership of a television or radio or the actual consumption of Yle’s services.⁴⁵
42. The amount of the Yle tax due by individual taxpayers depends on their annual income. The Act on Yle Tax provides that minors (i.e., Finns younger than 18 years of age), as well as persons with an annual income of less than €14.000 are exempt from the obligation to pay

42 Ibid. The Yle Act provides that the Administrative Council’s duty is to “oversee that tasks under public service programme activities are carried out.”

43 In theory, the Administrative Council could also prevent Yle from commencing activities that fall outside its public service remit, as part of its duty to carry out a prior evaluation “*of services and functions in relation to public service and the communications market as a whole, [...] and on the basis of such evaluation, to determine whether the service or function is to be started or not.*” (Section 6 of the Yle Act.) It could also decide whether to stop a certain activity, as the Administrative Council decides on Yle’s strategy. However, as further explained in Section III.C.2.3.1 below, the prior evaluation procedure has rarely been carried out by the Administrative Council. Moreover, in theory the Administrative Council could decide to stop a certain service. However, the Council is not tasked with the supervision of Yle’s external market impacts, but with carrying out an “internal audit” to control that Yle would not develop political bias in its content.

44 Prior to 1 January 2013, Yle’s activities were financed through license fees. The Act on Yle Tax is available (in Finnish) at <https://finlex.fi/fi/laki/ajantasa/2012/20120484>, last accessed on 15 April 2021.

45 See “Yleisradiovero”, available at <https://www.vero.fi/syventavat-vero-ohjeet/ohje-hakusivu/48391/yleisradiovero2/>, last accessed on 21 December 2020: “*Yleisradioveron suorittamisvelvollisuus on henkilökohtainen. Samassa perheessä tai taloudessa voi siten olla useampikin henkilö, joka suorittaa veroa. Yleisradioveroa on suoritettava riippumatta siitä, onko henkilöllä tai hänen taloudessaan televisio. Yleisradioveroa suoritetaan myös riippumatta siitä käyttääkö henkilö Yleisradion palveluita tai voiko hän edes käyttää Yleisradion palveluita.*” [“The obligation to pay the broadcasting tax is personal. Thus, there may be more than one person in the same family or household who pays the tax. The broadcasting tax must be paid regardless of whether the person or their household has a television. The broadcasting tax is also paid regardless of whether the person uses the services of Yle or can even use the services of Yle.”]

the Yle tax.⁴⁶ For others, the tax is set at 2.5% of the amount of the taxpayer's combined net earned and capital income in excess of €14.000. The maximum amount of the broadcasting tax is, however, capped at €163.⁴⁷ The highest amount of the Yle Tax (i.e., €163) was paid by Finns with an annual income of €20.520 or more, meaning that the average Finnish citizen paid the maximum amount (considering that the median salary in Finland in 2019 amounted to about €3.500 per month, or €42.000 yearly).⁴⁸

43. Corporate entities with less than €50.000 taxable income are exempted from the obligation to pay the Yle tax. For organizations with a taxable income of €50.000, the Yle tax due is €140. For all other corporate entities engaged in business operations, vocational practice or agriculture, the amount of the Yle tax is €140 plus 0.35% of the part of their taxable income that exceeds €50.000. There is a cap at €3.000 per year on the Yle tax for corporate taxpayers.⁴⁹ This maximum amount is paid by corporate entities that generated €867.143 or more in taxable income in that tax year.⁵⁰ The Yle tax is imposed on limited liability companies.⁵¹
44. The revenue produced by the Yle tax is transferred from the State Budget to the extra-budgetary "State Television and Radio Fund" managed by Traficom.⁵² Appropriations to the Fund are transferred yearly from the State Budget to cover the costs accrued by Yle in "*the provision of public service laid down in section 7 of the Act on Yleisradio Oy*,"⁵³ and are then paid to Yle "*in accordance with the utilisation plan and the financing needs of the company*."⁵⁴ In 2013, the appropriations amounted to €500 million, the exact amount going forward being reviewed yearly on the basis of "*an index in which a one-third weight is given to the general cost-of-living index and a two-third weight is given to the index of wage and*

46 An exemption from the obligation to pay the Yle tax also exists for natural and legal persons domiciled in the province of Åland. See Act on Yle Tax, Section 1.

47 Act on Yle Tax, Section 2.

48 Yle, "Board of Directors' report and financial statements 2019", available at <http://view.24mags.com/yle/board-directors'-report-and-financial-statements-2019#>, page 3. In 2019, the Yle tax was not collected from pensioners if their annual income was less than €14.000 and from wage-earners with an income less than €14.750. See also "Average monthly earnings in Finland from 2009 to 2019, by sector", available at <https://www.statista.com/statistics/529917/finland-average-monthly-earnings-by-sector/>, last accessed on 18 January 2020.

49 Act on Yle Tax, Section 3.

50 Yle, "Board of Directors' report and financial statements 2019", page 3.

51 Public organizations (e.g., the Government and its institutions, communes, parishes and housing communities) are exempt from the broadcasting tax.

52 See Act on the State Television and Radio Fund, Section 1(1). On top of the State Budget Appropriations, the assets of the Fund also comprise fees to be collected and surpluses accumulated from previous financial periods (Section 5).

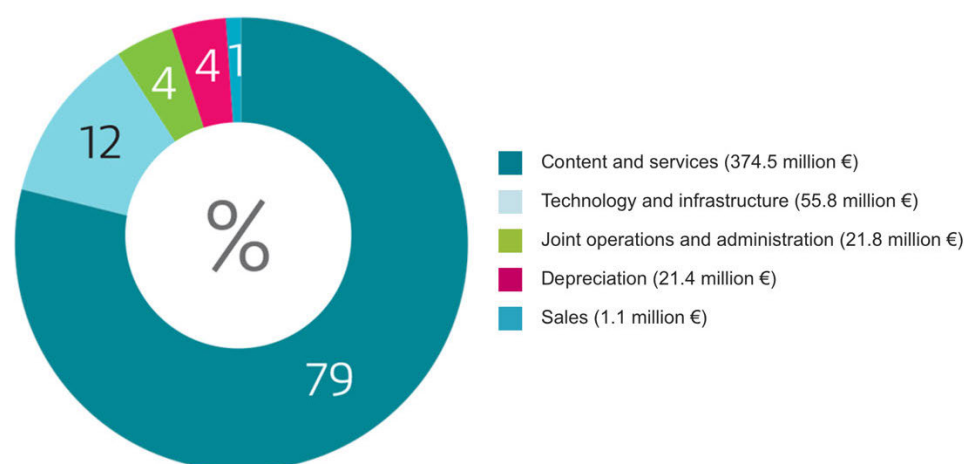
53 The Fund's assets may also be used to pay the fees for carrying out a prior evaluation on the basis of Section 6 of the YLE Act and to administer the Fund. Assets may also be used to promote television and radio operations. See Act on the State Television and Radio Fund, Section 5(2).

54 Act on the State Television and Radio Fund, Section 5.

salary earnings.”⁵⁵ It is thus important to note that Yle’s funding is not linked to the costs it undertakes to execute its public service missions. In 2019, €519.1 million was transferred to the Fund from the State budget.⁵⁶ Yle pays a 10% value added tax (“VAT”) to the State on this appropriation (which amounted to €47.2 million in 2019).⁵⁷ Yle’s net revenue from the appropriation on the basis of the YLE tax was €471.9 million, increasing by 2.2% from the previous year.⁵⁸

45. Appropriations based on the Yle tax constitute the largest share of Yle’s income – in 2019 representing 98.2% of Yle’s total income. Other income included in Yle’s turnover is income from programs and service sales (€6 million in 2019) and other operating income (€2.7 million in 2019). Yle’s total income in 2019 was €480.6 million and the net turnover was €478 million.⁵⁹
46. Yle then internally allocates the budget it receives from the Fund (and the other sources of income) to finance its numerous activities. In 2019, Yle’s cost structure totaled €474.5 million, with content and services costs amounting to €374 million (i.e., representing the largest chunk of Yle’s total costs – 79%). Figures 1 and 2 below illustrate the division of Yle’s cost structure and the cost of content and services, respectively.

Figure 1: Yle’s cost structure in 2019, tot. 474.5 million euros [Source: Yle]



55 Id., Section 1(2). In 2014, after the index increase, the appropriations amounted to approximately €508 million. No index increase was made in the years 2015-2018, during which the appropriations amount remained at the 2014 level.

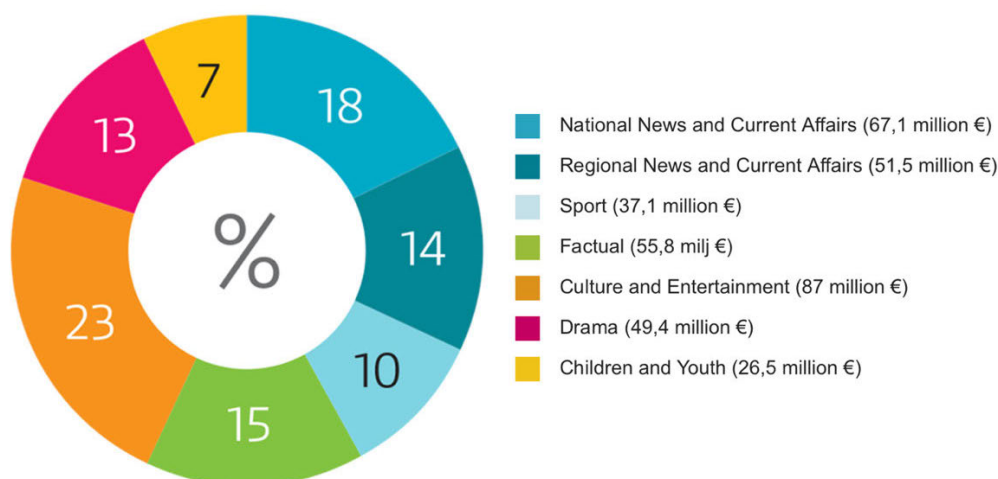
56 Yle, “Board of Directors’ report and financial statements 2019”, page 12. In 2020, €532.1 million was transferred to the Fund from the State budget.

57 Ibid.

58 Yle, “Board of Directors’ report and financial statements 2019”, page 12.

59 Ibid. “Turnover” includes revenues from the appropriation based on the Yle tax and income from program and service sales. “Net turnover” is income entered in turnover less value added tax and discounts. “Other operating income” includes subsidies, profit from the sale of fixed assets, rental income and other income. See Id., page 24. Also note that Yle is prohibited from showing advertising in its TV or radio programs or other content services provided within the framework of public service in various telecommunications networks. Yle is also prohibited from producing sponsored programs. See Yle Act, Section 12.

Figure 2: Content and services in 2019, tot. 374.5 million euros [Source: Yle]



47. It is apparent from Figure 2 above that Yle’s focus is to a large extent on entertainment content (representing around 46% of Yle’s content-related costs, including culture and entertainment (23%), drama (13%) and sports (10%). This illustrates Yle’s strategy to expand beyond its main missions which are to (i) “support democracy and everyone’s opportunity to participate by providing a wide variety of information, opinions and debates as well as opportunities to interact”, (ii) to promote Finnish heritage and culture and (iii) to produce content for minorities.

4. Yle’s broadcasting offering

48. Yle offers broadcasting services by operating nationwide FTA TV channels, nationwide and regional FM radio channels (and digital radio services) and Yle Areena, an online media service.⁶⁰

49. Yle’s FTA TV channel slots comprise Yle TV1, Yle TV2 and Yle Teema & Fem.⁶¹ *Yle TV1* is Yle’s main news, current affairs and factual journalism channel. Its programming also includes documentaries, drama, entertainment, cinema, as well as cultural and educational programs. *Yle TV2* is the main channel for sports programs and children’s and teenagers’ broadcasting. It also broadcasts drama, entertainment and factual programs, the later putting

60 Note that Sanoma includes Yle Areena in this sub-section only to the extent that it relates to the offering of live transmission and catch-up services of the programs broadcasted on its TV and radio channels. Yle Areena’s broad catalogue that is available for an indefinite period of time does not fall under Yle’s broadcasting offering, but constitutes, according to Sanoma, Yle’s expansion in the VOD segment, where it directly competes with commercial VOD providers. For a detailed discussion on this point, see Section III.A.2.

61 Prior to April 2017, what is now one slot on FTA (*Yle Teema & Fem*) was two separate channel slots: *Yle Teema* (a channel for culture, education and science with a focus on theme broadcasts) and *Yle Fem* (a Swedish-language full-service channel, broadcasting news, factual and children’s programs and entertainment). Although Teema and Fem are now offered within one channel slot on FTA, they still remain separate offerings.

an emphasis on domestic items, regional content and citizen journalism. *Yle Teema* is Yle’s channel brand for culture, education and science. It broadcasts recordings of performing arts and classical music, art and history documentaries, films and theme broadcasts. *Yle Fem* includes programming in Swedish. It broadcasts Yle’s Swedish-language offering (news, factual and children’s programs and entertainment), Nordic films and series, and Sami-language programs. It, moreover, shows selected broadcasts from Sveriges Television, Sweden’s Yle equivalent.

50. Yle is the largest supplier of FTA content in Finland, capturing in 2019 a share of viewing of 44%, as illustrated in Figure 3 below. Yle’s share of viewing in FTA has been persistent over the last 10 years, as illustrated in Figure 4 below, evidencing that its position in the provision of FTA content is entrenched.

Figure 3: Share of viewing in 10+ in 2019 [Source: Finnpanel]

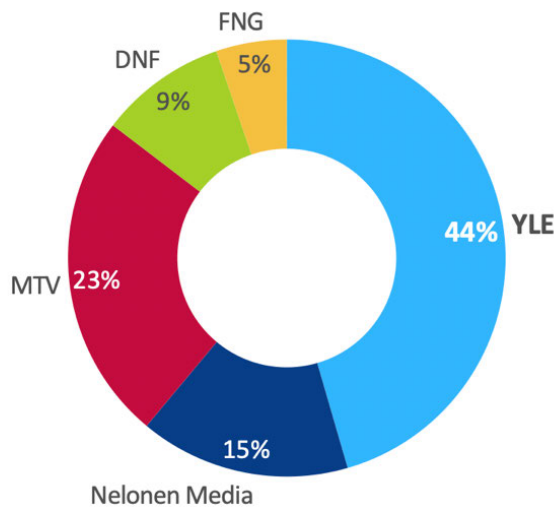
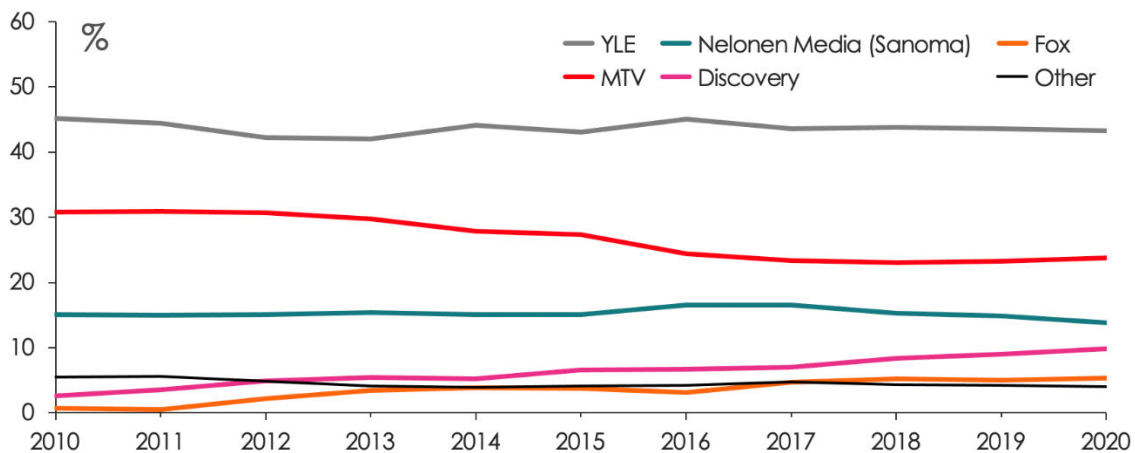


Figure 4: Development of share of viewing in 10+ (2010-2020) [Source: Finnpanel]



51. With regards to its radio offering, Yle operates six nationwide FM radio channels (Yle Radio 1, Yle Radio Suomi, YleX, Yle Radio Vega, Yle X3M and Yle Puhe), and three digital radio services. It, moreover, offers more than 20 regional radio programs.⁶²
52. Since 2007, Yle’s TV and radio programs are available online through Yle Areena, which is accessible through the areena.yle.fi website, mobile applications available on both Android and iOS devices, as well as several smart TV platforms and Sony’s PlayStation console. All Yle’s TV and radio channels are streamed live on Yle Areena, and broadcasted content, e.g., news broadcasts, sports broadcasts, culture programs, documentaries and series, can be viewed on Yle Areena.⁶³
53. In 2019, Yle reached 96% of the Finnish population every week and 78% daily.⁶⁴ Yle TV1 has been the most popular TV channel in Finland for many years, and Yle Radio Suomi the most popular radio channel in the country.⁶⁵ Yle Areena had 2.3 million views on a daily basis, 7 million visits monthly, and counted in total 1.45 million Yle IDs out of a Finnish population of around 5.5 million.⁶⁶

5. Yle’s non-broadcasting online activities

54. Yle has been following an expansive strategy, broadening its operations to cover new activities over the years, moving away from FTA TV and FM radio channels traditionally offered by the public broadcaster in carrying out its public service mission. The cornerstone of this growth is the expansion of Yle’s online presence, which is instrumental in attracting younger audiences to Yle’s content, in particular the under-45 age group, which is the most relevant target group for advertisers and, hence, for commercial broadcasters.⁶⁷
55. It is important to note that Sanoma does not contest Yle’s ability to offer the services forming part of its public service mission through online means. In principle, there is nothing wrong with offering its online Yle Areena service in order to allow Finns to watch or listen in real time Yle’s TV broadcasts or catch up with content broadcasted by Yle as part of its public service activities. What is problematic is that Yle engages in activities that are disconnected from its public service obligations, offering online services that directly compete with the

62 Yle, “Yle in a nutshell”, available at <https://yle.fi/aihe/pbi2019/yle-in-a-nutshell>, last accessed on 18 December 2020.

63 As will be explained in Section II.B.5.2, Yle Areena’s offering is far-reaching and extends beyond Yle’s public service remit, as well as the catch-up services commonly offered by public broadcasters.

64 Yle, “This is Yle 2020”, available at <https://view.24mags.com/yle/yle-2020>, last accessed on 18 December 2020, page 4.

65 Yle, “Yle in a nutshell”, available at <https://yle.fi/aihe/pbi2019/yle-in-a-nutshell>, last accessed on 18 December 2020.

66 Yle, “Yle’s year 2019”, available at <https://yle.fi/aihe/yles-year-2019>, last accessed on 18 December 2020; Yle, “Board of Directors’ report and financial statements 2019”, available at http://view.24mags.com/sites/all/files/public_files/documents/yle/a2f12ad686a1e55a24e9e4cecaa66b68/document.pdf, last accessed on 21 December 2020, page 6.

67 See Yle, “Board of Directors’ report and financial statements 2019”, pages 5-6.

offerings of commercial operators already active in Finland, while funding these new, non-broadcasting activities through State funds – i.e., the Yle tax. This strategy spans from Yle’s provision of text-based journalistic content (not targeted by the present complaint)⁶⁸ to Yle’s unconstrained expansion into online learning materials and VOD services (more on which below).

56. Worse, it seems that this will not be the end of Yle’s expansive strategy. Yle has publicly commented that it is planning on becoming active in new sectors, such as live events,⁶⁹ and extending its educational material offerings even further.⁷⁰ YLE wishes to be a “*provider of services for the entire nation*.”⁷¹ Yle’s strategy is to identify successful services developed by private media companies, such as Sanoma, to target specific customer groups and to launch its own services to compete with private actors. For example, having identified that “[m]edia companies increasingly and fiercely compete for young audiences and children”, Yle realized that its “*traditional assets [...] no longer support Yle as they used to*.” It, therefore, identified an alleged need to change its practices in order to strengthen its presence with regards to these audiences “*to ensure that the environment in which future generations are raised is not limited to the programming provided by global media giants*.”⁷² This vision is of course not accurate as Yle completely disregards that Sanoma, one of the largest media groups active in Finland, as well as other commercial operators also provide high quality and independent content.
57. We will now examine two areas in which Yle expanded its activities, moving away from its public service mission as the Finnish public broadcaster: online learning services (Sub-section 5.1) and VOD (Sub-section 5.2). This analysis shows a clear pattern on behalf of Yle to move away from its “public service broadcasting” activities, entering new markets and engaging in new activities while using State resources to unfairly compete with private companies.

68 The Finnish Media Federation filed a complaint in 2017 to the European Commission regarding the State funding for text-based journalistic online content to Yle, explaining that Yle’s provision of text-based journalistic content financed through the Yle tax does not meet the requirements of the EU State aid law. As a consequence of this complaint, the Finnish Government submitted a legislative proposal containing amendments to Section 7 of the Yle Act to limit the publication of online text-based journalistic content by Yle and to comply with EU State aid rules – signaling that the Commission’s opinion is that Yle’s current online text-based journalistic offering goes further than what allowed under EU State aid rules.

69 See “Yle’s strategy”, 19 May 2020 available at <https://yle.fi/aihe/strategy>, last accessed on 18 December 2020: “We create new ways to increase our understanding of our audiences by being present and interacting with them, both in person and digitally. The media is already more than just traditional content – events are highlighted in Yle’s operations. Live broadcasting is increasingly important.” Yle has also put in place a dedicated events team (which forms part of the “Sports and events unit”), whose role is described as follows: “The Events department produces influential and multimedia events in cooperation with Yle’s different units. In addition, the department develops the company’s event concepts, creating interaction with various audiences and an entirely new kind of digital presence as well. The Head of Department is Asta Kujala.” See “Yle’s units”, available at <https://yle.fi/aihe/s/about-yle/yles-units>.

70 The wording of YLE’s strategy makes it clear that YLE’s plans are far-reaching, and YLE wishes to expand as much as possible to reach and appeal to the interests all audiences in Finland. See “Yle’s strategy”, 19 May 2020, available at <https://yle.fi/aihe/strategy>, last accessed on 18 December 2020.

71 Ibid.

72 Ibid.

58. At this stage, we would like to emphasize that it is Yle's pattern of behaviour that prompted this Complaint and the fact that its expansive strategy backed up by State resources is not set to change any time soon. If no measures are taken, Yle will continue to use public funds to sponsor its ever-expanding scope of activities, distorting markets and destroying competition in the process.
59. It should also be noted that the fact that a legislative Proposal is being tabled putting forward amendments to Section 7 of the Yle Act does not negate the purpose and need for this Complaint. As explained above, the Proposal mainly addresses one of the non-broadcasting activities Yle engages with (i.e., online text-based journalistic content), while not fixing the systemic issues leading, for instance, to Yle's expansion into online learning services and VOD which are the subject of this Complaint.⁷³ More generally, the proposed amendment still leaves Yle's public service remit largely vague and broad.⁷⁴

5.1. Yle's expansion into online learning services

60. Yle originally offered learning services through the Koulu-radio and Koulu-TV, launched in 1963. These classic TV programs were addressed to primary schoolers and covered in their emissions lessons and knowledge useful to kids. Yle's learning offering expanded in 2000 with Opinportti, its web-service Kouluportti and day-time TV opettaja.tv, a hybrid TV / internet service directed to teachers and education professionals.
61. In 2010, Yle started offering Yle Oppiminen, an open online service / portal available through yle.fi/aihe/oppiminen.⁷⁵ Oppiminen is mainly targeted to students, but also offers materials for teachers. For primary (PE) and secondary (LSE) education, Yle offers a wide selection of complementary materials to be used in-class or outside, which are not structured according to the curriculum followed at school. Such materials can be used both by students and by teachers to complement the materials used in class on the basis of the curriculum. The "for teachers" (*Opettajalle*) section of the Oppiminen website, makes available ready-made packages on different themes which can be used by teachers directly for teaching.⁷⁶ Yle, finally, offers materials used for adult learning, in particular for foreign languages (available

73 Note that according to the Government's proposal, Yle's ability to publish educational text-based content that is not related to Yle's broadcasted content explicitly remains untouched. In other words, Yle can continue to provide textual content related to learning and teaching without this being related to an audiovisual publication. This applies, for example, to the publication of Yle Abitreenien and the corresponding Vetamix & Abimix published by Svenska Yle in cooperation with the education authorities. The Proposal however states that the intention is that Yle could continue to publish educational material online that does *not* affect the market for commercial educational materials. See Government proposal to the Finnish Parliament on the amendment of Section 7 of the Yle Act, page 24 (see [Annex 7](#)).

74 In addition, the proposal does not address further problems with regards to the activities of State-funded Yle and on which the current legislation remains silent. For example, it does not set in advance parameters for the calculation, control and review of Yle's compensation, and does not set out any arrangements for avoiding and recovering any overcompensation. It, furthermore, does not deal with the lack of effective supervision of Yle's compliance with its public service remit.

75 See <https://yle.fi/aihe/oppiminen>.

76 See <https://yle.fi/aihe/oppiminen/opettajalle>.

at the “Kielet” section of the Oppiminen website).⁷⁷ Such materials are, to a certain extent, also used in upper secondary education instead of materials published by commercial publishers.

62. In 2000, Yle started offering Yle Abitreenit, which is available through yle.fi/aihe/abitreenit, and is a service that aims at preparing students for the Matriculation Exam.⁷⁸ Abitreenit offers a wide variety of revision and practice tasks, exercises and materials, including past exams, covering all of the main subjects of upper secondary school (*Lukio*). Yle’s Abitreenit offering is Yle’s best known and most-used service, with which Yle directly competes against commercial providers of online learning services.
63. With regards to Yle’s most recent additions to the online learning offering, in 2015 Yle started offering Triplet.⁷⁹ This is a free service for teachers which takes the most interesting news of each day and turns them into learning materials – by creating exercises and complementary materials that can be used in class.
64. In August 2019, Yle further expanded its learning offering by releasing an app for preschoolers (the *Pikku Kakkonen’s Eskari* app), which includes a video game module aimed at improving the reading preparedness of preschool children.⁸⁰
65. It can be seen, therefore, that Yle has been increasing its online learning services offering, providing materials for students and teachers for all levels of K12 education. Sanoma expects that, given the likelihood that Yle’s activities on the media side will be limited if the amendment to the Yle Act is adopted, while its budget will remain the same, it is very likely that Yle will focus its efforts on expanding their online learning services offering even further.
66. In addition, given its unrestrained, State-funded budget, Yle can get a head start over its private competitors and gradually enter into new business areas, launching additional services before commercial operators can do so. Yle can make significant investments ahead of market commercialization possibilities without the need to refinance these new services. Therefore, contrary to commercial operators like Sanoma, Yle can build a market position before anyone else. Once the market takes off, Yle already has a well-established offering ahead of private competitors. This pattern is not specific to online learning services but is systemic.

5.2. Yle’s expansion into VOD

67. Yle entered the VOD segment by expanding the content available on Areena, Yle’s free online video service. Areena is not only an online video service allowing viewers to live-

77 See <https://yle.fi/aihe/oppiminen/kielet>.

78 See <https://yle.fi/aihe/abitreenit>.

79 See <https://yle.triplet.io>.

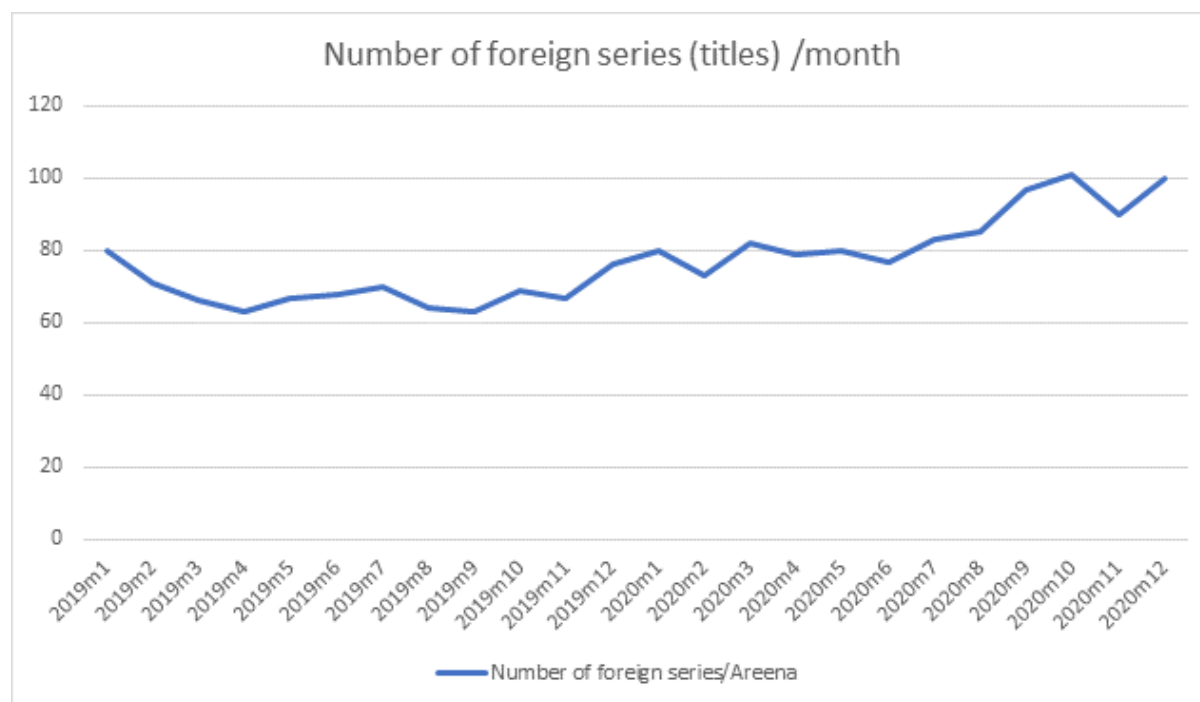
80 Yle, “Board of Directors’ report and financial statements 2019”, page 8.

stream the program broadcasted on Yle's FTA TV channels and catch up with already broadcasted audiovisual content. Instead, "*all programming made and purchased by Yle are published on Yle Areena as a full series catalogue and, as a rule, before they are broadcasted on linear TV.*"⁸¹

68. Yle made significant investments ahead of market commercialization possibilities also with respect to VOD. Thus, Yle established a strong market position at a very early stage of a nascent VOD segment, making it very difficult for private competitors to catch up with this unfair head start (which was only possible thanks to the State funding granted to Yle).
69. Yle Areena has recently added numerous domestic and foreign titles, e.g., in its "true crime" category (with 14 titles currently available on Areena), its "drama" content (e.g., Areena offers 20 series under the headline of "British drama" and 15 titles of international crime series) and its "reality entertainment" category (e.g., "*Naked singles*" (*Sinkut paljaana*), domestic reality entertainment produced by Aito Media, "*Ketonen & Myllyrinne*", a domestic sketch show originally produced for MTV (now Telia), "*The real L word*", a US reality entertainment show and "*Au pairs in Hawaii*", a domestic reality entertainment show, comprising eight seasons, all of which are available on YLE Areena). It is doubtful whether the existence of such content on Yle's free VOD service can be considered to meet the "*democratic, social and cultural needs*" of society – i.e., the purpose of public service media.
70. Figure 5 below illustrates the evolution in the number of foreign series (titles) per month for the years 2019 and 2020. As shown in this Figure, Yle has been increasing the foreign content available in its VOD catalogue in the last two years. Between July and December 2020, the number of foreign titles available on Areena increased by 25%, corresponding to Yle's strategy to make Areena an SVOD-like service.

81 Id., page 6 [emphasis added].

Figure 5: Number of foreign series (titles) / month available on Yle Areena (2019-2020)



71. Moreover, some of the titles available on Areena (e.g., “*The real L word*” or the Australian drama “*Everything’s gonna be ok*” which was published on Areena as part of its “Christmas package” for viewers) are Areena-exclusive – i.e., they have not been broadcasted on Yle’s channels. These examples show that Yle Areena is more than a catch-up service and bears more similarities to commercial VOD services – which have a comprehensive and stand-alone catalogue of content.
72. Similarly, the number of podcasts published only on Yle Areena further increased. Yle is also “actively negotiating on broadcasting rights that support online publishing and cover longer periods than before.”⁸²
73. Yle’s future strategy depends heavily on its Areena offering, aiming to increase the number of users logged into its online services with the Yle ID to an average of 800.000 per week, representing around 15% of the entire Finnish population.⁸³ In addition, Sanoma believes that around 300.000 users/week visit Yle Areena’s website without logging in. The advantage of having logged-in users is that Yle can provide personalized services and support content development (much like what commercial VOD players aim at with their subscription-based business) and that it increases the time spent on Yle’s content. It is clear, therefore, that Yle’s Areena offering goes much further than the online video services or TV catch-up services offered by public broadcasters in other Member States and competes with commercial players active in the VOD segment. Yle invests heavily in its VOD service (as illustrated in Table 4 below, Sanoma estimates that Yle’s investments in its VOD service

82 Ibid.

83 Id., page. 7.

amount to € [REDACTED] yearly), which is only expected to grow further in the following years – as explicitly stated in Yle’s new strategy.⁸⁴ At the same time, Yle’s free (and without advertising) VOD service can be promoted heavily on Yle’s TV channels – including Yle’s TV1 which has been the most popular TV channel in Finland for many years – driving Finnish viewers to the Areena SVOD-like service.

III. Legal assessment

74. In this Part, we first provide a description of the relevant markets (Section A), before providing a brief overview of the EU State aid legal framework relevant for this Complaint (Section B). We then show that the funding granted by the Finnish State to Yle for the provision of online learning services and VOD constitutes State aid incompatible with the internal market (Section C).

A. Description of the relevant markets

75. In this Section, we describe the markets in which Yle is active and which are distorted by the illegal aid granted to Yle by the Finnish State, as well as the actors competing in them. The focus will be on three markets of relevance to this Complaint: the market for online learning services (Sub-section 1), the market for audiovisual services, and in particular the segment for VOD services (Sub-section 2) and the market for the licensing / acquisition of audiovisual content for VOD services (Sub-section 3).

1. The market for online learning services

76. The Commission only dealt once with the market for online learning services. In the State aid decision *BBC Digital Curriculum*, the Commission mentioned the market for online learning services or more precisely the market for “electronic learning materials” without discussing the market definition in further detail.⁸⁵ According to Sanoma, this market comprises the provision of digital learning materials for students, as well as materials and software that can be used by teachers.

77. The Finnish market for online learning services comprises commercial operators Sanoma Learning, Otava, Studeo, e-Oppi and Edita. These operators offer a wide range of educational materials and digital solutions (video, animations and text content) to be used by students and teachers in primary, secondary and vocational education.⁸⁶ For primary and secondary education, commercial operators offer materials that cover fully the curriculum offered at school and which can be used by students and teachers for further learning and practice opportunities. Teachers using a digital learning platform provided by a commercial operator,

84 “Yle’s strategy”, 19 May 2020, available at <https://yle.fi/aihe/strategy>, last accessed on 18 December 2020.

85 See Commission Decision of 1 October 2003, N 37/2003 – *United Kingdom BBC Digital Curriculum*, C(2003)3371fin, paragraph 24: “The Commission notes that a market for electronic learning materials already exists.”

86 Note that some commercial publishers also offer printed learning materials.

such as Sanoma, can select among a wide range of materials provided therein to tailor the content to the needs of their class and students. Teachers' materials provided include, for example, Teachers' Guides (with a large amount of pedagogical and didactical tips and options with related materials), ready-made presentation materials including audiovisual materials (animations, video, photos) for each lesson, ready-made tests that can be modified by the teacher and used for testing and assessment, as well as a large number of exercises of varying difficulty that the teacher can give to students with different skill levels and needs. Through such a digital learning platform, therefore, teachers can plan and execute the lessons, as well as the practicing, testing and assessment. Students engage with the learning experience on the platform, using materials provided through the digital learning platform to study, practice and self-assess their learning progress.

78. For upper secondary education, commercial operators offer a wide range of materials to prepare students for the Matriculation Exam covering all subjects taught in this level of education. Finally, online learning service providers offer a broad range of materials for adult learning, including languages.
79. As explained in Section II.B.5.1 above, Yle is also active in the market for online learning services, offering materials and online platforms to be used by students and teachers, such as Oppiminen and Abitreenit. Currently, Yle directly competes with commercial operators when it comes to the offering of preparation materials for the Matriculation Exam (through its Abitreenit offering), as well as with respect to the offering of materials for the learning of foreign languages in adult education (which may also be used in upper secondary education).
80. With regards to primary and secondary education, Yle has been building an offering of complementary / additional materials and it is expected that, in the near future, this will lead to an offering that competes directly with that of commercial operators.⁸⁷ Sanoma would also like to emphasize that, even though Yle's online learning offering for primary and secondary education would not yet directly compete with commercial operators as it does not cover the full curriculum, Yle's free offering commoditizes the market, already instilling a habit of using free learning materials. This is a threatening trend, and the more Yle builds on its online learning offering and, thus, builds the habit of using its digital platforms when searching for learning content, the more likely it will be for teachers to stop using materials provided by commercial operators, choosing the free materials offered by Yle instead. In fact, any learning materials provided by Yle and targeted to teachers and / or students – be it materials that currently directly compete with publishers' materials, e.g., Abitreenit, but also any other services, e.g., Triplet – harm commercial publishers and competition in the market for online learning services in that they dilute the value commercial publishers could add to teaching and learning by supporting teachers and students. Importantly, the provision of learning materials by Yle also diminishes the opportunities commercial publishers have to innovate

87 It is also worth noting that, when it comes to secondary education, Yle's online learning materials may be said to compete with commercial publishers' online learning materials but also print materials. The secondary education segment in Finland is highly digital: in upper secondary education every student has a laptop and exams take place digitally. Thus, online learning materials may well replace print materials.

and create new learning services and business models. This is because the publishers' role is no longer limited to offering a static collection of content which follows the curriculum; instead, a significant part of their role is to provide a platform that allows teachers to combine content from different methods and to add additional content from various external sources into a teaching combination, which can easily be shared with students. Thus, the fact that Yle does not provide a full portfolio of "curriculum-based" content does not mean that its free online learning offering does not distort competition in the market for online learning services in Finland.

81. Commercial operators active in the Finnish online learning services market offer their broad range of online learning materials at a reasonable price.⁸⁸ For example, in 2021, the price range of materials for upper secondary education that correspond to two credits (2 opintopistettä) is approximately between €10-20 (VAT 0%) and the duration of license varies between one to five years depending on the publisher. Digital materials for teachers typically cost between €50-500 per year per school for each method. Moreover, some publishers offer certain free-of-charge materials for teachers when the school buys materials for students.

2. The market for audiovisual content (and the VOD segment)

82. When it comes to the offering of retail audiovisual content, the Commission has in the past defined separate product markets for FTA TV and Pay TV,⁸⁹ and, within the Pay-TV market, for linear and non-linear services.⁹⁰ The Commission has left open the question of whether the non-linear services market should be sub-divided into narrower markets, e.g., pay-per-view ("PPV") or VOD.⁹¹ Sanoma, however, strongly believes that the Commission should move away from such a fragmentation of the audiovisual services market and define a single market comprising all audiovisual services, including both linear and non-linear services, as viewers are increasingly migrating from linear to non-linear (online) content and are consuming linear and non-linear content simultaneously (i.e. they do not belong to either group exclusively).

88 Similarly, print materials are also reasonably priced, ranging between €14-30 (VAT 0%) per two credits in 2021.

89 See, e.g., Commission decision of 25 June 2008, COMP/M.5121 - *News Corp/Premier*, paragraph 15; Commission decision of 18 July 2007, COMP.M4504 - *SFR-Télé2 France*, paragraph 13; Commission decision of 21 December 2010, COMP/M.5932 - *NewsCorp/BskyB*, paragraph 99. However, in its Decision regarding the Liberty Global/Ziggo merger, the Commission left open the question as to whether a distinction between FTA and Pay TV exists. See Commission decision of 10 October 2014, M.7000 - *Liberty Global/Ziggo*, C(2018) 3569 final, paragraph 115.

90 See, e.g., Commission decision of 21 December 2010, COMP/M.5932 - *NewsCorp/BskyB*, paragraph 107.

91 See, e.g., Commission decision of 25 June 2008, COMP/M.5121 - *News Corp/Premier*, paragraph 21. PPV allows a user to purchase content that is available through the electronic program guide. In other words, a user pays to watch specific content (e.g., a specific sporting event or other live-event show) that is to be watched in real-time. Because these shows are live, the programs run on a fixed, predetermined schedule; a user, therefore, can check the TV guide on each PPV channel, find out the show they are interested in watching and the time that it airs, and then purchase the specific show. Once bought, the user has access to the show for however long the program is set to last, and once the show ends, the user's access to the content expires. In contrast, VOD allows users to watch content on-demand, i.e., at any time they prefer. VOD content, as will be explained below, can be offered on the basis of various business models.

83. In any event, Sanoma submits that, for the purposes of this Complaint, the definition of the relevant market can be left open, as it does not affect the assessment of the public funding granted to Yle for the provision of its VOD offering. Based on the Commission’s decisional practice, the relevant geographic market is national in scope or, at most, relates to linguistically homogenous areas.⁹²
84. We now describe the Finnish segment for VOD services, presenting the actors offering VOD services in Finland and the competitive dynamics of this segment.
85. As a preliminary remark, Sanoma would like to emphasize that there is a technical distinction between catch-up TV services and VOD services. Catch-up services allow viewers to watch, at a later time, content already broadcasted on the operators’ TV channels. Such content is available for a limited duration of time, such as for 7 days after the broadcast. In other words, catch-up services do not include content that has not already been broadcasted on FTA TV and do not offer a catalogue of series or movies available indefinitely for viewers to watch. Such catalogues are offered by VOD providers, i.e., commercial operators that offer a variety of audiovisual content to users for them to view on-demand. Therefore, references in the Complaint to the concept of VOD should be taken as excluding catch-up services unless indicated otherwise.
86. Commercial VOD service providers can choose to operate on the basis of three business models: the ad-funded business model (“**AVOD**”), the subscription-based business model (“**SVOD**”) and the transactional or “pay-per-view” business model (“**TVOD**”). In the case of AVOD, consumers can stream the content for free but have to sit through ads, much like commercial broadcast TV. In the case of SVOD, users purchase a subscription in order to view the content offered. They can then consume as much content as they wish at this flat rate (per month). When a pay-per-view / transactional business model is used, consumers purchase content on a “pay-per-view” basis. This mostly applies to sports events or recent movies in services that offer movie rentals.
87. In the Finnish VOD segment, there exist both domestic and global / international commercial operators that offer all three types of VOD services, i.e., AVOD, SVOD and TVOD (the latter, however, being of minor importance in the Finnish market, much like Pay-TV). Yle, Finland’s public service broadcaster, is active in this market through its Yle Areena offering, which is funded by the Finnish State through the Yle tax. Yle does not charge any fee for its VOD service and does not sell ad space (in other words, it does not monetize its VOD service through advertising), as Section 12 of the Yle Act imposes a prohibition on advertising to the extent that the services fall under Yle’s public service remit (and Yle considers that Yle Areena’s VOD offering forms part of its public service).

92 See, e.g., Commission decision of 21 December 2010, COMP/M.5932 – *NewsCorp/BskyB*, C(2010) 9684, paragraph 110; Commission Decision of 15 July 2019, COMP/M.9370 - *Telenor/DNA*, paragraph 26.

88. Table 1 below presents the VOD providers in Finland, as distinguished on the basis of the business model they employ.⁹³

Table 1: VOD providers in Finland

	AVOD	SVOD	TVOD⁹⁴	Tax-funded VOD
Domestic players	Ruutu (Sanoma) MTV (Telia)	Ruutu+ (Sanoma) MTV (Telia) C More (Telia)	Telco Elisa Telco DNA	Yle
Global / international players	Youtube⁹⁵	Netflix Disney+ HBO Nordic Elisa Viihde Viaplay ⁹⁶ Discovery+ Amazon Prime Video AppleTV+	iTunes Elisa Viihde Viaplay SF Anytime Google Play Amazon Prime Video	N/A

89. In the light of the significant number of actors present, the Finnish VOD segment is highly competitive, with global / international and domestic actors competing fiercely in terms of quality and price, allowing Finnish consumers to choose from a wide variety of offerings.
90. In terms of quality, the various VOD suppliers offer a broad catalogue of movies and TV series covering all categories (e.g., drama, lifestyle, fiction, documentaries etc.) of both domestic and foreign content. As to *international content*, global players, such as Netflix or Disney+, provide access to a wide variety of acquired and original foreign movies and series. Domestic suppliers also offer a considerable amount of foreign content. For example, Sanoma’s Ruutu AVOD and SVOD catalogues include 116 series that are categorized as “international”.⁹⁷ When it comes to *domestic content*, Finnish VOD providers make available a wide variety of content in the Finnish language; in 2018, it is estimated that 262 domestic titles with a production date in 2017 or 2018 were broadcasted for the first time (excluding

93 The main actors in the Finnish market are shown in the Table in bold.

94 This Table presents the main TVOD actors present in Finland. However, as indicated TVOD is of minor importance in the Finnish VOD segment, and therefore the players presented under this category cannot be considered to be “main actors” in the Finnish VOD segment. Also note that SVOD providers (e.g., C More and Sanoma) may also occasionally offer TVOD (e.g., when offering certain sports events).

95 It should be noted that while YouTube is an AVOD provider and constitutes a real alternative for users, YouTube’s offering is not similar to that of SVOD (and other AVOD and TVOD) providers in that YouTube does not offer the same broad catalogue of acquired and original international and domestic films and movies.

96 Elisa Viihde and Viaplay merged in December 2020 and the SVOD service is now called Elisa Viihde Viaplay.

97 Data from 3 February 2021.

Yle's and MTV's in-house production).⁹⁸ International players (such as NENT, with their VOD service Elisa Viihde Viaplay) also offer Finnish content in addition to their other Nordic and international offering.⁹⁹ International commercial VOD players, such as NENT and Telia's C More, also make available in Finland *content in the Swedish language*, attending to the preferences of the Swedish-speaking viewers in Finland.

91. The presence of numerous SVOD providers in Finland stimulates price competition in the market (also given that a wide variety of content is also available to Finns without a subscription fee). The average monthly cost of SVOD in Finland (excluding the more expensive subscriptions for sports content) is about €10 per month, VAT included.¹⁰⁰ This is in line with the global average SVOD monthly cost of €9.11.¹⁰¹
92. Due to the low barriers to entry, global / international actors (as well as new domestic actors) can enter the Finnish market and compete with the already existing VOD providers, as illustrated by the recent entry of Disney+, which brings original content from Disney itself, as well as from Marvel, Pixar and Fox. These new players can enter the market with lower price levels and high-quality content, putting pressure on existing domestic and global SVOD suppliers. For example, Disney+ has communicated a lower price level (€6.99 per month, VAT included) than the average SVOD monthly price in Finland of about €10, VAT included.
93. However, it is imperative to note that while the presence of global / international players and new entry by such players is important, these will offer mostly international content. The provision of domestic content – which is scarcer and mostly offered by domestic operators – is, therefore, an important distinctive feature for domestic commercial players and instrumental in their ability to compete with large international VOD providers. This competitive feature is jeopardized due to Yle's State-funded VOD offering, which negatively impacts existing domestic commercial VOD providers.
94. As can be seen in Figure 6 below, highest in the preferences of Finnish consumers are Netflix, Yle Arena and YouTube, followed by Sanoma's Ruutu, mtv Suomi, Telia's C More, Viaplay, Disney+ and HBO Nordic:

98 Based on data from AFPI (Audiovisual Producers Finland), a trade organization for production companies.

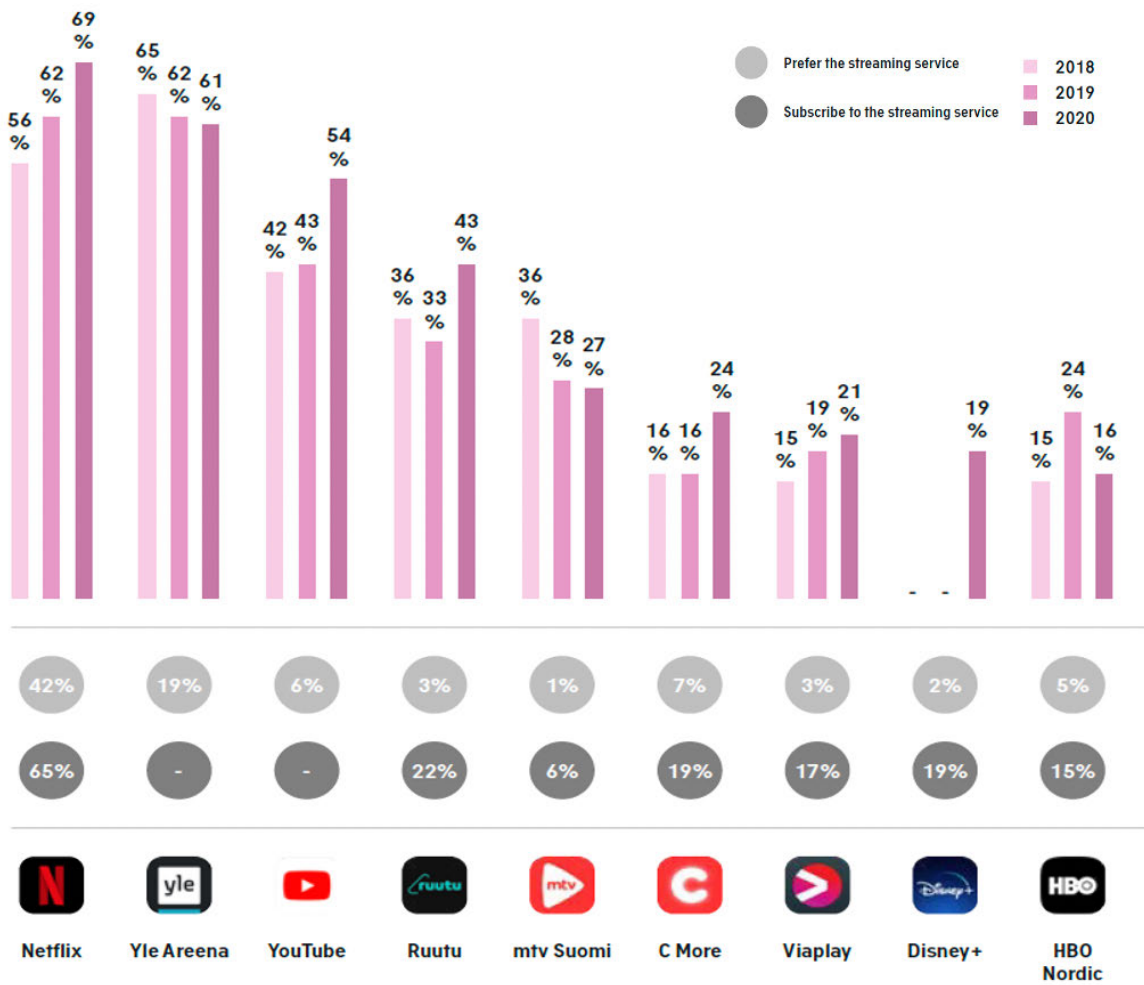
99 Some global players are expected to increasingly offer domestic content (produced or acquired). This offer is currently limited in Finland. Netflix, for example, makes available 12 Finnish programs and movies in its catalogue and has not yet produced a "Finnish original" movie or series. In Sweden, however, Netflix has already produced a few Swedish original series. It is likely, therefore, that Netflix will invest in Finnish content in the foreseeable future.

100



101 See Richard Middleton, "Germany, UK are 'biggest' European markets for SVOD, says research", 13 March 2020, available at <https://tbivision.com/2020/03/13/germany-uk-are-biggest-european-markets-for-svod-says-research/>, last accessed on 13 January 2020.

Figure 6: Consumer preferences – streaming services in Finland [Source: AudienceProject]



95. In terms of average weekly reach of VOD services, as well as the average min / day spent on VOD services, Yle Arena is the leading domestic player, following the global giants Netflix and YouTube, as illustrated in Figures 7 and 8 below.

Figure 7: Average weekly reach of VOD services – October 2020 [Source: Finnpanel Oy, Total TV-tutkimus, AdEdge VOD]

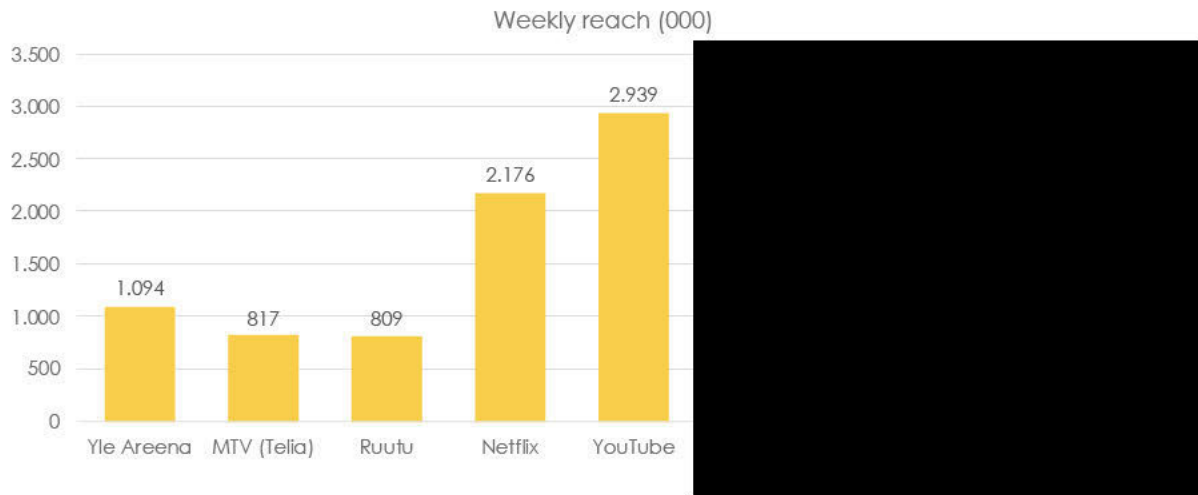
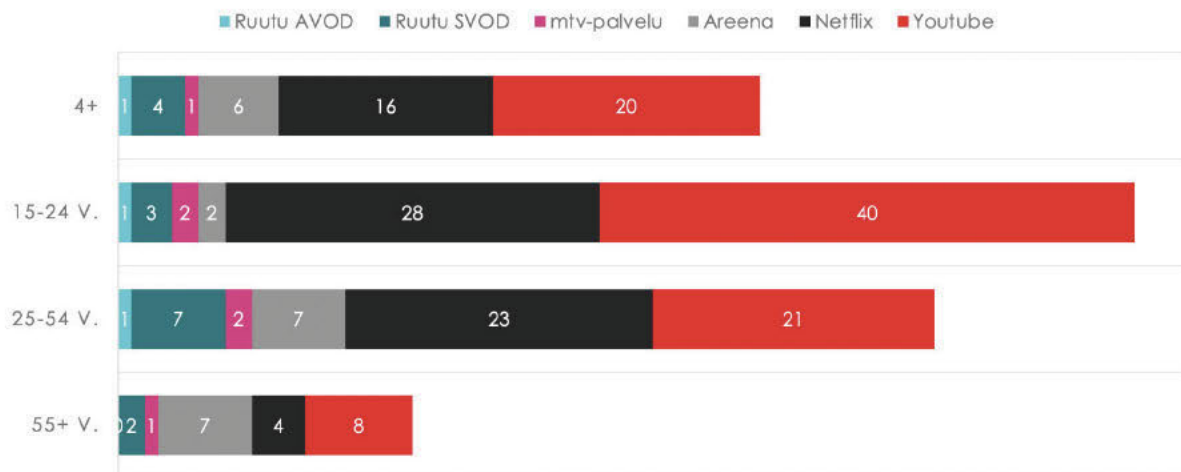


Figure 8: VOD service average min/day – October 2020 [Source: Finnpanel Oy, Total TV-tutkimus, AdEdge VOD]



96. Yle Areena’s weekly reach has consistently been significantly higher than the weekly reach of Sanoma’s Ruutu or Telia’s MTV. Yle has grown quicker than Sanoma in absolute terms in the last years, capturing a significant proportion of the growth of the VOD segment. A comparison of the weekly reach trends between Yle Areena and Sanoma’s Ruutu in the 2019-2000 period is shown in Figures 9 and 10 below.

Figure 9: Sanoma Ruutu and Yle Areena weekly reach in 4+ population 2019-2020 [Source: Finnpanel TV data]

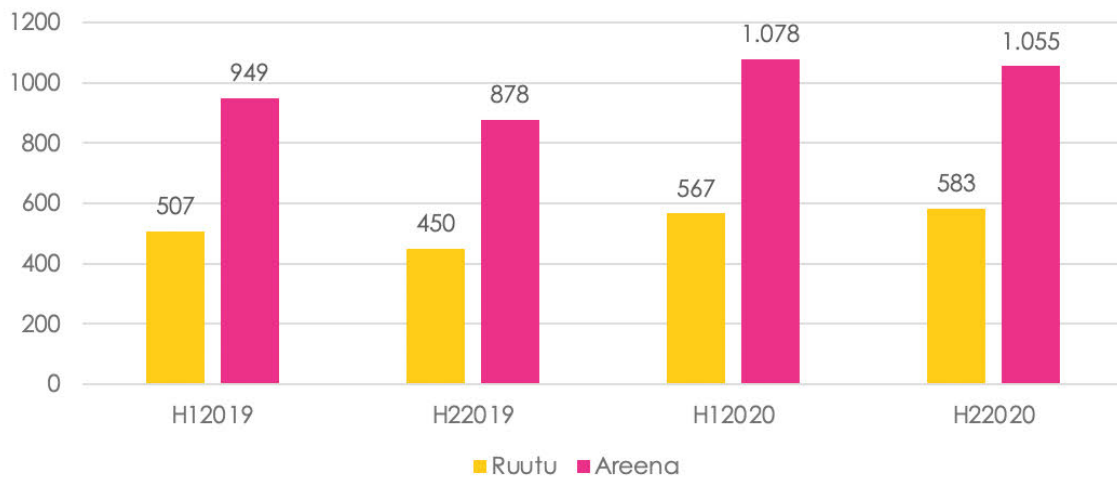
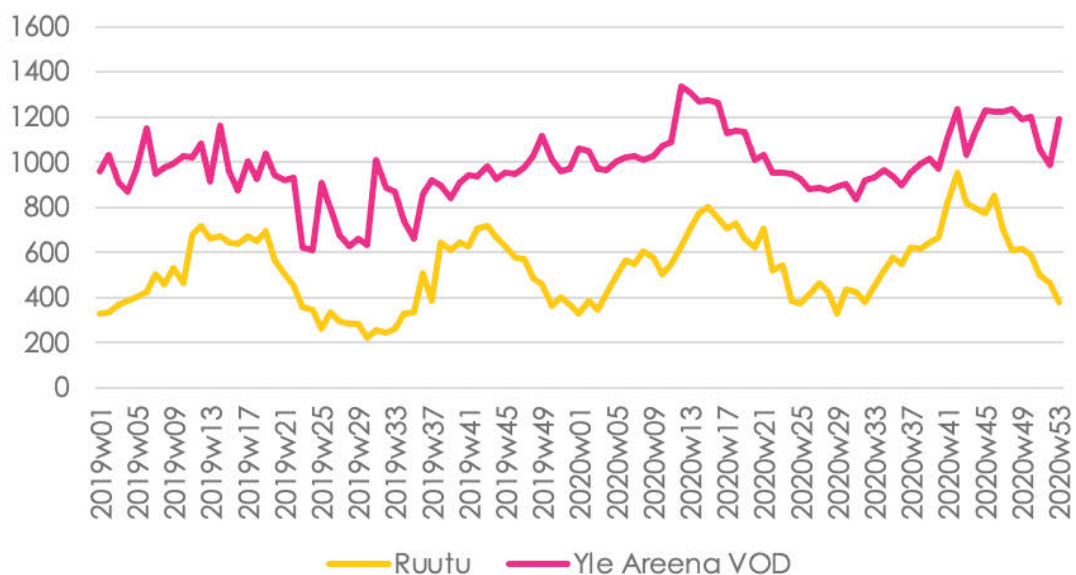


Figure 10: Sanoma Ruutu and Yle Areena weekly reach in 4+ population by week 2019-2020 [Source: Finnpanel TV data]



3. The market for the licensing / acquisition of audiovisual content

97. In the market for the licensing / acquisition of audiovisual content, the Commission has distinguished in its decisional practice between different types of content, namely between sport, film and other content. The Commission has also considered a possible distinction between FTA and Pay-TV, linear and non-linear content, premium and non-premium content, as well as the different broadcasting windows (including a possible further distinction within VOD between SVOD and TVOD), but has ultimately left the product

market definition open.¹⁰² With regards to the geographic market, the Commission has considered it to be national in scope.¹⁰³ Sanoma submits that as the exact market definition does not have an impact on the assessment of the illegal State aid Yle receives for the provision of its online learning services and VOD offering, the market definition can be left open.

98. For the purposes of the following analysis, it is sufficient to consider that Yle competes with domestic and international audiovisual content providers (including VOD providers) for the licensing / acquisition of rights to audiovisual content. Yle's stable, guaranteed and considerable public funding allows it to invest significantly in the acquisition of rights to domestic and foreign audiovisual content, competing with domestic commercial operators which have more limited resources to allocate for the acquisition of such content.
99. Tables 2 and 3 below illustrate the costs of investment undertaken by Sanoma and Yle for the acquisition and production of broadcasting/VOD content in the 2017-2019 period.¹⁰⁴ Taking into consideration acquisition *as well as* production costs is necessary in order to paint the right picture when it comes to the content costs undertaken by Yle and Sanoma. This is because, unlike Sanoma which does not have in-house production (and thus all its content is either commissioned from domestic production companies or acquired from foreign rights holders), Yle relies heavily on its large in-house production resources. Sanoma estimates that in 2019 alone, Yle invested € [REDACTED] on the production of broadcasting/VOD content. Therefore, in order to have a comprehensive picture of Yle's investments in content as they compare to those of Sanoma, it is important to not only consider acquisition costs but also production costs.
100. In this regard, as shown in Tables 2 and 3, in 2019 Sanoma's total investments in (FTA and VOD) content equaled € [REDACTED] million, while Yle's total investments in TV-related (broadcasting/VOD) content (acquisition and production) are estimated to have amounted to about € [REDACTED] – i.e., they are [REDACTED] times higher than Sanoma's investments in content.¹⁰⁵

102 See, e.g., Commission Decision of 30 May 2018, M.7000 – *Liberty Global/Ziggo*, C(2018) 3569 final, paragraphs 71-79.

103 See, e.g., Commission Decision of 30 May 2018, COMP/M.7000 – *Liberty Global plc/Ziggo N.V./Vodafone Group Plc*, paragraph 89; Commission decision of 18 July 2007, COMP.M4504 – *SFR/Télé2 France*, paragraph 15.

104 Sanoma's estimates are based on Yle's Annual Reports 2017-2019. Note, however, that these reports do not clearly distinguish between the different types of costs, as well as between the costs for TV, VOD and radio content. For example, in the 2019 Annual Report, Yle states that it spent €34.4 million on "broadcasting fees, broadcasting right fees and rebroadcasting fees related to music and radio, as well as other rights fees related to programs." It is not clear, however, what exactly falls under this group.

105 Even if we only take into account acquisition costs (which would not be the right approach as indicated above, due to Yle's large investment in the production of content), Yle's content acquisition costs are higher than Sanoma's costs. In 2019, for example, Nelonen Media's total content acquisition costs amounted to € [REDACTED] million, while Yle's content acquisition costs rose to [REDACTED]

Table 2: Sanoma's investments in content (2017-2019)¹⁰⁶

Nelonen Media content costs (acquisition)	2017	2018	2019
Domestic content			
International content			
Sports*			
International content & sports combined			
Total content costs (acquisition)			

Table 3: Yle's investments in content (2017-2019)



The content of Table 3 is completely redacted with a large black rectangular block.

B. Overview of the legal framework

101. Article 107(1) of the Treaty on the Functioning of the European Union (“TFEU”) sets out the definition of State aid that is in principle incompatible with the internal market:

“Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort

106 As explained above, Sanoma does not produce content in-house, but acquires all content, in contrast with Yle which invests heavily in in-house production. Thus, in order to compare the investments in content, Sanoma’s total costs (Table 2) comprise the cost for the acquisition of content (as Sanoma does not produce content in-house), while Yle’s total costs (Table 3) comprise the investments made both for the acquisition and the in-house production of content.

competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.”¹⁰⁷

102. Thus, a measure will be considered as State aid incompatible with the internal market if the four *cumulative* conditions of Article 107(1) TFEU are met: (i) it has been granted by the Member State or through State resources of any form to an undertaking, (ii) it grants a selective economic advantage to the receiving undertaking, (iii) it affects trade between Member States, and (iv) it distorts or threatens to distort competition.¹⁰⁸
103. The Treaty, as well as secondary legislation, provide certain exemptions to the general prohibition of State aid.¹⁰⁹ Of particular relevance for the present Complaint is the derogation of Article 106(2) TFEU for the provision of services of general economic interest (“SGEI”). Article 106(2) TFEU provides that:

“Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.”

104. In other words, aid can escape the prohibition of Article 107(1) TFEU, if three *cumulative* conditions are met:
- First, the State must have defined a service as SGEI (**definition**);
 - Second, the receiving undertaking must have been entrusted with the operation of the SGEI (**entrustment**); *and*

107 Treaty on the Functioning of the European Union (“TFEU”), OJ C 326, pages 47-390, Article 107(1).

108 See also, e.g., Judgment of the Court of 24 July 2003, C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, and *Oberbundesanwalt beim Bundesverwaltungsgericht*, ECLI:EU:C:2003:415 paragraph 74; Judgment of the Court of 8 May 2013, Joined Cases C-197/11 and C-203/11 *Eric Libert and Others v Gouvernement flamand (C-197/11) and All Projects & Developments NV and Others v Vlaamse Regering (C-203/11)*, ECLI:EU:C:2013:288, paragraph 74.

109 See, e.g., Articles 107(2) and 107(3) TFEU; Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (“GBER”), OJ L 187, page 1; Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid (“*de minimis* Regulation”), OJ L 352, pages 1-8; Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (“SGEI Decision”), OJ L 7, pages 3-10. There are also sector-specific instruments that provide for exemptions to the general prohibition of State aid under certain conditions.

- Third, the aid should not affect trade to such an extent that would be contrary to the interests of the EU (**proportionality**).¹¹⁰

105. In the case of public service broadcasting, which is considered to be different from other SGEIs in that it is “*directly related to the democratic, social and cultural needs of each society*,”¹¹¹ the derogation of Article 106(2) TFEU is interpreted in light of the Amsterdam Protocol. The Broadcasting Communication lays down the framework for assessment of State funding to public service broadcasters.¹¹² In other words, while the three requirements of the Article 106(2) TFEU derogation – i.e., definition, entrustment and proportionality – are the relevant criteria for assessment, their interpretation, is adapted to reflect the Amsterdam Protocol which states that:

“The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account.”

106. The exemption set out in the Amsterdam Protocol (and clarified by the Broadcasting Communication) only applies to the *broadcasting* activities of public service broadcasters and does not cover unrelated activities on other markets on which the public broadcaster might be active. The notion of “broadcasting” is closely intertwined with the concept of “audiovisual services”. The Broadcasting Communication defines “audiovisual service(s)” as the “*linear and/or non-linear distribution of audio and/or audiovisual content and of other neighbouring services such as online text-based information services*.”¹¹³
107. While it is not further explained in the Broadcasting Communication what is meant by “*neighbouring services such as online text-based information services*”, it can be assumed that, as reference is made to “*neighbouring*” services, such text-based and other services must be closely linked to the audiovisual services. Thus, “stand-alone” services would fall outside

110 These requirements have been further elaborated on in ECJ case law and notably the *Altmark* judgment (Judgment of the Court of 24 July 2003, C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht*, ECLI:EU:C:2003:415). The different requirements established in the *Altmark* case law have been used as a basis for further instruments enacted by the European Commission clarifying the applicable SGEI regime.

111 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts - Protocol annexed to the Treaty of the European Community - Protocol on the system of public broadcasting in the Member States (“Amsterdam Protocol”), OJ C 340, page 109.

112 Communication from the Commission on the application of State aid rules to public service broadcasting (“Broadcasting Communication”), OJ C 257, pages 1-14.

113 *Id.*, Footnote 8 [emphasis added].

the scope of the Broadcasting Communication. This strict interpretation of “broadcasting activities” seems to also be in line with the fact that Article 106(2) TFEU constitutes an exemption from the general prohibition of State aid and thus – like any exemption to the Treaty provisions – must be interpreted strictly.

C. Assessment of State funding for Yle’s provision of online learning services and VOD

108. Having outlined the applicable legal framework, we now show that the funding from the Finnish State to Yle for the provision of its online learning services and VOD constitutes State aid incompatible with the internal market. We first explain that this funding constitutes State aid within the meaning of Article 107(1) TFEU (Sub-section 1), before analyzing why the derogation of Article 106(2) TFEU is not applicable in this case (Sub-section 2).

1. The public funding of Yle’s provision of online learning services and VOD satisfies the conditions of Article 107(1) TFEU

109. As explained in Section III.B above, a measure will be considered as State aid incompatible with the internal market if the four *cumulative* conditions of Article 107(1) are met: (i) it has been granted by the Member State or through State resources of any form to an undertaking, (ii) it grants a selective economic advantage to the receiving undertaking, (iii) it affects trade between Member States, and (iv) it distorts or threatens to distort competition.¹¹⁴ All four conditions are met in the case of Yle’s funding from the Finnish State.

1.1. Yle’s funding has been granted by the State or through State resources

110. The first condition, i.e., the “State origin” of the measure, in fact comprises two separate and *cumulative* conditions: first, that an advantage is “*granted directly or indirectly through State resources*” (i.e., that there is a transfer of State resources), *and* second, that this advantage is “*imputable to the State.*”¹¹⁵

111. The transfer of State resources can take many forms, such direct grants, loans, guarantees, direct investment in the capital of companies and benefits in kind. State resources include all resources of the public sector.¹¹⁶ The origin of these resources “*is not relevant provided that, before being directly or indirectly transferred to the beneficiaries, they come under public control and are therefore available to the national authorities, even if the resources do not*

114 See also, e.g., Judgment of the Court of 24 July 2003, C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, and *Oberbundesanwalt beim Bundesverwaltungsgericht*, ECLI:EU:C:2003:415, paragraph 74.

115 Judgment of the Court of 16 May 2002, C-482/99 *French Republic v Commission of the European Communities*, ECLI:EU:C:2002:294, paragraph 24.

116 See Judgment of the Court of First Instance of 12 December 1996, T-358/94 *Compagnie nationale Air France v Commission of the European Communities*, ECLI:EU:T:1996:194, paragraph 56: “all subsidies from the public sector threatening the play of competition are caught by the abovementioned provisions, it being unnecessary for those subsidies to be granted by the government or by a central administrative authority of a Member State.”

*become the property of the public authority.*¹¹⁷ Moreover, it is irrelevant whether or not the institution transferring the aid is autonomous within the public sector, i.e., whether it is independent from other authorities.¹¹⁸

112. An intervention will by definition be imputable to the State

“[i]n cases where a public authority grants an advantage to a beneficiary, [...] even if the authority in question enjoys legal autonomy from other public authorities. The same applies if a public authority designates a private or public body to administer a measure conferring an advantage. Indeed, Union law cannot permit the rules on State aid to be circumvented through the creation of autonomous institutions charged with allocating aid.”¹¹⁹

113. In the case of Yle, there is a transfer of funds from the State Television and Radio Fund managed by Traficom, a public authority imputable to the Finnish State, to the public broadcaster to finance all its activities, including the provision of online learning services and VOD. These funds have been transferred to the Fund from the State Budget (i.e., they originate from the State) and are collected by the Finnish State through the Yle tax.¹²⁰ Thus, it is evident that the first condition of Article 107(1) is fulfilled and funding for Yle’s online learning services and VOD is imputable to the State and granted through State resources.

1.2. The aid grants a selective economic advantage to Yle

114. The second condition of Article 107(1) TFEU requires the granting of a selective economic advantage to the recipient undertaking. In the *Altmark* case, the European Court of Justice (“ECJ”) elaborated further on the notion of State aid in general, and the second criterion of Article 107(1) TFEU in particular in the context of a SGEI.¹²¹ The ECJ stated that a selective economic advantage will not be found to have been granted

“where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have

117 Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (“Notice on the notion of State aid”), OJ C 262, pages 1-50, paragraph 57.

118 Judgment of the Court of First Instance of 12 December 1996, T-358/94 *Compagnie nationale Air France v Commission of the European Communities*, ECLI:EU:T:1996:194, paragraph 62: “the existence of rules for ensuring that a public body remains independent of other authorities does not call into question the principle itself of the public nature of that body. Community law cannot permit the rules on State aid to be circumvented merely through the creation of autonomous institutions charged with allocating aid.”

119 Notice on the notion of State aid, paragraph 39.

120 See Section II.B.3 above.

121 To be more precise, the case refers to Article 92(1) of the EC Treaty, which now is Article 107(1) TFEU. We will refer directly to the numbering as is now.

the effect of putting them in a more favourable competitive position than the undertakings competing with them.”¹²²

115. To reverse the reasoning, a selective economic advantage will exist if the State measure cannot be regarded as compensation for services provided by the recipient undertaking to discharge public service obligations. In that case, the undertaking will have enjoyed a “*real financial advantage*” that puts it “*in a more favourable competitive position*” than its competing undertakings and thus a State aid has been granted (if the other conditions of the notion of State aid are satisfied).
116. Yle’s public funding is *de jure* selective: on the basis of Finnish national legislation, Yle is the only undertaking financed through State resources for the provision of online learning services and VOD. It is thus evident that Yle’s public funding confers a “*selective economic advantage*” to Yle within the meaning of Article 107(1) TFEU.
117. Moreover, according to the *Altmark* judgment, in order for compensation to “*escape classification as State aid*”, four cumulative conditions must be fulfilled:
- “First, the recipient undertaking **must actually have** public service obligations to discharge, and the obligations must be **clearly defined**;”¹²³
 - “Second, the **parameters** on the basis of which the compensation is calculated must be **established in advance in an objective and transparent manner**, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings;”¹²⁴
 - “Third, the **compensation cannot exceed what is necessary** to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;”¹²⁵ *and*
 - “Fourth, where the undertaking which is to discharge public service obligations, in a specific case, **is not chosen pursuant to a public procurement procedure** which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of **compensation** needed must be determined on the basis of an analysis of the costs which a **typical undertaking, well run and adequately provided with means of transport** so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.”¹²⁶

122 Judgment of the Court of 24 July 2003, C-280/00 *Altmark*, paragraph 87.

123 *Id.*, paragraph 89 [emphasis added].

124 *Id.*, paragraph 90 [emphasis added].

125 *Id.*, paragraph 92 [emphasis added].

126 *Id.*, paragraph 93 [emphasis added].

118. Given that the four *Altmark* criteria are *cumulative*, it is sufficient for Sanoma to show that one of them is not fulfilled for Yle’s State funding to be considered as granting a selective economic advantage to the Finnish public service broadcaster. Despite the fact that the first criterion is clearly not satisfied (which could mark the end of the analysis of this criterion), for purposes of completeness, Sanoma will explain that the rest of the criteria are also not fulfilled.

1.2.1. Yle’s public service obligations are not clearly defined

119. As explained above in Section II.B.1, Yle’s public service obligations are not clearly defined. The unclear definition of Section 7 of the Yle Act has been used by Yle as a justification for its engagement in activities that are in fact not part of its public service remit. Yle seems to have disregarded that the Yle Act provides that only TV and radio programming and services *related* to this TV and radio programming fall within the scope of Yle’s public service remit, and that any “*other content services*” have to be *related* to public service. Instead, it simply offers services unrelated to its public service remit and to the democratic, social and cultural needs of the Finnish society, such as online learning services and VOD.
120. With regards to the provision of online learning services, the Finnish State might try to argue that they fall within the definition of Yle’s public service remit as per Section 7 of the Yle Act, as this provision requires Yle to “*take educational and equality aspects into consideration in the programmes, provide an opportunity to learn and study, give focus on programming for children and young people, and offer devotional programmes.*” This, however, would be a wrong interpretation of this provision. It is one thing to offer TV and radio programming that provides children with opportunities to learn – much like what Yle’s Koulu-radio and Koulu-TV offered – and another thing to expand into a new, unrelated market, that of online learning services. In other words, the Yle Act requires Yle *in its programming* to take educational and learning aspects into consideration but does not define Yle’s public service remit as encompassing online learning services unrelated to its TV and radio programming.¹²⁷

127 The Government proposal for an amendment to Section 7 of the Yle Act submitted to the Finnish Parliament in December 2020 seeks to create an exception for learning services from the requirement that textual content be associated with a publication containing moving image or sound. In other words, it seeks to include (online) learning services (that Yle has already been providing) within the public service entrusted to Yle. However, this amendment would not change the analysis of this Complaint on the illegal State aid granted to Yle for the provision of its online learning services. First, it is not certain that the amendment will be adopted. Second, even if this amendment is adopted in its current wording, this does not change the fact that Yle’s provision of online learning services up until the time of the adoption of the amended Act did not fall within Yle’s public service remit – and thus the funding of such services through State resources cannot be deemed legal. Third, the amendment at its current wording still does not clearly define Yle’s public service remit when it comes to the offering of learning services: the proposal merely provides in the abstract that Yle’s offering of textual content does not have “to be associated with a publication containing the company’s moving image or sound.” This is nothing but a clear definition of Yle’s public service remit. Fourth, the proposal does not change the fact that there is no reason for the Finnish State to define the provision of online learning services as a SGEI, as there is no market failure that would justify this. Fifth, the proposal would not properly entrust Yle with the provision of such services, as, e.g., it does not define the timeframe for such an entrustment, it does not set in advance parameters for the calculation, control and review of Yle’s compensation, and does not set out any arrangements for avoiding and recovering any overcompensation.

121. With regards to the provision of VOD services, a distinction should be made between catch-up TV and VOD offering, as mentioned above in Section III.A.2. It is not disputed that Yle may offer catch-up TV – in other words, make available online content already broadcasted on TV for viewers to watch on-demand for a clearly-set and limited time after the broadcast (such as 7 days). After all, this content is an additional service *related* to Yle’s TV programming. Such a 7-day catch-up service would allow Yle to make available on-demand a significant amount of content, given that such service would include all the content broadcasted in all Yle’s channels. However, the provision of VOD – that is a catalogue of movies and TV shows that is available for viewers to (binge-) watch on demand for a longer time (or even for an unlimited time) after the TV broadcast or that even includes content (films or series) not broadcasted at all on Yle’s TV channels or made available on Yle Areena before being broadcasted on TV – goes much beyond the catch-up service that Yle can offer as part of its public service remit, as it is not a service *related* to Yle’s TV programming – nor is it a content service *related* to public service. Instead, it is a commercial service offered by actors competing in the VOD segment and not a public service entrusted to Yle on the basis of the Yle Act. Otherwise, Yle would also be entitled to launch a DVD rental service, which is a very similar activity except that the medium (DVD) is different.

1.2.2. The parameters of calculation of Yle’s compensation are not established in advance in an objective and transparent manner

122. Yle is funded through appropriations from the State Television and Radio Fund on the basis of a price floor set in 2013 – €500 million yearly. The law provides that this amount is to be reviewed (i.e., increased) annually on the basis of an index “*in which a one-third weight is given to the general cost-of-living index and a two-third weight is given to the index of wage and salary earnings.*”¹²⁸

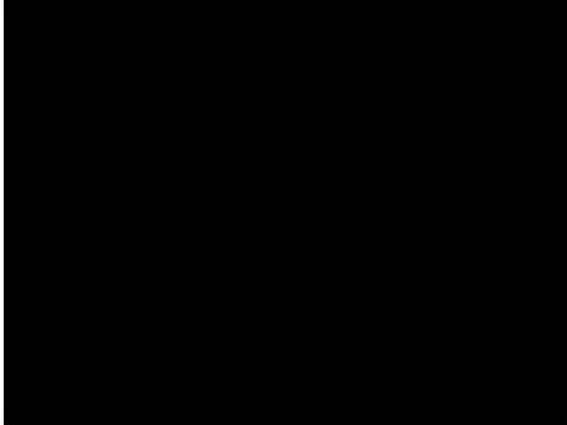
123. Yle, therefore, receives an annual budget which is only to be adjusted to reflect changes in the cost of living and the cost of labour, but is not to be adjusted to reflect the costs Yle actually undertakes to carry out clearly defined public service activities. In other words, there exist no transparent and objective parameters on the basis of which Yle’s public funding is calculated, let alone transparent and objective parameters specific to the compensation it receives for VOD and online learning services. The Finnish public broadcaster receives a pre-determined annual budget (set in 2013 and adjusted on the basis of an index that is not linked to Yle’s actual costs) that it is then allowed to allocate internally as it deems fit. Yle’s funding, therefore, operates in the exact opposite way of what is required by the *Altmark* case law: instead of setting out in advance the (expected) costs of Yle’s individual public service activities on the basis of which Yle would receive its compensation, Yle in fact receives a budget from the State and can then decide how and where to allocate this budget. It is to justify this very generous budget, and make sure it keeps it in the future, that Yle expands its activities into fields that have nothing to do with its public service, hence disrupting competition on otherwise competitive markets.

128 Act on the State Television and Radio Fund, Section 3(2).

- 1.2.3. Yle's compensation exceeds what is necessary to cover the costs incurred in the discharge of its public service obligations
124. Given the lack of transparency as to Yle's compensation and costs, it is not possible for Sanoma to examine how Yle's funding for online learning services and VOD compares to its actual costs. As indicated in the previous Section, Yle does not define the costs related to its public service missions in advance so as to receive appropriate funding, but uses the public money it receives according to its own priorities, for instance to launch new services, such as VOD or online learning services. Furthermore, Yle does not disclose how it allocates its public funding internally, and thus the amount of this budget that finances Yle's online learning services and VOD offering. Yle also does not disclose separate bookkeeping for VOD and online learning services.
125. In addition, Yle is not entrusted with the provision of online learning services and VOD, which are in any event not to be considered as public service activities. Thus, this criterion is not fulfilled.
- 1.2.4. The level of compensation is not benchmarked against the costs of a typical, well-run and adequately resourced undertaking
126. The fourth *Altmark* criterion provides that if a SGEI provider is not chosen pursuant to a public procurement procedure, "*the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations.*"
127. Yle has not been chosen as the public service broadcaster on the basis of a public procurement procedure. Therefore, the level of its compensation should indeed be benchmarked against the costs of a typical, well-run and adequately resourced undertaking providing similar services – that would be online learning services and VOD. Such a benchmarking exercise has never taken place, according to Sanoma's best knowledge. Yle's budget was set in 2013 at €500 million and it can since only be adjusted, i.e., increased, to reflect changes in wages and salary earnings and, to a lesser extent, in the cost of living. These are, however, only parts of the cost of an undertaking such as Yle. Costs, such as those related to the acquisition or the production of content (which in fact represent the majority of Yle's costs) are not taken into consideration in the calculation of Yle's compensation.
128. As Yle does not publicly disclose how it allocates its State funding internally, it is not possible to compare with certainty Yle's cost base for the provision of online learning services and VOD with that of commercial operators. Sanoma estimates that Yle's cost base for online learning services and VOD is much higher compared to its own cost base for these services.
129. As illustrated in Tables 2 and 3 above, Yle's investments in content are ■ times higher than similar investments undertaken by Sanoma. While Sanoma's TV-related content cost

base is around € [REDACTED] million, Yle's broadcasting/VOD content cost base is about € [REDACTED]. Sanoma estimates that out of this total € [REDACTED], VOD (outside catch-up) content costs for Yle amount to € [REDACTED], i.e., represent between [REDACTED]% of Yle's total content costs.¹²⁹ According to Sanoma's best estimates, Yle's content costs for VOD are as follows:¹³⁰

Table 4: Estimates of Yle's costs for VOD services [REDACTED] (outside catch-up services)



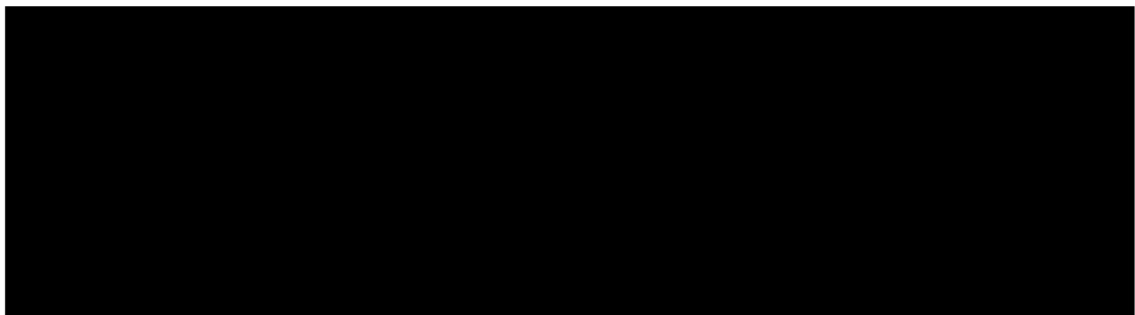
130. It is clear, therefore, that Yle's content costs are much higher than the respective costs of its competitors. This is because of Yle's stable revenue flow from public resources, which is irrespective of Yle's actual costs in carrying out its public service activities. It is important to note, in this regard, that content and services costs represent the highest chunk of Yle's overall costs, amounting to 79% of Yle's total costs in 2019, as illustrated above in Figure 1.
131. When it comes to the provision of online learning services, Sanoma estimates that Yle's costs for the provision of such services amount to approximately € [REDACTED].¹³² Compared to

129 Sanoma took as a reference Yle's entire catalogue (as of January 2021) and allocated acquisition and production costs by category of content produced / acquired between 2019 and 2021. Older content has not been taken into account, as Sanoma adopted a conservative approach (some of these titles might still generate costs). To perform this allocation, Sanoma listed each title in one of the program categories. Subsequently, Sanoma used suitable hourly rates for the titles produced and acquired between 2019 and 2021 and the episode volume. Hence, Sanoma went through Yle's total offering and placed a value to the most recent content. News, current affairs and documentaries were excluded from this calculation.

130 This calculation excludes news, documentaries and current affairs, as Sanoma considers that these are TV-related categories and would thus not form part of a VOD catalogue.

131 Please note that there may be some overlap between youth content and drama, as the domestic VOD programming was calculated and valued one by one including also the drama targeted at youth.

132



the size of the online learning services market, this amount (i.e., the State aid Yle receives) is significant. For instance, the estimated market size with respect to preparatory materials for the Matriculation Exam amounts to around € [REDACTED].

1.3. Yle's funding affects trade between Member States

132. The third condition, namely that trade between Member States be affected, does not require the receiving undertaking to carry out itself cross-border activities. This condition will be fulfilled if its competitors are also active in other Member States or their ownership structure extends over several Member States.
133. In its Decision regarding the *Annual Financing of the Dutch public service broadcaster*, the Commission held that it generally considers that

“the State financing of public service broadcasters is liable to distort competition and affect trade between Member States given the often international trade in programmes and programme rights, [...] and because the ownership structure of private competitors may extend over several Member States. [...] According to the jurisprudence of the Court of Justice, “when state financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Union trade the latter must be regarded as affected by that aid”, even if the beneficiary undertaking itself is not involved in exporting. Similarly, where a Member State grants aid to undertakings operating in the service and distribution industries, it is not necessary for the recipient undertakings themselves to carry on their business outside the Member State for the aid to have an effect on trade within the European Union.”¹³³

134. Similarly, in the *BBC Digital Curriculum* Decision, the Commission stated that

“The BBC would deliver to the education market entailing a potential distortion of competition. BBC's competitors in the U.K. also sell to other Member State markets. Furthermore, the ownership of these competitors may also extend to other Member States. The fact that the service is intended for students in the U.K does not prevent an effect on intra-Community trade. As confirmed by the Court, the question of whether aid is capable of affecting trade between Member States does not depend on the local or regional character of the services provided or on the scale of the field of activity

[REDACTED]

133 Decision of the European Commission of 26 January 2010, E-5/2005 (ex NN 170b/2003) – *Annual financing of the Dutch public service broadcasters – The Netherlands*, C(2010)132 final, paragraphs 96-97 [emphasis added].

concerned. The scheme can thus be regarded as affecting trade between Member States.¹³⁴

135. It is thus evident that Yle's State funding affects trade between Member States: Yle's competitors (both in the market for online learning services and in the VOD segment) are also active in other Member States and their ownership extends to other Member States. For example, Sanoma – which competes with Yle in the provision of both online learning services and VOD – is active not only in Finland but also, *inter alia*, in Belgium, the Netherlands, Spain and Germany with respect to online learning services and it is a listed company with ownership that extends beyond Finland. In the VOD segment, international players, such as Netflix or Disney+ are active in Finland: their ownership structure and activities expand over numerous Member States. Yle, moreover, competes with commercial operators for the acquisition of program rights for audiovisual content, which involves cross-border trade (as rights to foreign movies and TV series are traded). Yle also offers content in the Swedish language, thus potentially competing with Swedish media and reaching Swedish-speaking consumers. Finally, it is important to note that, as a rule, VOD services and online learning materials can be provided by operators located in other Member States, and thus Yle's public funding may erect barriers to entry.
136. Consequently, the third condition of Article 107(1) TFEU is fulfilled: the provision of public funding for Yle's online learning services and VOD affects trade between Member States.

1.4. Yle's public funding distorts competition in the relevant markets

137. With regards to the fourth condition of Article 107(1) TFEU (i.e., that competition has been or may be distorted), the Commission held in its Decision on the *Annual financing of the Dutch public service broadcaster* that

“[w]here public service broadcasters offer online services which are similar or identical to online services offered by private operators, it is obvious that the public funding of such activities may have an impact on the business model of private operators either through the competition of pay-services offered by private operators with services offered by public service broadcasters for free or through the competition for users which ultimately determine the advertising revenues of private operators.”¹³⁵

138. In Finland, both online learning services and VOD are offered by private operators, and Yle's services are similar to those already offered by commercial operators. Thus, Yle's provision of such services funded by State resources distorts competition in the highly competitive Finnish market for online learning services and the VOD segment, for the reasons explained below (in Sub-sections 1.4.1 and 1.4.2, respectively).

134 See Decision of the European Commission of 1 October 2003, N-37/2003 – *United Kingdom – BBC Digital Curriculum*, C(2003)3371fn, paragraph 25 [emphasis added].

135 Decision of the European Commission of 26 January 2010, E-5/2005 (ex NN 170b/2003) – *Annual financing of the Dutch public service broadcasters – The Netherlands*, C(2010)132 final, paragraph 99 [emphasis added].

1.4.1. Yle's public funding distorts competition in the market for online learning services

139. With regards to the market for online learning services, commercial actors such as Sanoma, Otava and Edita offer a wide variety of digital learning products and services, addressed to both students of primary, secondary and vocational education, and teachers. Sanoma and other competitors not only offer digital course materials that cover all subjects of the school curriculum, but also digital learning and teaching platforms that drive learning impact. Yle offers online learning materials that compete head-to-head with the offering of Sanoma and other commercial operators. A major difference, however, is that Yle can offer such online learning products and services for free given that it is publicly funded. In contrast, commercial operators have to offer their services under normal market conditions – i.e., for a fee.
140. The availability of similar *free* products and services in the market reduces customers' willingness to pay for products and services and reduces the revenues of commercial operators – negatively impacting commercial publishers' ability and opportunities to innovate and create new learning services and business models. To put it into perspective, with regards to the preparatory materials for the Matriculation Exam, an area in which Yle directly competes with commercial operators, Sanoma estimates that the total segment size is about € [REDACTED].¹³⁶ Sanoma's revenue in this area is currently around € [REDACTED] million per year. As Sanoma is a large player in the market, its revenue, in the absence of Yle's free offering, could be approximately € [REDACTED] million (i.e., capturing [REDACTED] % of the market).
141. Sanoma estimates that the total learning material spend per pupil in Finland amounts to approximately € [REDACTED] per year in primary education, € [REDACTED] per year in secondary education and € [REDACTED] per year in upper secondary education (*lukio*). With its free offering attracting customers (which therefore no longer purchase the materials offered by commercial operators), Yle captures a material part of the annual spend of Finnish students that would otherwise be captured by commercial operators. The ability of these operators to amortize investments is therefore reduced, and so is the attractiveness of investment and innovation in this market. Thus, Yle's public funding for the production and offering of online learning services distorts competition in the existing market for online learning services.
142. As the Commission held in its *BBC Digital Curriculum* decision, which is similar to the case at hand, in terms of the provision by the public service broadcaster of online learning materials for free:

“[f]or the purpose of assessing the distortion of competition, the Commission notes that a market for electronic learning materials already exists. The BBC would benefit from direct funding that would not be available to other undertakings. The BBC's brand

136 This is estimated on the basis that, in Finland, approximately 35.000 students sit the Matriculation Exam per year, each taking five to six subjects. If each student would spend € [REDACTED] per exam on preparation material, this would lead to a total market size of about € [REDACTED].

coupled with free availability of material to the user threatens to distort competition in a market where there are incumbent, commercial players.”¹³⁷

143. In Finland, the market for electronic learning materials (or online learning services) already exists. Yle benefits from direct funding that is not available to other undertakings, it has a strong brand (being the public service broadcaster with a strong, enduring share of viewing in FTA and reaching all Finnish consumers) and its online learning materials are provided for free. Thus, a distortion to competition (or, at minimum, a threat that competition will be distorted) is established in this case.
144. In addition, given its considerable, guaranteed and unrestrained budget, Yle can get a head start over commercial operators and gradually increase its offering, by launching new services. Yle can invest significantly ahead of market commercialization possibilities, without undertaking risk and without the need to refinance these new learning services – due to its continuous revenue flow from the Finnish State. Therefore, unlike commercial operators, Yle can build a market position before anyone else, and, since it offers its services for free, it is thus able to foreclose commercial players. By the time the market takes off and commercial players start building their offer, Yle already has a well-established offering. For example, the Yle Triplet service offers daily news as ready-made learning content pieces, including news videos and Q&As about each topic. To make the content more user-friendly, Yle also lists the news per school subject. The service is offered for free and is very popular. There is thus no reason for a commercial publisher to establish a similar service, as it would have to compete against an already-established, popular and free offering by Yle. Another example is Yle Uutisluokka, a service which focuses on the promotion of media literacy and which allows Yle, under this broad heading, to offer a wide variety of content. Media literacy, however, is also a very important part of the curriculum (mother tongue). Thus, Yle also “competes” with commercial operators in relation to a subject that is included in the curriculum, partially diminishing the added value of the publishers’ learning material.
145. It should also be mentioned at this stage that Yle’s negative impact on the market for online learning materials is likely to further intensify in the near future. If the current legislative proposal amending Section 7 of the Yle Act is adopted, clarifying that text-based journalistic content is outside Yle’s public service remit, Yle is likely to further invest on online learning services, transferring (human and capital) resources currently used for text-based journalistic content to this field. Such a growth of Yle’s offering of online learning services is very likely to distort competition in this market even further, to the detriment of commercial operators, innovation and ultimately consumers. Moreover, the legislative proposal seeks to create an exception for learning services from the requirement of a link between textual publications and Yle’s content containing moving image or sound – which will likely be used by Yle to expand – unconstrained – its learning offering.

137 Commission Decision of 1 October 2003, N 37/2003 – *United Kingdom BBC Digital Curriculum*, C(2003)3371fin, paragraph 24 [emphasis added].

1.4.2. Yle's public funding distorts competition in the VOD segment

146. The Finnish VOD segment, as explained in Section III.A.2 above, is highly competitive, with numerous domestic and global / international players present, offering catalogues encompassing a wide variety of domestic and international content of all categories (e.g., drama, lifestyle, fiction, documentaries etc.). Such commercial operators either offer their services for a fee (SVOD, and to a lesser extent TVOD) or offer their content to viewers for free but monetize it through advertising (AVOD). In contrast, Yle does not need to monetize its VOD service, as it receives continuous funding from the Finnish State.
147. Yle's VOD offering is similar to the VOD offering of commercial operators. As explained above, Finnish commercial VOD providers, as well as global actors such as Netflix or Disney+ provide Finnish viewers with the most recent international movies and TV shows, as well as a significant amount of original content. Domestic VOD providers, such as Sanoma and MTV, offer a wide variety of domestic content for Finnish consumers to view on-demand, and international players, such as NENT with its Elisa Viihde Viaplay service, also offer domestic content in addition to their other Nordic offering. It is, moreover, likely that, progressively, global players such as Netflix are also going to invest in domestic content (as, for example, Netflix has done in the Swedish market). Finally, international VOD providers, such as NENT and C More, offer content in the Swedish language, attending to the Swedish-speaking viewers in Finland.
148. Yle's VOD offering – financed through State resources – distorts competition in the following three ways: First, Yle leverages its large share of viewing in Finnish FTA and strong brand recognition to attract users to its Areena VOD service (Sub-section 1.4.2.2). Second, as Yle captures users that would have otherwise been served by commercial operators, it negatively impacts their subscription and advertising revenues (Sub-section 1.4.2.2). Third, Yle's presence reduces commercial VOD providers' ability to invest and innovate (Sub-section 1.4.2.3).

1.4.2.1. Yle leverages its large share of viewing in Finnish FTA and strong brand recognition to capture users

149. Yle enjoys an enduring large share of viewing in FTA (around 44% since 2010) and strong brand recognition.¹³⁸ Yle operates the most popular TV channel in Finland (Yle TV1) and the most popular radio channel in the country (Yle Radio Suomi).¹³⁹ In 2019, Yle reached 96% of the Finnish population every week and 78% daily.¹⁴⁰ It can, therefore, leverage its share of viewing in FTA and brand recognition to promote and benefit its VOD offering.

138 See Figures 3 and 4 above.

139 Yle, "Yle in a nutshell", available at <https://yle.fi/aihe/pbi2019/yle-in-a-nutshell>, last accessed on 18 December 2020.

140 Yle, "This is Yle 2020", available at <https://view.24mags.com/yle/yle-2020>, last accessed on 18 December 2020, page 4.

150. Yle can leverage this position in two ways. First, when it comes to the acquisition of VOD users: Finns searching for a VOD service, and being aware of Yle's presence, are likely to enquire whether the public service broadcaster indeed offers one, being ultimately led to Yle Areena. Second, Finns who already use Yle Areena to either stream live Yle's broadcasts or catch up with content already broadcasted on Yle's TV channels, soon find out that Areena's offering goes far beyond a mere streaming or catch-up service and offers a free VOD service.

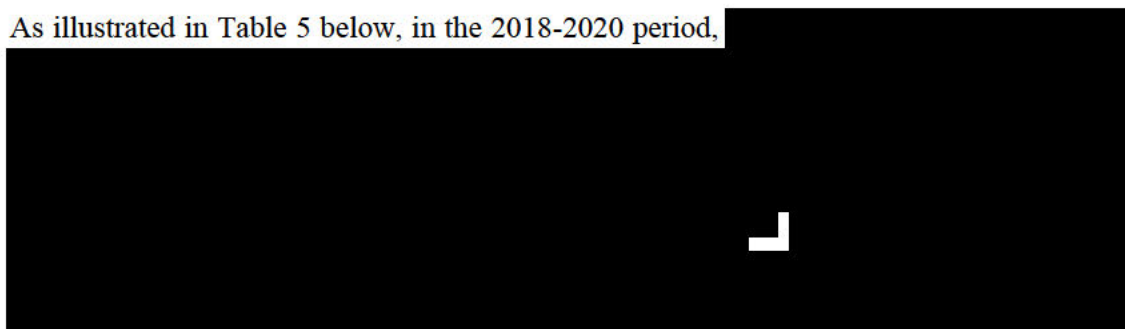
1.4.2.2. As Yle captures users that would have otherwise been served by commercial operators in the Finnish VOD segment, it impacts their subscription and advertising revenues

151. Yle offers its VOD service for free and without ads to Finnish viewers. This has an impact on both commercial providers offering their VOD services for a fee (that is SVOD and TVOD) and providers offering ad-funded VOD services (AVOD). We now explain how Yle's VOD offering negatively impacts commercial SVOD and AVOD providers in Finland and therefore distorts competition in the Finnish VOD segment.¹⁴¹

152. ***Yle Areena's negative impact on SVOD.*** Yle and commercial SVOD providers compete for users. For commercial SVOD providers, the number of users is fundamental in that it drives subscription revenues with which they finance their business. Yle's presence in the VOD segment with its free, SVOD-like Areena offering affects the size of the market (as it captures users that would otherwise be served by commercial VOD operators) and therefore the revenues of its competitors.

153. Yle's presence mainly has an impact on the market through its effect on the level of "stacking" (i.e., the number of subscriptions to VOD services each household buys). Yle Areena offers for free an SVOD-like service in terms of content and characteristics (e.g., indefinite availability of content, structured stand-alone catalogue etc.) that competes with commercial players. This reduces the Finnish viewers' incentive to purchase subscriptions from commercial SVOD providers, as they can access SVOD-like content for free.

154. As illustrated in Table 5 below, in the 2018-2020 period,



141 As explained above, TVOD is of minor importance in the Finnish VOD segment, and thus we will not analyse the effects of Yle's offering on this part of the VOD segment.

142 For example, as shown in Table 5, in 2021



[REDACTED]

Table 5: Estimate of Yle Areena's impact on SVOD (up to 2025) [Source: Sanoma]

[REDACTED]

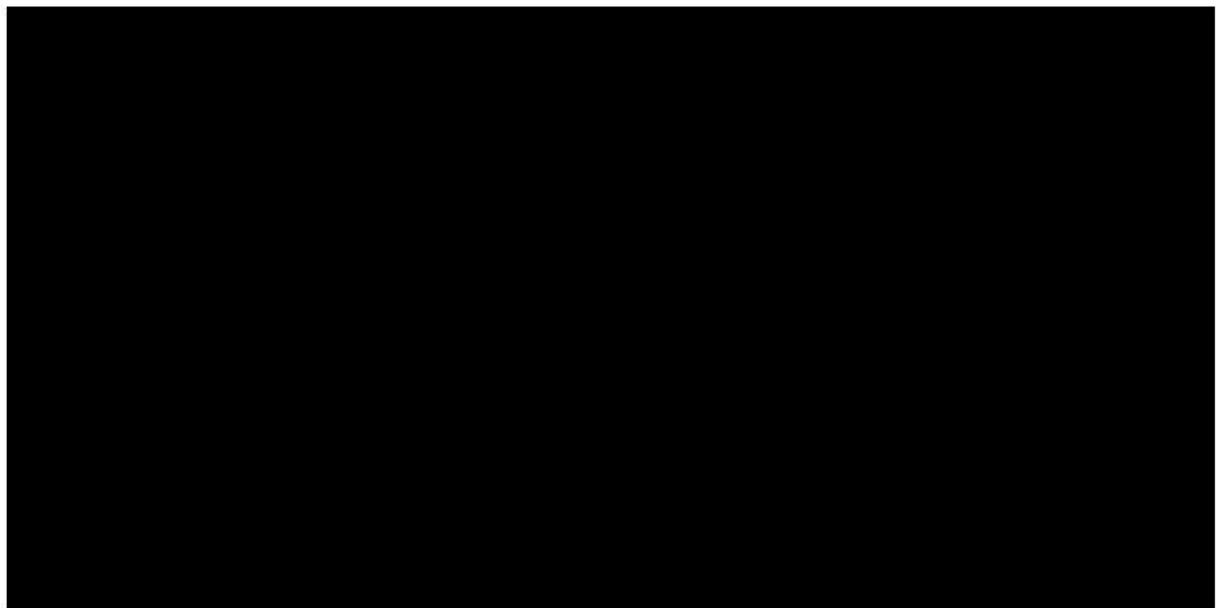
155. Due to Yle's impact on [REDACTED] the total number of SVOD subscriptions has been and will continue to be lower than it would have been in the absence of Yle's VOD offering.¹⁴³ This, in turn, has affected and will continue to affect the total SVOD revenues of commercial operators.
156. As shown in Table 5 above, in 2018, Yle's presence in the market led to a decrease in commercial VOD providers' revenues of [REDACTED]
157. Table 5 above also shows the estimated impact of Yle Areena's VOD offering on the Finnish VOD segment (and in particular, on SVOD providers) for the period up to 2025. According to Sanoma's best estimates for this period, Yle's presence is expected to continue having a significant impact on the total SVOD revenues for commercial operators. For example, as shown in Table 5, in 2025, the total SVOD revenue (with Yle being present in the VOD

143 To calculate the number of SVOD subscriptions, [REDACTED]

segment) is estimated to be € [REDACTED]¹⁴⁴ If Yle Areena did not offer its SVOD-like service for free, Sanoma estimated that the total SVOD revenue in 2025 would likely be € [REDACTED]. Hence, total SVOD segment revenues in 2025 are expected to be reduced by € [REDACTED] compared with what they would have been in the absence of Yle's VOD offering.

158. Figure 11 below illustrates the evolution of the total SVOD revenues (with and without the existence of Yle's VOD offering). Total SVOD revenues are estimated to be significantly lower in the period leading up to 2025 than they would have been in the absence of Yle's SVOD-like Areena offering.

Figure 11: Evolution of total SVOD revenues



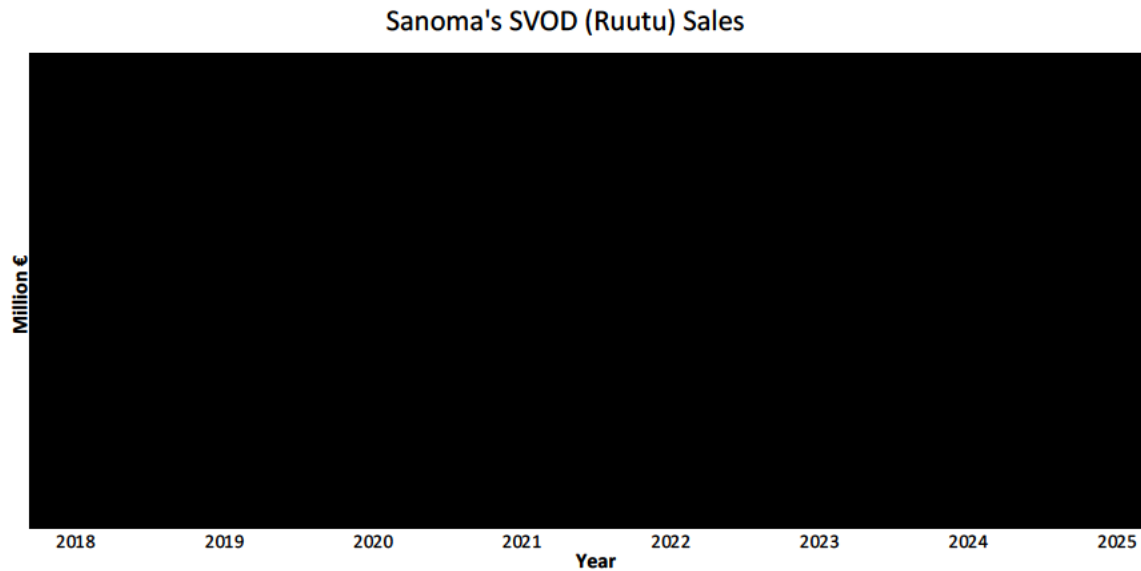
159. Table 5 above, finally, illustrates Yle Areena's negative impact on Sanoma's SVOD sales in the 2018-2025 period (referred to as "Ruutu sales" in the Table). Assuming that Sanoma's share of the SVOD segment would remain the same with or without Yle Areena's VOD offering in the period 2020-2025,¹⁴⁵ Sanoma's SVOD revenue is expected to be € [REDACTED] million lower per year than it would have been in the absence of Yle's SVOD-like offering. For example, as shown in Table 5, in 2021, Sanoma estimated that its (Ruutu) sales will be € [REDACTED] million, while in the absence of Yle Areena's VOD offering, they would have been € [REDACTED] million. In other words, Yle's presence is estimated to lead to a loss of € [REDACTED] million in Ruutu sales in 2021. In 2025, Sanoma expects that Ruutu sales will be € [REDACTED] million, while they would be € [REDACTED] million if Yle was not active in the commercial VOD segment – i.e., Yle's presence is expected to lead to a loss of € [REDACTED] million in Sanoma's SVOD sales in 2025.

144 [REDACTED]

145 Sanoma's estimated share of the market is shown in Table 5 above in the row named "Share %".

160. The evolution of Sanoma’s projected revenues (with and without Yle Areena’s VOD service) is illustrated in Figure 12 below.

Figure 12: Evolution of Sanoma’s SVOD sales



161. **Yle Areena’s negative impact on AVOD.** Yle’s VOD offering also has an impact on Sanoma’s AVOD business: as Finnish viewers are inclined to use Yle Areena (which offers SVOD-like content for free and without showing ads), the user base of Sanoma’s AVOD business (and similarly that of other AVOD providers) is reduced. As illustrated in Table 6 below, Sanoma estimates that about [REDACTED] % of Yle Areena’s viewers do not use Sanoma’s AVOD because of Yle’s offering.

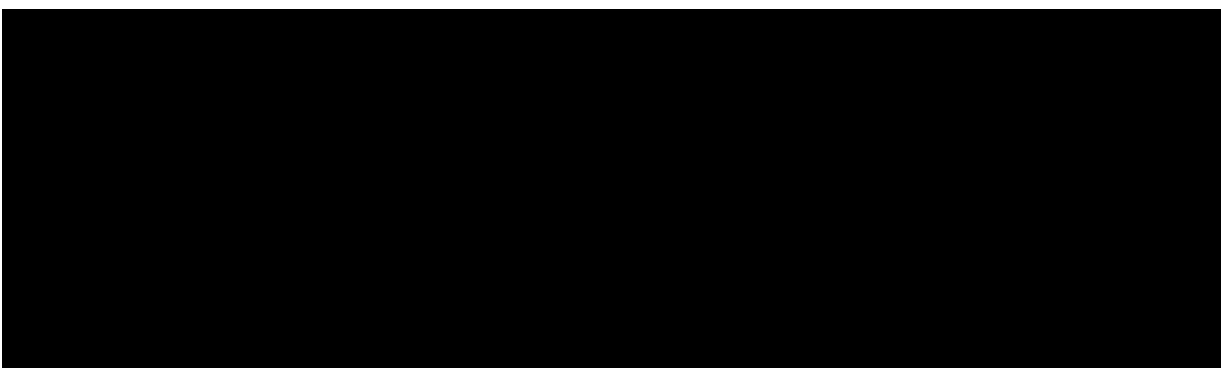
162. A lower user base makes Sanoma’s AVOD less valuable to advertisers, which become less eager to spend their advertising budget on Sanoma’s AVOD (and, similarly, other AVOD providers), preferring instead to concentrate their ad spend on tech giants, such as Google and Facebook,¹⁴⁶ to maximize their reach. Given that in Finland premium online video advertising [REDACTED] the loss of AVOD ad revenue is particularly detrimental for Sanoma and other private media companies offering VOD services.

163. The impact of Yle’s VOD offering on Sanoma’s AVOD business in 2020 is estimated to be in the range of € [REDACTED] million per year, as shown in Table 6 below.

146 These two companies already capture approximately 60% of online advertising and more than a fifth of the entire advertisement sales in Finland. Yle, “Board of Directors’ report and financial statements 2019”, page 4.

147 Source: Finnpanel, AdEdge. Note that for premium AVOD there is no exact data, [REDACTED]

Table 6: Estimate of Yle Areena's impact on AVOD [Source: Sanoma]



164. It should, moreover, be noted that [redacted] of Sanoma's AVOD viewers also use Yle Areena on a weekly basis.¹⁴⁸ In the absence of Yle's VOD offering, Sanoma would likely be able to capture more viewing time from these users, which it could then monetize through advertising. Thus, Yle Areena's VOD offering has a negative impact on Sanoma's ad revenue.
165. **Yle Areena's total impact on Sanoma's VOD business.** As shown in Tables 5 and 6 above, Sanoma estimates that the impact of Yle's VOD offering on Sanoma's VOD business will be in the range of € [redacted] million per year leading up to 2025 (that is an impact of € [redacted] million per year on Sanoma's SVOD business and of € [redacted] million on Sanoma's AVOD business).
166. A revenue loss of € [redacted] million per year has very important implications for Sanoma. FTA and VOD businesses are to a large extent based upon fixed costs. For instance, content acquisition costs represent [redacted] % of Sanoma's total costs (see Table 8). Any loss in sales, therefore, directly impacts the profitability of the business. In Sanoma's case, this loss of profitability [redacted]
167. In 2019, Sanoma's budget for the acquisition of content for FTA and VOD amounted to € [redacted] million.¹⁴⁹ In addition to content-related costs, Sanoma incurs other costs, such as costs for digital development, digital distribution, advertising sales, consumer sales, marketing etc. Sanoma's VOD revenue amounted to € [redacted] million in 2019. [redacted] In 2019, Sanoma's entire TV business (including FTA and VOD) made a € [redacted] million [redacted] by generating € [redacted] million net sales.
168. Sanoma anticipates a significant shift of market demand in the coming years from FTA to VOD, and in particular SVOD. For instance, Sanoma forecasts that its FTA revenues will

148 Source: Kantar Mind database H1/2020, target group 15-74.

149 The entire content offering acquired by Sanoma is available in both AVOD (Ruutu) and SVOD (Ruutu+) (excluding sports content which is SVOD-only, but only amounted to an investment of € [redacted] million, and a few titles that do not encompass VOD rights, representing investments below € [redacted] million).

shrink from around € [redacted] million in 2020 to € [redacted] million in 2025 and to a [redacted] € [redacted] million by 2030. [redacted] (increasing from € [redacted] million in 2020 to € [redacted] million in 2030).

Overall, Sanoma's revenues from VOD and FTA are forecasted [redacted]

Table 7: Sanoma's forecasted FTA and VOD revenues by category (in € million) (2020-2030)

	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
Other	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
SVOD	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
AVOD	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
FTA	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Total	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

169. As Table 8 illustrates, Sanoma anticipates [redacted]

Consequently, Sanoma's customers will inevitably have access to a [redacted]

Table 8: Forecast of Sanoma's VOD and FTA related costs (in € million) (2020-2030)

	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
Content	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Fox ¹⁵⁰	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Broadcasting & distribution	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Other COGS	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Other costs	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Total costs	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

Table 9: Forecast of Sanoma's VOD and FTA related earnings (in € million) (2020-2030)

	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
Revenues	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Costs	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Earnings	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

¹⁵⁰ Sanoma has an ad sales representation agreement with Fox in Finland (covering their two channels FOX and National Geographic). As a consequence, Sanoma is in charge of the marketing of Fox' advertising in Finland since FOX does not have any sales or marketing department in Finland.

170. As illustrated in Tables 7, 8 and 9 above, Sanoma will have to be [REDACTED]. In addition, the expected earnings thereafter [REDACTED] are anticipated [REDACTED]. However, the current market conditions and the pressure from actors, such as Netflix and Disney+, rather indicate that Sanoma will [REDACTED]. Sanoma anticipates [REDACTED].
171. Hence, the revenue loss of € [REDACTED] million per year due to Yle’s State-funded VOD offering has very significant consequences [REDACTED]. Conversely, an additional revenue of € [REDACTED] million per year would enable Sanoma to remain competitive [REDACTED] as well as to make additional investments in content, allowing consumers to benefit from a larger choice of and better-quality content.
172. Therefore, if Yle continues to benefit from the illegal State aid to finance its VOD activities, there is a serious risk that [REDACTED], reducing the choice for consumers.

1.4.2.3. Yle presence ultimately reduces commercial VOD providers’ ability to invest and innovate

173. Yle competes with commercial players for VOD content – both for the production of original content and for the licensing / acquisition of rights to audiovisual content. Unlike domestic commercial players whose resources – and consequently, their ability to invest – depend on revenues from subscription fees (or “pay-per-view” fees) or from advertising, Yle has a considerably higher budget to spend on content, as it is funded through the Yle tax. This budget is guaranteed, irrespective of any investments made by Yle and the returns on these investments. As mentioned above, the State funding allowed Yle to make significant investments ahead of market commercialization possibilities also with respect to VOD. This allowed Yle to establish a strong market position at a very early stage of a nascent VOD segment, making it very difficult for private competitors to catch up with this unfair head start.
174. Sanoma has explained in Section III.C.1.4.2.2 above how Yle’s presence in the VOD segment negatively affects the subscription and ad revenues of commercial VOD providers. With less revenue, commercial VOD providers’ ability to invest in content (original and acquired) is reduced. However, the quality and diversity of content offered by VOD providers is fundamental for acquiring and maintaining their user base. Commercial VOD providers, therefore, try to differentiate their offering and provide a comprehensive catalogue for their viewers to watch, as well as to improve user experience in their service. Currently, commercial operators can still use FTA content in their VOD services. This possibility will, however, be reduced over time, which will intensify the negative consequences of Yle’s

presence in the VOD segment, as the ability of commercial VOD providers to invest in VOD content and differentiate their services will be further impacted.

175. With regards to international content, domestic commercial VOD providers face strong competition from global actors, such as Netflix or Disney+. In reaction, domestic commercial VOD providers aim at differentiating their offering and compete in terms of the production and acquisition of domestic content. However, Yle is in a favourable position compared to commercial VOD providers to produce and acquire such content in that it has a high and guaranteed budget to spend. Yle indeed invests heavily in original and acquired content. As shown in Tables 2 and 3 above, it is estimated that Yle's TV/VOD content cost base is more than [REDACTED] times higher than the respective cost base of Sanoma.¹⁵¹ Moreover, Yle's presence affects input prices and thus increases production costs, increasing in turn the costs borne by commercial operators.
176. In sum, Finnish VOD providers see their revenues decrease due to Yle's State-funded presence in the VOD segment, while at the same time having to compete with Yle with regards to the acquisition and production of content on unequal terms. Consequently, commercial VOD providers' ability to invest in their VOD offering and innovate is reduced, which ultimately harms Finnish viewers.

2. The public funding of Yle's provision of online learning services and VOD cannot be exempted from the prohibition of Article 107(1) TFEU

177. In this Sub-section, we first exclude the application of exemptions to the Article 107(1) TFEU prohibition provided for in the Treaty or secondary legislation (Sub-section 2.1). We then turn to the SGEI derogation of Article 106(2) TFEU and explain that this derogation cannot be relied upon either to exempt the State funding for Yle's online learning services and VOD from the general prohibition of Article 107(1) TFEU (Sub-section 2.2). We finally explain that, if the Commission decides to apply the Broadcasting Communication to VOD services going beyond catch-up services, the conditions for the exemption are not met either (Sub-section 2.3).

2.1. Inapplicability of the exemptions provided in the TFEU and secondary legislation

178. We will now explain why (i) the cultural exception of Article 107(3)(d) TFEU, (ii) the General Block Exemption Regulation ("**GBER**"), (iii) the SGEI *de minimis* Regulation, and (iv) the Commission Decision on the application of Article 106(2) TFEU to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of SGEI ("**SGEI Decision**") cannot be relied upon with regards to the public funding for Yle's online learning services and VOD offering.

151 Based on Yle's Annual Reports, Sanoma estimates that, e.g., in 2019 Yle's TV/VOD content costs rose to € [REDACTED], while the respective Nelonen Media's content costs amounted to around € [REDACTED] million.

179. In the first place, the cultural exception of Article 107(3)(d) TFEU, providing that “*aid to promote culture and heritage conservation*” may be considered to be compatible with the internal market “*where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest*” is not applicable in the present case, neither for Yle’s online learning services nor for VOD.
180. The notion of “culture” under Article 107(3)(d) TFEU, and thus the scope of this exception, is interpreted strictly.¹⁵² The cultural exception may only be applied in cases “*where the cultural product is clearly identified or identifiable.*”¹⁵³ The Commission, moreover, explicitly considers that the exception under Article 107(3)(d) TFEU does generally not apply to public service broadcasters:
- “the educational and democratic needs of a Member State have to be regarded as distinct from the promotion of culture under Article 87(3)(d).
- State aid to public service broadcasters usually does not differentiate between cultural, democratic and educational needs of society. Unless a funding measure is specifically aimed at promoting cultural objectives, Article 87(3)(d) would generally not be relevant. State aid to public service broadcasters is generally provided in the form of compensation for the fulfilment of the public service mandate and is assessed under Article 86(2), on the basis of the criteria set out in the present Communication.”¹⁵⁴
181. It thus follows that the cultural exception is not applicable in the case at hand: when it comes to Yle’s online learning services and VOD offering, it is not possible to clearly identify a “*cultural product*” or the promotion of a specific cultural objective, which is a prerequisite for the application of the Article 107(3)(d) TFEU exception.
182. In the second place, the GBER, which declares certain categories of State aid compatible with the internal market, is not applicable in this case. The only relevant category included in the GBER provides for an exception in the case of “*aid for culture and heritage conservation*” on the basis of Article 107(3) TFEU.¹⁵⁵ However, as was explained above, the notion of “culture” is to be interpreted strictly, and thus this exemption cannot be relied upon for the public funding of Yle’s online learning services and VOD offering.
183. In the third place, the public funding of Yle’s online learning services and VOD cannot escape the prohibition of Article 107(1) TFEU by reason of being *de minimis*. Yle’s funding exceeds the threshold set by the SGEI *de minimis* Regulation – that is €500.000 over a period

152 See Judgment of the Court of First Instance of 6 October 2009, T-8/06 *FAB Fernsehen aus Berlin GmbH v Commission of the European Communities*, ECLI:EU:T:2009:386, paragraphs 87-89.

153 Broadcasting Communication, paragraph 34.

154 *Id.*, paragraphs 34-35 [emphasis added].

155 See GBER, Article 53: “Aid for culture and heritage conservation shall be compatible with the internal market within the meaning of Article 107(3) of the Treaty and shall be exempted from the notification requirement of Article 108(3) of the Treaty, provided the conditions laid down in this Article and in Chapter I are fulfilled.”

of three fiscal years.¹⁵⁶ Yle receives at least €500 million annually from the Fund, which it can then allocate internally as it deems fit. While not publicly disclosed, the funding for Yle’s VOD offering and online learning services is estimated to amount to € [REDACTED] and € [REDACTED] annually, respectively. This by far exceeds the €500.000 threshold over a three-year period of the *de minimis* Regulation.

184. In the fourth place, the SGEI Decision, which declares aid for certain SGEI categories as compatible with the internal market and exempts Member States from the obligation to notify public service compensation for such aid if the conditions set therein are fulfilled, cannot be relied upon as an exemption to Article 107(1) TFEU in the present case. Most importantly, the Finnish State does not even claim to rely on the SGEI Decision to provide funding for Yle’s online learning services and VOD offering, in that the Yle Act does not include a reference to the SGEI Decision to justify the aid granted to Yle, as required by Article 4(f) of the Decision. In addition, this Decision only applies when compensation does not exceed €15 million annually.¹⁵⁷ Funding for Yle’s VOD offering is estimated to amount to € [REDACTED] [REDACTED] annually, which is far above the €15 million threshold. While funding for Yle’s provision of online learning services does not exceed the threshold of the SGEI Decision, other conditions for the application of the Decision are not met.
185. The Decision “*only applies where the period for which the undertaking is entrusted with the operation of the service of general economic interest does not exceed 10 years,*” unless “*significant investment is required from the service provider that needs to be amortised over a longer period in accordance with generally accepted accounting principles.*”¹⁵⁸ The Yle Act does not specify the duration of Yle’s entrustment with its public service mission (including VOD and online learning services), as required by the SGEI Decision *and* the provision of learning services and VOD does not require significant investment from Yle that needs to be amortized over a longer period of time, which would allow for a duration of entrustment of more than 10 years. Thus, the public funding of Yle’s online learning services and VOD offering does not fall within the scope of application of the SGEI Decision.¹⁵⁹
186. Thus, the funding by the Finnish State to Yle can only escape the prohibition of Article 107(1) TFEU if it can benefit from the derogation of Article 106(2) TFEU – *quod non*.

156 Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest (“**SGEI *de minimis* Regulation**”), OJ L 114, pages 8-13, Article 2(2).

157 SGEI Decision, Article 2(1)(a).

158 *Id.*, Article 2(2).

159 Since the SGEI Decision is not applicable in the case at hand, we will not examine the additional requirements for the application of this Decision. Sanoma, however, considers that additional requirements set out by this Decision (e.g., that the public service mission be clearly defined, the parameters on the basis of which Yle’s compensation is calculated be established in advance in an objective and transparent manner, that there are measures in place to control overcompensation etc.) are also not fulfilled. We touch upon these issues further elsewhere in the Complaint.

2.2. The public funding of Yle’s online learning services and VOD cannot be exempted under the Article 106(2) TFEU derogation for SGEI

187. In this Sub-section, we will first explain why Yle’s provision of online learning services and VOD must be assessed under the general SGEI regime of Article 106(2) TFEU, and not under the “special regime” for broadcasting activities on the basis of the Amsterdam Protocol and the Broadcasting Communication (Sub-section 2.2.1). We will then show that the conditions of Article 106(2) TFEU are not met in this case, and thus Yle’s public funding for the provision of its online learning services and VOD constitutes State aid incompatible with the internal market (Sub-section 2.2.2).

2.2.1. Yle’s provision of online learning services and VOD should be assessed under the general SGEI regime of Article 106(2) TFEU

188. The notion of broadcasting, as explained in Section III.B above, is closely related to audiovisual services, which are defined as the “*linear and/or non-linear distribution of audio and/or audiovisual content and of other neighbouring services such as online text-based information services.*”¹⁶⁰

189. The reference to “*neighbouring services*” indicates that only text-based and other services that are directly related to and necessary for the operation of Yle’s main broadcasting offering or are closely linked to the audiovisual services – in other words, they are *ancillary* to Yle’s main broadcasting activities – can be considered as broadcasting activities. Thus, “stand-alone” text-based and other services fall outside the scope of the Broadcasting Communication and have to be assessed under the “general” Article 106(2) TFEU SGEI regime.

190. Yle’s online learning services are neither “*directly related to and necessary for*” Yle’s broadcasting activities nor “*closely linked*” (i.e., ancillary) to Yle’s broadcasting (i.e., its main) activities.¹⁶¹ They are independent economic activities, severable from Yle’s main broadcasting activities. Yle’s online learning offering is extensive and goes much further than Yle’s original TV programs that were addressed to primary schoolers and covered in their emissions lessons and knowledge useful to kids. As explained above in Section II.B.5.1, Yle’s online learning offering now covers materials for all levels of education (primary, secondary and vocational education) that are addressed to students and teachers. While in the primary and secondary education, Yle mainly produces additional materials, in the upper secondary education segment, Yle directly competes with commercial operators in providing materials for the preparation of students for the Matriculation Exam. It also offers materials related to the learning of foreign languages by adults (which can also be used instead of materials published by commercial operators in upper secondary schools). These materials

160 Broadcasting Communication, Footnote 8 [emphasis added].

161 The concept of “ancillarity” under State aid law implies that the activity in question is not the main (or primary) activity but is “*directly related to and necessary for the operation of the [main activity] or intrinsically linked to*” the main activity. See, e.g., Commission Notice on the notion of State aid, paragraph 207.

cannot be seen as necessary to meet the “*democratic, social and cultural needs of society*” and be directly related and necessary for Yle’s main activities. Moreover, it would be counterintuitive to consider providers of online learning services as broadcasters.

191. Neither can VOD be considered as ancillary – i.e., “*directly related to and necessary for*” or “*closely linked*” – to Yle’s broadcasting offering. As explained above in Section II.B.5.2, Yle Arena has expanded significantly in recent years and now offers a broad catalogue of films and series that is available indefinitely for users to view. It is thus comparable to commercial VOD services and is not confined to being a catch-up service (of limited duration) of programs already broadcasted on Yle’s TV channels. Moreover, Yle offers content that is Arena-exclusive (i.e., has not been broadcasted on Yle’s TV channels), such as “*The Real L Word*” or Australian drama “*Everything’s gonna be ok*”. Thus, Yle’s VOD offering cannot be considered as ancillary (or “*neighbouring*”) to Yle’s main activities as the public service broadcaster, and consequently falls outside the scope of application of the Broadcasting Communication.
192. The distinction between Yle’s broadcasting activities, services ancillary to broadcasting activities and non-broadcasting activities is illustrated in Figure 13 below:

Figure 13: Yle’s broadcasting and non-broadcasting activities of public broadcasters

Broadcasting activities	Ancillary broadcasting activities	Non-broadcasting activities
Yle’s provision of audio and audiovisual content on TV, radio and online platforms (e.g., FTA TV, catch-up TV)	Content directly related to and necessary for or intrinsically linked to the broadcasting of audio and audiovisual content (e.g., teletext services)	Yle’s activities not directly related to and necessary or intrinsically linked to the broadcasting of audio and audiovisual content (e.g., learning services, VOD offering)

- Amsterdam Protocol and Broadcasting Communication apply
- Lenient definition of SGEI => wider margin of discretion for Member States
- No need to show market failure => Member State can define SGEI if it serves the “*democratic, social and cultural needs of society*”

- Amsterdam Protocol and Broadcasting Communication do not apply
- Definition of SGEI only if market failure.

193. Having explained why the general SGEI regime of Article 106(2) TFEU is to be applied both for Yle’s online learning services and VOD, we will now turn to showing that the three *cumulative* conditions of the SGEI derogation of Article 106(2) TFEU (definition, entrustment and proportionality) are not met in the present case. Thus, the public funding of

Yle's online learning services and VOD offering cannot escape the prohibition of Article 107(1) TFEU.

2.2.2. Yle's public funding for its online learning services and VOD cannot be exempted under the Article 106(2) TFEU derogation for SGEI

194. We now show that the conditions of Article 106(2) TFEU, namely that the SGEI has been clearly defined, that it is properly entrusted to the SGEI provider and that it is proportional, are not fulfilled when it comes to the provision by YLE of online learning services and VOD funded by the Finnish State.

2.2.2.1. *The provision of online learning services and VOD has not been defined as a SGEI*

195. In this Sub-section, we first explain that there is no market failure that would justify the definition of Yle's online learning services and VOD offering as SGEIs (Sub-section i), before explaining that, in any event, the services in question have not been clearly defined as a SGEI (Sub-section ii).

i. There is no market failure that would justify the definition of Yle's online learning services and VOD offering as SGEIs

196. Unless there are specific rules set by EU law, Member States have a wide margin of discretion in defining a given service as SGEI. The Commission's competence in that respect is then "*limited to checking whether the Member State has made a manifest error when defining the service as an SGEI and to assessing any State aid involved in the compensation.*"¹⁶²

197. This, however, does not entail that Member States' discretion is without any limits.¹⁶³ Public service obligations should only be attached to activities that are not "*already provided or can be provided satisfactorily and under conditions, such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by the State, by undertakings operating under normal market conditions.*"¹⁶⁴ In other words, activities shall be defined as SGEI if an undertaking would not assume them or would

162 Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest ("SGEI Communication"), OJ C 8, pages 4-14, paragraph 46.

163 See, e.g., Judgment of the Court of First Instance of 12 February 2008, T-289/03 *British United Provident Association Ltd (BUPA), BUPA Insurance Ltd and BUPA Ireland Ltd v Commission of the European Communities*, ECLI:EU:T:2008:29, paragraph 168; Judgment of the General Court of 1 March 2017, T-454/13 *Société nationale maritime Corse Méditerranée (SNM) v European Commission*, ECLI:EU:T:2017:134, paragraph 112.

164 SGEI Communication, paragraph 48.

not assume them to the same extent or under the same conditions if it was considering its own commercial interest,¹⁶⁵ i.e. if there is a market failure.

198. In this regard, the General Court emphasized in its *SNCM* judgment that the absence of private initiative is what shows the need for a given public service:

“for a maritime cabotage service to be classifiable as an SGEI, it must meet a real public service need, demonstrated by the insufficient regular transport services in a situation of free competition, and that the scope of the SGEI is necessary and proportionate to that need. It is unquestionably the responsibility of the Member State concerned, and not the Commission, to make out proof of this by adducing sufficiently convincing evidence. It should be noted in that regard that, contrary to *SNCM*’s assertions at the hearing (see paragraph 106 above), the Member State cannot merely rely on the existence of a ‘general interest in the broadest sense’. The absence of any evidence provided by the Member State establishing that the abovementioned criteria have been met or disregarded is liable to constitute a manifest error of assessment which the Commission is required to take into consideration.

[...] Next, nor can there be such a need if the user demand is already capable of being met by the market operators in the absence of an obligation laid down by the public authorities to that end. In other words, as has already been pointed out in paragraph 125 above, in the absence of a shortage of private initiative, there can be no real public service need. Lastly, if there is a user demand and if that demand is not capable of being met by the interplay of market forces alone, the national authorities should still give preference to the approach which is least harmful to the essential freedoms for the proper functioning of the internal market.”¹⁶⁶

199. The definition of a public service is not static: *“the assessment of whether there is a real public service need may evolve over time in the light of the development of market forces.”*¹⁶⁷
200. In Finland, there is no need for a SGEI to be defined neither in the market for online learning services nor in the VOD segment, as commercial operators (domestic and international) provide a significant and accessible supply of online learning materials and VOD services to the Finns.
201. As explained above in Section III.A.1, in the Finnish market for online learning materials, commercial operators, such as Sanoma, Otava, Studeo and Edita, offer a wide range of products and services addressed to students of primary, secondary and vocational education, as well as teachers, and covering all subjects of these levels of education, as well as offering materials for the learning of foreign languages. Thus, there is no shortage of private

165 Id., paragraph 47.

166 Judgment of the General Court of 1 March 2017, T-454/13 *Société nationale maritime Corse Méditerranée (SNCM) v European Commission*, ECLI:EU:T:2017:134, paragraph 133-134 [emphasis added].

167 Id., paragraph 99.

initiatives in the Finnish market for online learning services that would justify the definition of a SGEI in this field. Sanoma does not contest that there may be a need to define a SGEI for the provision of specific materials that are not offered by commercial operators and which, therefore, may need to be provided by Yle. Such materials are, for example, materials in the Sami language which are currently produced by the Finnish National Agency for Education (*Opetushallitus*). If it was considered necessary that additional materials in the Sami language be produced, Yle could have engaged in the production and free distribution of such materials, as they aim at target groups that are not served by commercial providers.

202. The Finnish VOD segment, as shown in Section III.A.2 above, is highly competitive, comprising domestic players (e.g., Sanoma's Ruutu, Telia's MTV) and global actors (e.g., Netflix, Disney+, HBO) that compete fiercely on quality and price, and offer a wide variety of VOD services to Finnish customers. In this vibrant segment, there is "*no real public service need*" for a state-financed actor, as user demand is already met by existing private operators – and potentially new domestic and/or foreign entrants, as the recent entry of Disney+ in the Finnish VOD segment.
203. These different suppliers make available to Finnish viewers a broad range of movies and series covering all categories of content (such as drama, entertainment, documentaries, lifestyle, fiction and so on). Domestic players like Sanoma offer a large variety of domestic content, as well as international content. Global players like Netflix or Disney+ offer many original and acquired movies and series largely exceeding Yle's offer. For example, Sanoma estimates that in 2019 Netflix offered in Finland 3,300 titles, while Disney+ offers over 350 series, 500 films and 26 Disney+ Originals.¹⁶⁸ Global players have also started including Finnish content to their catalogue in the recent past (Netflix, for example, currently offers 12 Finnish speaking titles) and it is likely that they will expand this offering in the future. Moreover, international players such as NENT (Elisa Viihde Viaplay) and Telia's C More offer Finnish content in addition to their other Nordic offering and make available in Finland a significant amount of content in the Swedish language. Therefore, in terms of quality and diversity, the offering of private VOD services is more than sufficient to cover the needs of the Finnish consumers.
204. Finnish consumers, moreover, have access to both ad-funded VOD services offered by commercial operators (e.g., Sanoma offers its Ruutu service as AVOD and so does MTV, and YouTube is a service widely available to Finns) – which they can access for free – and to subscription-based VOD services, both domestic (e.g., Sanoma's Ruutu+ SVOD) and global (e.g., Netflix, Disney+). Hence, even if Yle was not present in the Finnish VOD segment, consumers would still have access to VOD services based upon different pricing models, including free-for-consumer models, solely funded by advertising revenues. Hence, Yle's entry into the market does not bring additional choice for consumers in terms of pricing models.

168 See https://help.disneyplus.com/csp?id=csp_article_content&sys_kb_id=b4f49049db03d4d432f7c28d139619e1, last accessed on 15 February 2021.

205. Furthermore, the cost of SVOD in Finland (about €10 per month, VAT included) is in line with the global average SVOD cost (€9.11 per month), illustrating that there is no market failure due to a high price level in the VOD segment in Finland. It should also be pointed out that although Yle’s VOD service is provided “for free”, Finns, in fact, do pay for Yle’s services, including the SVOD-like Yle Areena, through the Yle tax. Given that in an average household, more than one person would need to pay the Yle tax – while it would not be necessary for each household to buy more than one Ruutu+ or Netflix subscriptions – the cost of Yle’s VOD service to a household is significant. More precisely, the average household pays €346 of Yle tax per year, which is significantly higher than the €160 per year spent on newspaper subscriptions and the €94 per year on commercial SVOD services.¹⁶⁹
206. It is obvious, therefore, that there is no “*shortage of private initiative*” that would justify the definition of VOD services as SGEI. User demand can be met by market operators which provide both AVOD and (affordable) SVOD and thus attend to the preferences of all consumers. Consequently, the provision of VOD services by Yle as a SGEI cannot be considered necessary to remedy a market failure.
207. In sum, there is no market failure in the Finnish market for online learning services and/or VOD that would justify the definition of a SGEI in these fields. Sanoma, therefore, submits that the provision by Yle of online learning services and VOD cannot be defined as a SGEI and thus cannot be declared compatible with the internal market under Article 106(2) TFEU.
208. It should also be noted that the burden of proving a market failure does not lie with the Complainant or the European Commission, but with the Member State, which must show that a market failure does exist and necessitates the definition of a SGEI. As the General Court held in *SNCM*, “[i]t is unquestionably the responsibility of the Member State concerned, and not the Commission, to make out proof of this by adducing sufficiently convincing evidence.”¹⁷⁰ Sanoma considers that such evidence cannot be adduced by the Finnish State in the present case.

ii. *Yle’s online learning services and VOD offering have not been clearly defined as SGEI*

209. The provision of online learning services and VOD has not been defined as a SGEI by the Finnish State. Section 7 of the Yle Act defines as “public service” the provision of “*versatile and comprehensive television and radio programming with the related additional and extra services*.” This provision further elaborates on certain aspects that this public service programming should have.¹⁷¹ These aspects are not exhaustive, but merely describe certain

169 Source: TNS Mind 2020 database.

170 Judgment of the General Court of 1 March 2017, T-454/13 *Société nationale maritime Corse Méditerranée (SNCM) v European Commission*, ECLI:EU:T:2017:134, paragraph 133.

171 According to Section 7 of the Yle Act, public service programming should: “support democracy and everyone’s opportunity to participate by providing a wide variety of information, opinions and debates as well as opportunities to interact; produce, create, develop and maintain Finnish culture, art and inspiring

characteristics of the public service and only applies to public service “programming”. Thus, on the basis of Section 7 of the Yle Act, what constitutes public service is the provision of TV and radio programming and additional and extra services *to the extent* that they are *related* to this programming.¹⁷²

210. In any event, the definition of public service in the Yle Act is unclear, in particular due to the vague reference to “*additional and extra services*” and to “*other content services*”. As explained in Section II.B.1 above, the unclear public service remit allows Yle to substitute its own understanding of the boundaries of the public service for that of the regulator and engage in activities that are offered by commercial operators. This leads to market uncertainty and lack of predictability of Yle’s future conduct, which makes commercial operators’ investments into new, innovative services a risky endeavor – ultimately harming Finnish consumers.
211. The impact that an unclear definition of the public service remit can have on commercial operators and on media pluralism was emphasized by the Commission in its *RTBF* decision:

“En accordant une telle latitude à la RTBF pour offrir des services de nouveaux médias assez vaguement définis, et compte tenu du manque de prévisibilité pour les parties tierces, d’autres opérateurs du marché risquent d’être dissuadés de développer et d’offrir de tels services de nouveaux médias. Une mission de service public clairement définie est donc indispensable pour trouver un équilibre entre la prestation de services d’intérêt économique général et une égalité de traitement entre les opérateurs publics et privés, en veillant ainsi à ce que le financement d’activités des nouveaux médias n’aille pas à l’encontre de l’intérêt communautaire.

[...]

Comme généralement pour les services de nouveaux médias, cette définition laisse une grande latitude à la RTBF quant au contenu de ses services en ligne, alors qu’une prévisibilité et définition claire et précise du mandat concernant les services en ligne (et en particulier ses services écrits en ligne) sont nécessaires pour permettre aux parties tierces, tels que les éditeurs de journaux, de mettre en place ou d’adapter un modèle économique viable sur internet et d’éviter qu’un développement incontrôlé de l’offre de nouveaux services en ligne par le radiodiffuseur public avec des fonds publics puisse

entertainment; take educational and equality aspects into consideration in the programmes, provide an opportunity to learn and study, give focus on programming for children and young people, and offer devotional programmes; treat in its broadcasting Finnish-speaking and Swedish-speaking citizens on equal grounds and produce services in the Sami, Romany and sign languages as well as, where applicable, in the languages of the other language groups in the country; support tolerance and multiculturalism and provide programming for minority and special groups; promote cultural interaction and provide programming directed abroad; and broadcast official announcements and make provision for television and radio broadcasting in exceptional circumstances.”

172 Similarly, as explained above, any “*other content services*” offered by Yle have to be “*related to public service.*” The provision of a standalone, commercial-like VOD catalogue by Yle cannot be considered to be a service “*related to public service.*”

menacer la viabilité de ces éditeurs et dès lors constituer un risque pour le pluralisme des médias. Une définition plus claire du mandat de la RTBF en ce qui concerne les services (écrits) en ligne est donc nécessaire.”¹⁷³

212. Sanoma would also like to point out once again that the recent Government Proposal that provides for an amendment to Section 7 of the Yle Act does not clarify the overly broad definition of public service, not least because the reference to “*additional and extra services*” is maintained.¹⁷⁴ In addition, when it comes to the provision of learning services, the proposal seeks to establish a broad exception, providing that Yle’s offering of textual content does not have “*to be associated with a publication containing the company’s moving image or sound.*” This is not a clear definition of Yle’s public service remit.

2.2.2.2. *Yle has not been properly entrusted with the provision of online learning services and VOD*

213. Entrustment must have taken place by way of an act (or a series of acts) that must *at least* specify (i) the content and duration of the public service obligations, (ii) the undertaking and, where applicable, the territory concerned, (iii) the nature of any exclusive or special rights assigned to the undertaking, (iv) the parameters for calculating, controlling and reviewing compensation – which must be “*established in advance in an objective and transparent manner,*”¹⁷⁵ and (v) the arrangements for avoiding and recovering any overcompensation.¹⁷⁶

214. The Finnish legislation does not fulfil the above criteria:

- The content and duration of the public service obligations are not specified. Yle has not been (properly) entrusted with the provision of online learning services and VOD.¹⁷⁷ Online learning services and VOD do not fall within Yle’s public service remit, as they cannot be considered as *related* services to Yle’s TV and radio programming (for the reasons presented above). Furthermore, Article 7 of the Yle Act does not specify a certain duration for the public service obligations, which are therefore for an indefinite period of time and without any provision being made for review.
- The legislation does not specify any exclusive or special rights assigned to Yle.

173 Commission Decision of 7 May 2014, SA.32635 (2012/E) - *Financement de la RTBF Belgique*, C(2014) 2634 final, paragraphs 186 and 194 [emphasis added].

174 And so is the reference to “*other public service content services.*” For a detailed discussion of the Government Proposal and its implications, please see Section II.B.1 above.

175 SGEI Communication, paragraph 54. See also Judgment of the Court of 24 July 2003, C-280/00 *Altmark*, paragraph 90.

176 SGEI Communication., paragraph 52; See also SGEI EU Framework, paragraphs 15-17.

177 See, e.g., Section III.C.1.2.1. above.

- The legislation does not establish in advance the parameters for calculating, controlling and reviewing Yle's compensation.¹⁷⁸
- The legislation does not set out any arrangements for avoiding and recovering any overcompensation.¹⁷⁹

2.2.2.3. The provision of online learning services and VOD by Yle fails the proportionality test

215. The third condition of the SGEI derogation of Article 106(2) requires that a proportionality assessment be carried out to ensure that the public funding of the SGEI provider does not affect the development of trade “*to such an extent as would be contrary to the interests of the Union.*” According to the SGEI EU Framework,

“a more detailed assessment may be necessary [...] where the Member State entrusts a public service provider, without a competitive selection procedure, with the task of providing an SGEI in a non-reserved market where very similar services are already being provided or can be expected to be provided in the near future in the absence of the SGEI. Those adverse effects on the development of trade may be more pronounced where the SGEI is to be offered at a tariff below the costs of any actual or potential provider, so as to cause market foreclosure. The Commission, while fully respecting the Member State's wide margin of discretion to define the SGEI, may therefore require amendments, for instance in the allocation of the aid, where it can reasonably show that it would be possible to provide the same SGEI at equivalent conditions for the users, in a less distortive manner and at lower cost for the State.”¹⁸⁰

216. The State-funded provision of online learning services and VOD by Yle, which has been appointed by the Finnish State as a public service provider without prior competitive selection procedure, has disproportionate effects on trade and competition in the Finnish markets for online learning services and the VOD segment.

217. By providing these services, Yle enters into markets / segments that are non-reserved and in which commercial operators are active, offering very similar services to those offered by Yle – or in fact, even more comprehensive services than those offered by Yle. Thus, Yle's services are already being provided to a sufficient extent by numerous domestic and foreign commercial operators. In the market for online learning services, commercial actors, such as Sanoma, Otava and Edita offer, as explained above, a variety of digital learning products and

178 See Section III.C.1.2.2

179 See also Section III.C.2.3.3. Note also that the recently submitted Government proposal for an amendment to Section 7 of the Yle Act does not fulfil the requirements that are necessary for a proper entrustment of Yle with the provision of (online) learning services. In particular, the Proposal does not specify any duration for the entrustment, it does not contain provisions for the calculation, control and review of Yle's compensation and does not set out arrangements for avoiding and recovering any overcompensation.

180 SGEI EU Framework, paragraph 56 [emphasis added].

services (including teaching platforms), addressed to both students of primary, secondary and vocational education, and teachers.¹⁸¹

218. In the VOD segment, a large number of both domestic (e.g., Sanoma, MTV) and global (e.g., Netflix, Disney+, HBO Nordic) actors are present offering domestic and international, original and acquired content of all categories (e.g., drama, lifestyle, fiction, documentaries etc.).¹⁸² These actors offer their VOD services either for a moderate fee (SVOD and TVOD) or for free, monetizing them through advertising (AVOD) – thus attending to the preferences and budgets of all Finnish viewers.
219. Yle offers its services in both the online learning services market and the VOD segment below the costs of any commercial operator. Funded by the Yle tax, Yle is able to offer its online learning services and VOD – which are similar to the offering of commercial operators – at zero price. The provision of free products and services by Yle (coupled with Yle’s enduring strong position and strong brand recognition), incentivizes consumers to use Yle’s free services instead of those offered by private actors and reduces their willingness to pay for such products and services. This results in reduced subscription and advertising revenues to the detriment of commercial operators in the Finnish online learning services market and the VOD segment, as explained in Section III.C.1.4 above. With regards to VOD, there is a serious risk that [REDACTED] if Yle continues to benefit from the illegal State aid to finance its VOD activities.
220. At the same time, Yle’s public funding affords it a stable and high budget that can be spent on the production of original content, as well as on the licensing / acquisition of content. As shown above in Tables 2 and 3, Yle’s spend on TV/VOD content is [REDACTED] times higher than that of Sanoma. What is more, Yle’s presence affects input prices and thus increases production costs, increasing in turn the costs borne by commercial operators. Overall, therefore, Yle’s presence in the market for online learning services and the VOD segment – where private actors operate on the basis of normal market conditions – distorts competition to the detriment of its competitors, innovation and ultimately consumers.
221. Such a distortion of competition is disproportionate in that the services offered by Yle (online learning services and VOD) can be offered by private operators “*at equivalent conditions for the users, in a less distortive manner and at lower cost for the State*”:
- Private operators active in both the VOD segment and the online learning services market offer a wide variety of services and products that are available to and accessible by all Finns. These private operators employ various business models, attending to the preferences and budgets of all Finnish consumers. In the VOD segment, commercial operators provide free-for-consumers AVOD services. SVOD prices in Finland are moderate – and, in fact, cost the average Finnish household less than what they pay for Yle’s seemingly free service through the Yle tax (see Section

181 For a more detailed description of the market for online learning services, see Section III.A.1.

182 For a detailed presentation of the VOD segment, see Section III.A.2.

III.C.2.2.2 above). In the online learning services market, commercial operators provide a wide range of affordable materials and digital services that cover all levels of K12 education (primary, secondary and vocational education) and which can be used by students and teachers to enhance the learning process, following the school curriculum.

- The distortive effects to competition in the market for online learning services and the VOD segment would not exist if Yle was not receiving State funding to finance its activities in these highly competitive Finnish markets / segments;
- The cost for the State would be considerably lower, as the State would not need to finance Yle.

222. In sum, the funding through State resources of Yle’s online learning services and VOD fails the proportionality test required under Article 106(2) TFEU for the SGEI derogation to be applicable and exempt the funding of these activities by the Finnish State from the general Article 107(1) TFEU prohibition of State aid.

2.3. The public funding of Yle’s VOD offering cannot be exempted under the Article 106(2) TFEU derogation and the Broadcasting Communication framework

223. Sanoma submits that Yle’s VOD offering should be assessed on the basis of the general SGEI regime of Article 106(2) TFEU and not on the basis of the Broadcasting Communication regime, for the reasons explained in Section III.C.2.2.1 above. However, if the Commission were to apply the Broadcasting Communication in the assessment of Yle’s VOD offering, Sanoma submits that the conditions would still not be fulfilled for the public funding of Yle’s VOD offering to escape the general prohibition of Article 107(1) TFEU.

2.3.1. Yle’s public service remit has not been clearly defined

224. The Broadcasting Communication requires that

“[t]he definition of the public service mandate by the Member States should be as precise as possible. It should leave no doubt as to whether a certain activity performed by the entrusted operator is intended by the Member State to be included in the public service remit or not.

[...]

At the same time, given the specific nature of the broadcasting sector, and the need to safeguard the editorial independence of the public service broadcasters, a qualitative definition entrusting a given broadcaster with the obligation to provide a wide range of programming and a balanced and varied broadcasting offer is generally considered, in view of the interpretative provisions of the Amsterdam Protocol, legitimate under Article 86(2). Such a definition is generally considered consistent with the objective of fulfilling

the democratic, social and cultural needs of a particular society and guaranteeing pluralism, including cultural and linguistic diversity.”¹⁸³

225. Thus, in the broadcasting sector, compared to the SGEI regime, Member States are afforded a wider discretion in the definition of the public service remit of the public service broadcaster – however, the public service remit should still be defined clearly and precisely and leave no doubt as to which activities are intended by the regulators to be included within the public service remit – in other words make a separation between public service activities and non-public service activities. The role of the Commission is limited to checking whether the Member State has committed a “*manifest error*” – i.e., whether the definition of the public service remit includes “*activities that could not reasonably be considered to meet – in the wording of the Amsterdam Protocol – the ‘democratic, social and cultural needs of each society’*,” and thus “*State aid is used to finance activities which do not bring added value in terms of serving [such] needs of society.*”¹⁸⁴
226. As explained above in Section II.B.1, Yle’s public service remit is not defined in a manner that leaves “*no doubt as to whether a certain activity performed by the entrusted operator is intended by the Member State to be included in the public service remit or not.*” Yle’s public service remit is so broad that Yle feels entitled to interpret it in a manner that would allow it to engage in an increasingly wide range of activities that fall outside the intended scope of the public service remit and which compete with those offered by commercial operators to the detriment of competition, innovation, consumers and media pluralism.¹⁸⁵
227. The Commission has, nevertheless, accepted that the definition of a public broadcaster’s public service remit can be further specified through a prior evaluation procedure. Such a prior evaluation procedure, required by the Broadcasting Communication when public service broadcasters are to engage in “*significant new audiovisual services*”, allows the Member States to examine whether the new services the public service broadcaster intends to provide meet the conditions of the Amsterdam Protocol – i.e., whether the new services meet the democratic, social and cultural needs of the society.¹⁸⁶
228. A service is to be considered as new, and thus be subject to a prior evaluation, either when it is “*newly created (=provided for the first time) and [it] differ[s] substantially from the offerings already rendered by [the public service broadcaster] at the time of the evaluation*” or when “*existing offerings are changed and the changed offering is most likely significantly different from the already existing offering.*”¹⁸⁷

183 Broadcasting Communication, paragraphs 45 and 47 [emphasis added].

184 Id., paragraph 48.

185 See Commission Decision of 7 May 2014, SA.32635 (2012/E) - *Financement de la RTBF Belgique*, C(2014) 2634 final, paragraphs 186 and 194.

186 Broadcasting Communication, paragraph 84.

187 Commission decision of 28 October 2009, No E2/2008 (ex CP 163/2004 and CP 227/2005) – *Financing of the Austrian public service broadcaster ORF*, C (2009) K(2009)8113, paragraph 198. See also Broadcasting Communication, paragraph 85: “It is up to the Member States to determine, taking into

229. A differentiation may be considered as *significant* (i) when a new offer differs significantly from existing offerings in its content, its form of technical usability or its access, (ii) when a new offer addresses a significantly different target group than existing comparable offers, or (iii) when the new / modified service costs more than a certain percentage of the total public service budget (in the case of the financing of the Austrian public service broadcaster ORF, Austria set this percentage at more than 2% of the total public service budget in the proposal for appropriate measures made to the Commission).¹⁸⁸
230. While “*it is within the competence of the Member States to choose the most appropriate mechanism to ensure the consistency of audiovisual services with the material conditions of the Amsterdam protocol,*”¹⁸⁹ there are certain requirements that a prior evaluation procedure put in place in each Member State must fulfil. In particular:
- The prior evaluation procedure must give all interested stakeholders the “*opportunity to give their views on the envisaged significant new service in the context of an open consultation. The outcome of the public consultation, its assessment, as well as the grounds for the decision shall be made publicly available.*”¹⁹⁰
 - On the basis of the outcome of the public consultation, Member States must carry out a proportionality assessment to assess “*the overall impact of a new service on the market by comparing the situation in the presence and in the absence of the planned new service.*” Member States must take into consideration the existence of similar or substitutable offers, the market structure, the market position of the public service broadcaster, the level of competition and the potential impact on private initiative, and balance it with the value of the services in question for society.¹⁹¹
 - The prior evaluation procedure must be carried out by a “*body which is effectively independent from the management of the public service broadcaster.*”¹⁹²
231. In accordance with the Broadcasting Communication, Section 6a of the Yle Act provides that a “*prior evaluation shall be carried out of such new services and functions that have a more than insignificant influence on the available content services as a whole and that are*

account the characteristics and the evolution of the broadcasting market, as well as the range of services already offered by the public service broadcaster, what shall qualify as ‘significant new service’. The ‘new’ nature of an activity may depend among others on its content as well as on the modalities of consumption.”

188 Commission decision of 28 October 2009, No E2/2008 (ex CP 163/2004 and CP 227/2005) – *Financing of the Austrian public service broadcaster ORF*, C (2009) K(2009)8113, paragraph 199. See also Broadcasting Communication, paragraph 85: “The ‘significance’ of the service may take into account for instance the financial resources required for its development and the expected impact on demand. Significant modifications to existing services shall be subject to the same assessment as significant new services.”

189 Broadcasting Communication, paragraph 86.

190 Id., paragraph 87 [emphasis added].

191 Id., paragraph 88.

192 Id., paragraph 89.

considerable in terms of significance, duration and cost.” The offering of VOD constitutes a *significant new audiovisual service* for which a prior evaluation should have taken place. Yle Areena’s VOD offering differs significantly from Yle’s traditional broadcasting offering, as well as the provision of catch-up services (for which it is undisputed that they fall within the definition of Yle’s public service remit), as Yle Areena now offers a different type of content and in a new form. It now offers not only content broadcasted on Yle’s channels, but also international and domestic, acquired and original movies and series, which have the form of a stand-alone, structured catalogue. Moreover, Yle’s VOD service addresses a significantly different target group than Yle’s traditional TV offering: Yle Areena’s on-demand service targets Finns who do not watch linear TV, that is mainly the younger population.

232. Yle has carried out prior evaluations on four occasions in the recent past, none of which examined Yle’s expansion into the VOD segment: (i) in 2011 concerning the launch of Yle’s regular high-definition broadcasts, (ii) in 2014 concerning the rental of Yle’s studio capacity, (iii) in 2017 concerning regional news online services and personalization, and (iv) in 2017 concerning a change in the supply structure of Yle’s TV programmes.
233. The fourth evaluation, which focused on changes in Yle’s TV programme supply structure, made some references to Yle Areena’s offering, *without* however assessing the exact impact of an extension of Yle’s VOD content or inviting interested stakeholders to share their views on such an extension. In particular, the main purpose of this evaluation was to cease the operation of one of Yle’s TV channel slots and to repackage / restructure Yle Areena’s content. The evaluation did not explicitly concern the content to be provided on Yle Areena other than stating that Yle would increase the availability on Areena of content *produced by itself* (i.e., not acquired content, such as foreign movies and series). Thus, Yle’s extensive offering of acquired foreign content on Areena and the further expansion of its VOD service did not form part of a prior evaluation. In fact, even before 2017, Yle already included foreign content on Yle Areena, for which, to Sanoma’s knowledge, no prior evaluation was undertaken. Therefore, as the extension of Yle’s VOD service was not the focus of this prior evaluation, stakeholders were not invited (and could not have been expected) to express any informed views on this matter, especially considering that foreign content *already* formed part of Yle Areena’s offering.
234. It is, moreover, important to note that the manner in which the prior evaluation procedure is to be carried out in Finland does not rise up to the standards set by the Broadcasting Communication. What is particularly problematic is that the prior evaluation procedure with regards to the activities undertaken by the Finnish public service broadcaster is *not* carried out by a “*body which is effectively independent from the management of the public service broadcaster.*”
235. On the basis of Article 6 of the Yle Act, it is a duty of Yle’s Administrative Council to carry out the prior evaluation procedure of services and functions in relation to public service and the communications market as a whole, to determine, on the basis of this evaluation, whether the service or function is to be started or not, and to publish its decision with its justifications. The trouble is that the Administrative Council is an organ of Yle which, *inter alia*, determines

Yle's strategy and decides on the expansion or restriction of Yle's activities.¹⁹³ The Administrative Council is, therefore, not independent from the management of Yle; quite the contrary, it forms *part* of Yle's management and has a most significant role in determining the operations and future activities of the Finnish public broadcaster.

236. Considering that the prior evaluation procedure, as set out in Section 6a of the Yle Act, is to be carried out by a body that is not independent from the management of the company, that it is a tool that has not been widely used to define Yle's public service remit and to assess intended expansions of Yle's activities, and that there is no mechanism in place for concerned parties to complain in case they believe that a prior evaluation procedure should have taken place before the commencement of a new activity by Yle, the prior evaluation procedure as enshrined in the Yle Act and put in practice by the Administrative Council cannot be considered as a sufficient mechanism for the clarification of Yle's broad public service remit.

2.3.2. Yle has not been properly entrusted with the offering of VOD

237. As explained in detail above, Section 7 of the Yle Act, which sets out Yle's public service remit and vests Yle with the provision of a "*versatile and comprehensive television and radio programming with the related additional and extra services,*" cannot be considered as entrusting Yle with the offering of VOD services going beyond catch-up services. VOD (unlike catch-up services) cannot be considered as a service *related* to Yle's TV and radio programming, as it comprises a stand-alone catalogue of content of all kinds that viewers can watch on-demand for an unlimited period of time. Similarly, the offering of a commercial-like VOD service by Yle cannot be considered to constitute the provision of "*other content services related to public service*" within the meaning of Section 7 of the Yle Act, as the provision of a standalone catalogue of content (which is questionable to what extent meets the "*democratic, social and cultural needs of society*") cannot be deemed "*related to public service.*"
238. Moreover, with regards to the requirement of entrustment, the Broadcasting Communication emphasizes that, not only a formal entrusting act is required, but also an effective supervisory structure must be put in place to ensure that the public service broadcaster indeed carries out its public service obligations:

"It is also necessary that the public service be actually supplied as provided for in the formal agreement between the State and the entrusted undertaking. It is therefore desirable that an appropriate authority or appointed body monitors its application in a transparent and effective manner.

[...]

Such supervision would only seem effective if carried out by a body effectively independent from the management of the public service broadcaster, which has the

193 On the duties of the Administrative Council as well as Yle's supervision, see Section II.B.2.

powers and the necessary capacity and resources to carry out supervision regularly, and which leads to the imposition of appropriate remedies insofar it is necessary to ensure respect of the public service obligations.”¹⁹⁴

239. As explained in detail in Section II.B.2 above, Yle’s Administrative Council is the only body entrusted with the supervision of Yle’s public service activities. Unlike what is required on the basis of the Broadcasting Communication, Yle’s Administrative Council is *not* effectively independent from the management of the public service broadcaster. Yle’s Administrative Council is not only responsible for supervising that Yle indeed carries out its public service tasks but is also responsible for determining Yle’s strategy and deciding on issues regarding the expansion or restriction of Yle’s activities. This dual role of the Administrative Council – as the organ defining Yle’s activities and the organ supervising these activities – *by definition* prevents it from being independent, as required by the Broadcasting Communication.
240. What is more, due to it being an organ of Yle, it is highly unlikely that the Administrative Council would impose any appropriate remedies (e.g., require Yle to stop providing Arena’s VOD offering, which is a service Yle heavily invests in and puts it in the center of its development activities) if its investigations revealed that Yle does not respect its public service obligations. Without being (in theory and in practice) in the position to impose appropriate remedies, it cannot be considered that the Administrative Council can effectively supervise Yle and ensure that it carries out (and it stays within the limits of) its public service obligations.

2.3.3. Yle’s VOD offering fails the proportionality assessment

241. When it comes to the third requirement, i.e., the proportionality test, the Commission will have to assess

“whether or not any distortion of competition arising from the public service compensation can be justified in terms of the need to perform the public service and to provide for its funding. The Commission assesses, in particular on the basis of the evidence that Member States are bound to provide whether there are sufficient guarantees to avoid disproportionate effects of public funding, overcompensation and cross-subsidisation, and to ensure that public service broadcasters respect market conditions in their commercial activities.”¹⁹⁵

242. The proportionality test also requires Member States to ensure that public service broadcasters “*undertake their commercial investments in line with the market economy investor principle, and do not engage in anti-competitive practices with regards to their competitors, based on their public funding.*”¹⁹⁶

194 Broadcasting Communication, paragraphs 53-54 [emphasis added].

195 Id., paragraph 40 [emphasis added].

196 Id., paragraph 93.

243. We have explained in detail in Section III.C.1.4 above that the public funding Yle receives for the provision of its VOD service distorts competition, to the detriment of commercial VOD providers, innovation and consumer choice. At the same time, there is no need for the Finnish State to finance the provision of VOD by Yle, given that domestic and global VOD providers offer domestic and foreign content of all categories to Finns, employing various business models (fee-based SVOD and TVOD, as well as ad-funded, free-for-consumers AVOD) catering to the preferences and budgets of all Finnish viewers. Given the negative effects on competition and the lack of necessity of public funding due to the existence of sufficient private initiative in the VOD segment, the funding of Yle Arena’s VOD offering through State resources is disproportionate and thus incompatible with the internal market.
244. It should also be mentioned that there are no sufficient guarantees to avoid the disproportionate effects of public funding, overcompensation and cross-subsidization. Finnish legislation does not vest any authority or body with the power of preventing that public funding leads to overcompensation / produces disproportionate effects. As to cross-subsidization, in principle, it is one of Traficom’s duties to supervise that Yle does not engage in price undercutting or cross-subsidization.¹⁹⁷ In practice, however, this supervisory role does not provide sufficient safeguards against cross-subsidization. This is because Traficom is responsible for ensuring that Yle is not engaging in cross-subsidization between its public service activities and its commercial activities. However, Yle considers that all “content” activities that it engages with, including, e.g., FTA broadcasting, Yle Arena and online learning services, are “public service” activities – and Traficom does not have the responsibility of assessing what falls in or outside Yle’s public service remit.¹⁹⁸ Thus, the fact that Traficom is in theory vested with the task of ensuring that Yle does not engage in cross-subsidization, has very limited – if any – practical importance as it only relates to the very few activities Yle itself considers as commercial activities. Overall, as Yle’s funding is enshrined in the law (which set a minimum budget for Yle that is to be adjusted (i.e., increased) on the basis of a cost-of-living and a cost-of-wages index), Traficom (or any other authority or body) has no power to reduce the amount of funding Yle receives to ensure that it does not amount to over-compensation or that Yle does not engage in cross-subsidization.

D. The public funding of Yle’s provision of online learning services and VOD constitutes new aid

245. An important distinction ought to be made between new and existing aid. Pursuant to the State aid Procedural Regulation, existing aid is “*aid which existed prior to the entry into force of the TFEU in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the*

197 See Yle Act, Section 12a: “**Financial supervisory duties of the Finnish Communications Regulatory Authority.** The Finnish Communications Regulatory Authority monitors that sections 7a, 8, 8a and 12 are complied with and that no price undercutting or cross-subsidisation is practised.” If Yle violates the above provisions, Traficom is competent to obligate it to rectify its error or omission and may issue a notice of a conditional fine as a sanction.

198 See Section II.B.2.

*TFEU in the respective Member States.*¹⁹⁹ This distinction is of particular relevance in the case of State funding to public service broadcasters because “*the funding schemes currently in place in most Member States were introduced a long time ago.*”²⁰⁰

246. In order to assess whether aid can be considered as existing – i.e., forming part of the funding scheme already put in place – or new, the Commission “*must verify whether or not the legal framework under which the aid is granted has changed since its introduction.*”²⁰¹ In *Gibraltar*, the General Court held that

“it is only where the alteration affects the actual substance of the original scheme that the latter is transformed into a new aid scheme. There can be no question of such a substantive alteration where the new element is clearly severable from the initial scheme.”²⁰²

247. In order to assess whether the alteration affects the actual substance of the original scheme thus constituting “new aid”, the Commission will generally examine:

- “Whether the original financing regime for public service broadcasters is existing aid [...]”;
- Whether subsequent modifications affect the actual substance of the original measure (i.e., the nature of the advantage or the source of financing, the purpose of the aid, the beneficiaries or the scope of activities of the beneficiaries) or whether these modifications are rather of a purely formal or administrative nature; and
- In case subsequent modifications are substantial, whether they are severable from the original measure, in which case they can be assessed separately, or whether they are not severable from the original measure so that the original measure is as a whole transformed into a new aid.”²⁰³

248. Yle’s public funding scheme was put in place before Finland’s accession to the EU. The overall scheme can, therefore, be viewed as existing aid that has not been notified to the

199 Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (“Procedural Regulation”), OJ L 248, pages 9-29, Article 1(b)(i).

200 Broadcasting Communication, paragraph 25.

201 *Id.*, paragraph 29.

202 Judgment of the Court of First Instance of 30 April 2002, Joined cases T-195/01 and T-207/01 *Government of Gibraltar v Commission of the European Communities*, ECLI:EU:T:2002:111, paragraph 111 [emphasis added].

203 Broadcasting Communication, paragraph 31. See also Judgment of the General Court of 11 July 2014, T-151/11 *Telefónica de España, SA and Telefónica Móviles España, SA v European Commission*, ECLI:EU:T:2014:63, paragraph 62; Opinion of Mr Advocate General Trabucchi delivered on 4 December 1974, *Case 51-74 P.J. van der Hulst's Zonen v Produktschap voor Siergewassen*, ECLI:EU:C:1974:134; Judgment of the Court of 9 August 1994,.

European Commission. However, the public financing of Yle's provision of online learning services and VOD constitutes a new aid for several reasons.

249. First, as mentioned above, Yle's VOD and online learning services do not constitute a continuation of Yle's traditional broadcasting activity. Even when taking into account that Yle's TV programming always included programs having an educational purpose, providing online learning services and tools for pupils and teachers is a completely different offering. The broadcasted content was designed as a marginal complement to learning materials provided by commercial operators (i.e., it consisted in offering 1-2 hours of educational material per week when video content was still unique and could not be provided by commercial operators) but was never meant to replace them. Now Yle's offering aims to compete with providers of online learning services and to eventually replace them. If the Commission were to accept that Yle is merely continuing what it has always done, there would be no reason for Yle to stop expanding its offering into other educational markets unconnected to broadcasting, such as online university courses.
250. Concerning VOD services, while TV catch-up services can be considered as a logical continuation of Yle's broadcasting activity in the digital era, the same cannot be said with respect VOD services going beyond such catch-up services. Those VOD services might be seen as the continuation of DVD rental activities but not of TV broadcasting (see Section III.C.1.2.1).²⁰⁴
251. Second, in the *BBC digital curriculum* case,²⁰⁵ the Commission had to examine whether a new service, i.e., the provision of educational materials over the Internet, could be considered as "*ancillary*" (the Digital Curriculum service was to be provided by the BBC as an "ancillary service" according to BBC's Charter) or "*closely related*" to the radio and television activity of the BBC, thus constituting existing aid. The Commission considered that this was not the case:

"The Commission notes that although the proposed service builds on the educational traditions of the BBC and may be seen by some to be a logical and natural extension of the BBC's activities, the Digital Curriculum is a digression from the various markets within which the BBC has been active."²⁰⁶

252. The Commission also highlighted that the BBC entered an already existing market with the launch of its Digital Curriculum:

204 See, e.g., Section III.C.1.2.1.

205 Commission decision of 1 October 2003, N 37/2003 – *United Kingdom BBC Digital Curriculum*, C(2003)3371fin.

206 Id., para. 36.

“The use of public funding to enter markets that are already developed and where the commercial players have had little or no exposure to the BBC as a competitor cannot be considered as maintaining the status quo regarding the nature of the scheme.”²⁰⁷

253. The facts are nearly identical in the present case, as Yle entered existing (and functioning) markets by expanding the provision of its online learning services and VOD offering. In both cases, Yle entered a market in which commercial actors, like Sanoma, Otava and Edita, were previously not exposed to Yle’s State-funded presence.²⁰⁸
254. In addition, section 7 of the Yle Act, refers to “*television and radio programming with the related additional or extra services.*” This wording is comparable to the wording employed in the concept of “*ancillary services*” in the *BBC Curriculum* decision. In that decision, the Commission highlighted that BBC’s previous activities in the field of education were not sufficient to justify the financing of the Digital Curriculum as existing aid. The same conclusion needs to be drawn with respect to Yle’s online learning and VOD services, given that they are not “*related*” to Yle’s broadcasting activities and, thus, their financing leads to a substantive alteration of the existing aid.
255. Third, pursuant to the Commission’s and the EU Courts’ decisional practice, the financing of new online services offered by public service broadcasters should be considered as existing aid when these services are closely linked to the broadcasting program, their content is part of the public service remit and the budget is not increased substantially:

“The provision of online services (and teletext) connected with the programmes, which according to the ORF Law serve to achieve the programme remit and are connected with the broadcasting programme, has a close connection in any event, according to the wording, with ORF's traditional programme remit and appears restricted to supporting functions. In line with its case practice, the Commission therefore takes the view that the online services of ORF do not modify the existing public service remit to a fundamental extent within the meaning of the Gibraltar Jurisprudence.”²⁰⁹

256. As mentioned above, contrary to services such as teletext or TV catch-up services, which can be considered as “*ancillary*” or “*closely related*” to Yle’s broadcasting activities, online learning services and VOD are not closely related to broadcasting. In addition, online learning services and VOD do not form part of Yle’s public service remit.²¹⁰
257. In sum, the state funding allocated to Yle to finance its online learning and VOD services amounts to an alteration that affects the actual substance of the original aid scheme. It thus

207 Ibid.

208 See Sections III.A.1. and III.A.2.

209 Commission decision of 28 October 2009, No E2/2008 (ex CP 163/2004 and CP 227/2005) – *Financing of the Austrian public service broadcaster ORF*, C (2009) K(2009)8113, paragraph 130.

210 See, e.g., Section III.C.1.2.1.

constitutes “new aid”, notifiable to the Commission. To Sanoma’s understanding, such a notification did not take place.

IV. Conclusion

258. As Sanoma has shown in this Complaint, the funding that Yle receives from the Finnish State (through the Yle tax) for the financing of its online learning services and VOD offering constitutes State aid incompatible with the internal market within the meaning of Article 107(1) TFEU. Such funding cannot be exempted from the general prohibition of State aid on the basis of the SGEI derogation of Article 106(2). If the Commission considers that the relevant regime for assessment of Yle’s VOD offering is that set out in the Amsterdam Protocol and clarified by the Broadcasting Communication, Sanoma has explained that the conditions established therein are not fulfilled either.
259. Given that the funding for Yle’s online learning services and VOD constitutes new aid that the Finnish State should have notified to the Commission before its introduction (which, to Sanoma’s understanding, has not been the case), and that this funding constitutes aid incompatible with the internal market, the Commission should order Finland to recover the incompatible and unlawful state aid granted to Yle for the production and provision of online learning services and VOD offering on the basis of Article 16 of the Procedural Regulation, to the extent the aid is not time barred.
260. Should the Commission find, however, that the funding for Yle’s online learning services and/or VOD constitutes existing aid, Sanoma kindly requests the Commission to issue a recommendation for appropriate measures in accordance with Article 22 of the Procedural Regulation to ensure that the distortive aid is discontinued.
261. Finally, Sanoma would also welcome the establishment of an effective supervisory regime, making sure that Yle would, in the future, not be in a position to use public funding to enter and/or expand into markets in violation of State aid rules.
