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European Commission, DG Competition, Case SA.62830 – State aid to SA.62830 - State aid to public service broadcaster YLE for VOD and online learning services

**Response of Sanoma Media Finland Oy to the
Reply of the Finnish competent authorities to the Commission’s request for information of 30
April, dated 21 June 2021 and to the second Reply of Finnish competent authorities, dated 30
September 2021**

Part I

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GERADIN

PARTNERS

COMPETITION SPECIALISTS

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Executive summary

In April 2021, Sanoma Media Finland Oy (“**Sanoma**”) submitted a complaint to the European Commission setting out that the State aid granted to Yleisradio Oy (“**Yle**”) for the provision of video on-demand (“**VOD**”) and online learning services is illegal.

Sanoma did not submit its complaint to have Yle’s VOD services discontinued. Sanoma’s objective is to have clarity and fairness in the law in a rapidly digitalized and highly competitive market. Complying with the EU State aid rules ensures transparency over how public money is spent and leaves room for other media to serve the Finnish audiences. In the present submission Sanoma replies to the flawed observations made by the Finnish State to the Commission. Sanoma explains in detail that, contrary to other Member States, the Finnish State does not comply with the EU State aid rules for the reason that:

- a. ***Yle’s public service remit is not defined properly.*** State aid rules require a clear and precise definition of the public service mission (i.e., what Yle is allowed or not allowed to do). Yle’s excessively broad remit allows Yle to expand into new market segments, which undercuts commercial initiatives.
- b. ***Yle has not been entrusted to offer Yle Areena and online learning services.*** Where a public broadcaster plans to offer “significant new” services (e.g., online services that differ from Yle’s TV and radio services), it must be explicitly entrusted by means of an official act. An entrustment procedure did not take place when Yle introduced its VOD and online learning services, even though those services clearly qualify as “significant new” services.
- c. ***Yle is not subject to an effective control mechanism.*** The Administrative Council, the body that assesses whether Yle fulfils its public service obligations, is not an independent regulator. The control exercised by the Finnish Transport and Communications Regulatory Authority (“**Traficom**”) over whether Yle causes harm to competition is marginal and no appropriate safeguards have been put in place to ensure that the public money Yle spends is proportionate to the mission it is expected to fulfil.
- d. ***Yle’s provision of VOD and online learning services has produced disproportionate effects on competition.*** Such negative effects on the market can only be expected to increase. Sanoma will be submitting a second reply to the Commission that addresses this matter in detail.

Yle has evolved over time and its services now go far beyond the traditional broadcasting offer. When Yle enters into a new market segment, it does so with State subsidies. Contrary to Yle, commercial providers do not receive public funding. In order to survive, private operators must receive a reasonable return from investing into a new service. This return on investment is difficult to achieve if Yle benefits from a “first-mover advantage” because of its ability to lavishly spend public money. As a result,

commercial providers, which cannot replicate Yle's advantage, are discouraged from investing into emerging markets.

As market boundaries are becoming increasingly blurred and technological developments facilitate the launch of innovative services, compliance with the EU State aid rules is necessary so that Sanoma and all other commercial players can find their way into the Finnish audiences. The Finnish State must respect those rules in order to enable commercial operators to contribute to media pluralism and the long-term viability of the Finnish media landscape.

I. Introduction

1. On 23 April 2021, Sanoma submitted a Complaint (the “**Complaint**”) to the European Commission (“**Commission**”) regarding the State aid scheme supporting Yle, Finland’s public service broadcaster. The Complaint sets out that funding Yle’s VOD and online learning services is illegal State aid on the grounds that the conditions established in Article 106(2) of the Treaty on the Functioning of the European Union (“**TFEU**”), the Amsterdam Protocol and the Broadcasting Communication are not fulfilled. Sanoma explains in its Complaint that the VOD and online learning services provided by Yle do not fall within its public service remit, which is both unclear and excessively broad. Sanoma further demonstrates that there is no effective supervision mechanism ensuring that Yle complies with its public service mandate and that the provision of Yle’s VOD and online learning services has produced disproportionate effects on competition. Such effects can only be expected to increase unless appropriate safeguards are put in place.
2. On 21 June 2021, the Finnish State submitted a Reply to the Commission’s request for information (dated 30 April 2021), alleging that the measure financing Yle is compatible with the EU State aid rules.¹ On 30 September 2021, the Finnish State submitted a Second Reply that comprises additional information, including an economic analysis prepared by Copenhagen Economics that was conducted at the request of Yle.²
3. The present submission, alongside a second submission to follow in due course, replies to the observations made by the Finnish State in those responses, which it will show are entirely flawed.
4. Sanoma clarifies from the outset the rationale for the Complaint as well as its intentions: Sanoma does not aspire to have Yle’s VOD services discontinued. Sanoma’s objective is to ensure that the Finnish scheme supporting public service broadcasting complies with the EU State aid rules. The current framework deprives Sanoma of the ability to serve Finns as it would under fair conditions. Due to the uncertainty surrounding Yle’s potential expansion into new market segments, Sanoma finds it excessively difficult to plan its future activities. The reason is simple: contrary to Sanoma, which is financed by subscriptions and advertising, Yle’s funding is stable and secure. The lack of transparency over what Yle is allowed or not allowed to do is further aggravated by the fact that there is no effective supervision over how Yle fulfils its public mission or how it spends public money. Given the Commission’s State aid practice in the sector *and* best practices in other jurisdictions, the framework governing Yle is inadequate. Contrary to other Member States,

1 Reply of the Finnish competent authorities to the Commission’s request for information of 30 April 2021, SA.62830 – State aid to public service broadcaster YLE for VOD and online learning services – FI (“**First Reply of the Finnish competent authorities**”), 21 June 2021.

2 Second Reply of the Finnish competent authorities to the Commission’s request for information of 30 April 2021, SA.62830 – State aid to public service broadcaster YLE for VOD and online learning services – FI (“**Second Reply of the Finnish competent authorities**”), 30 September 2021.

Finland has still not revised its rules to ensure that Yle’s expansion into online markets fulfils the requirements set by EU State aid law.

5. The responses of the Finnish State acknowledge the *technological* developments that Yle should be allowed to take advantage of (e.g., the decline of linear television and the viewers’ increasing reliance on the Internet to access media content). They also acknowledge *market* developments, most notably how competitive the markets for VOD and online learning services are. But they fail to acknowledge the *EU law* developments that have accompanied and circumscribed the provision of online services with public money. Sanoma’s submission demonstrates that the Finnish State and Yle have ignored such developments.
6. For Yle’s financing to be compliant with Article 106(2) TFEU, the Amsterdam Protocol and the Broadcasting Communication, the following conditions must be fulfilled:
 - a. The services provided by Yle must be Services of General Economic Interest (“SGEI”) and clearly defined as such by the Member State (*clear and precise definition*);
 - b. Yle must be explicitly entrusted with the provision of those services (*entrustment*);
 - c. An appropriate authority must monitor compliance with Yle’s remit in a transparent and effective manner (*effective supervision*); and
 - d. Yle’s funding must not affect competition in the common market in a disproportionate manner (*proportionality*).³
7. The Finnish State’s arguments are based on an incorrect understanding of the legal standards that must be met for Yle’s public funding to fulfil the above requirements. Moreover, the Finnish State fails to provide any concrete evidence that Yle’s financing does not amount to illegal State aid. The present submission will demonstrate that:
 - **Yle’s remit is not defined properly:** The Finnish State contends that Yle’s overly wide remit is compatible with the EU State aid rules. This is incorrect for three reasons.
 - First, Yle’s mission to provide services “*related and additional to*” television and radio programming as well as “*other content*” services⁴ is far from clear and precise. Contrary to the Commission’s decisional practice and best practices followed in many jurisdictions, Yle’s remit is excessively broad. As a result,

3 Commission Communication on the application of State aid rules to public service broadcasting (“**Broadcasting Communication**”), [2009] OJ C 257/1, paragraphs 37 and 53.

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

competent authorities cannot control whether Yle’s VOD and online learning services fall within its mandate, and commercial operators cannot organize their activities.

- Second, even though the Finnish State has the freedom to (and has indeed) set qualitative criteria that define the remit, that freedom is not absolute. Instead, that freedom is subject to the condition that the definition does not disproportionately affect competition. There are currently no effective safeguards to ensure that Yle meets such qualitative standards and that it refrains from adopting the conduct of a commercial operator.

- Third, the argument of the Finnish State that a manifest error in the definition of the remit exists *only* where commercial activities (e.g., advertising) are not allowed is plainly wrong; a manifest error *also* exists when the public broadcaster instrumentalizes a broad remit to harm competition. Based on the type of content that is popular on Yle Areena (mainly entertainment⁵) and the increasing substitutability between Yle’s online learning offering with that of commercial operators, the added public value the contested services bring to the audience is unclear. Sanoma expects that, alongside the markets for VOD and online learning services, emerging markets (e.g., in the audio sector) will also suffer from lack of effective competition as a result of Yle’s excessively vague remit. Moreover, the *ex ante* test that was conducted in 2016 for changes introduced in Areena plainly demonstrates that the assessment of the impact Areena could have on the market was inadequate.

- **Yle has not been entrusted to offer Yle Areena and online learning services:** The Finnish State argues that the Yle Act entrusts Yle with the provision of VOD and online learning services on the grounds that the Amsterdam Protocol is technology neutral and that public broadcasters must be able to serve the evolving needs of the audience. This argument is misleading. It is now widely acknowledged that the expansion of public broadcasters into online markets must meet certain criteria. More particularly, due to differences in the modality of consumption (on-demand vs linear programming), the content offered, and the financial resources devoted to offer them, the contested services qualify as “significant new” services. As a result, a specific procedure should have been followed to entrust Yle with their provision. The Finnish State had the following options at its disposal to ensure that the entrustment criterion is met: it could have revised the Yle Act to include in the remit VOD and online learning services, it could have conducted an evaluation procedure prior to their launch, or it could have notified the aid to the

5 “Entertainment” content can be said to comprise “Domestic Children”, “Foreign Children”, “Domestic Drama”, “Foreign Drama”, “Entertainment” and “Sports” content.

Commission. The Finnish State did none of the above. To date, the impact of those services on the market has not been properly assessed.

- **Yle is not subject to an effective control mechanism:** The Finnish State attempts to argue that the Administrative Council and Traficom exercise effective control over whether Yle fulfils its remit and whether the money it spends does not disproportionately distort competition. Yet, based on the description provided by the Finnish State itself, the tasks that the above authorities are expected to perform clearly show that the system is flawed. In addition to checking compliance with the public service mandate, the Administrative Council also decides on Yle’s strategy, a function that is akin to that performed by a body managing the public broadcaster. Where such conflicts of interest arose in the past, Member States introduced changes in national legislation, assigning to independent regulators the task to assess whether the public service mission is fulfilled. Traficom is entrusted with ensuring that no spillovers of public money to commercial activities take place. However, due to the fact that Yle’s revenue-making activities are marginal (according to the Finnish State, those activities amounted to 0,6% of Yle’s total revenue in 2020⁶), that control is also marginal. The Finnish framework does not provide any adequate safeguards to ensure that the competent authority properly conducts the main type of control exercised over broadcasters that predominantly rely on public funds to reach audiences (i.e., a proper assessment of whether overcompensation has taken place).
8. The second reply Sanoma will submit in due course will demonstrate that Yle’s publicly-funded provision of VOD and online learning services has produced disproportionate effects on competition. Overall, Sanoma will show that, contrary to EU State aid rules, Yle’s VOD and online learning services have been offered without an assessment of how their negative impact on the market is outweighed by the public value those services deliver. There has been complete disregard for what the market offers, and the contested services are not used as a vehicle to discharge public service obligations, but as a means to attract mass audiences, to the detriment of competition. In this second submission, Sanoma will also explain in detail why the Commission should dismiss the findings of the Copenhagen Economics report commissioned by Yle.
 9. The present submission is structured as follows: **Part II** demonstrates that Yle’s VOD and online learning services cannot be deemed to fall within Yle’s remit. **Part III** shows that there has been no proper entrustment to Yle to provide such services. **Part IV** sets out that the supervision currently exercised by the Administrative Council and Traficom is not effective. **Part V** briefly contests the findings of the Copenhagen Economics report commissioned by Yle. **Part VI**, concludes.

6 First Reply of the Finnish competent authorities, paragraph 60.

II. Yle’s remit concerning VOD and online learning services is not defined properly

10. In its response to the Commission, the Finnish State mentions that, based on the Amsterdam Protocol, Member States are competent to define the public service remit as they deem fit in order to fulfil the social, democratic and cultural needs of the society they serve.⁷ The Finnish State further mentions that Yle should be able to follow technological developments in order to address the evolving needs of its audiences.⁸
11. Sanoma neither contests the Member States’ freedom to choose which services should be regarded as SGEI nor Yle’s ability to offer those services that fall within its remit through the Internet. Sanoma, however, takes issue with the fact that Yle uses public money to provide VOD and online learning services without those services falling under its remit. The analysis that follows demonstrates this point clearly.
12. Section 7 of the Act on the Finnish Broadcasting Company 1380/1998 (“**Yle Act**”) defines Yle’s public service remit as 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 shall be provided in public communications networks nationally and regionally.”⁹

13. The Yle Act further lays down certain qualitative standards/goals that must govern Yle’s offering, including the objective to “*provide an opportunity to learn and study.*”¹⁰
14. In its response to the Commission, the Finnish State argues that the above definition is compatible with the EU State aid rules on the following grounds:

7 First Reply of the Finnish competent authorities, paragraphs 32-33.

8 Id., paragraphs 35-38.

9 Yle Act, Section 7 [emphasis added].

10 See Yle Act, Section 2: 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.”

- a. The Yle Act sets out Yle’s public service tasks in a clear (yet broad) manner;¹¹
 - b. The definition of Yle’s remit rests on qualitative criteria and this is in line with Article 106(2) TFEU and the relevant case law;¹²
 - c. There has been no manifest error in the definition of the remit because it does not expressly include “*activities that could not be reasonably considered as addressing the democratic, social and cultural needs of the society, such as commercial advertising, e-commerce, teleshopping, use of premium rate numbers in prize games, sponsoring and merchandising.*”¹³
15. The above arguments do not hold water. First, Yle’s mission to provide services “*related and additional to*” television and radio programming as well as “*other content*” services¹⁴ is far from clear and precise. Yle’s excessively broad remit is not in line with the Commission’s decisional practice and best practices followed in many jurisdictions (**Section A**). Second, although the Finnish State has the freedom to set qualitative criteria that define the remit, that freedom is subject to the condition that the definition does not disproportionately distort competition. There are currently no effective safeguards to ensure that Yle meets such qualitative standards and that it refrains from adopting the conduct of a commercial operator (**Section B**). Third, the argument of the Finnish State that a manifest error in the definition of the remit exists *only* where commercial activities are not allowed is plainly wrong, as a manifest error *also* exists when the public broadcaster instrumentalizes a broad remit to harm competition (**Section C**). A case in point is “inspiring entertainment content” that Yle is expected to provide and the content that is actually consumed on Yle Areena (**Section D**). Finally, the Finnish State goes to lengths to attempt to prove that Yle Areena is a public service that fulfils the remit because it promotes content of European origin and because it serves the needs of minorities and expats. The Finnish State conveniently refrains from explaining in detail the relevant content and accessibility rules that bind commercial operators in Finland (**Section E**).

11 First Reply of the Finnish competent authorities, paragraph 46: “Contrary to the Complainant’s view, Yle VOD and online learning services fall within the scope of Yle’s public broadcasting remit, sufficiently precisely defined as required by State aid rules. Member States are allowed by the EU State aid rules to define the public remit in broad and qualitative terms in order to allow public broadcasters to use new distribution platforms and new technologies in order to achieve objectives recognized by the Amsterdam Protocol.”

12 Id., paragraph 34: “The General Court has recognized that Member States’ discretion in defining public service remit allows for a wide and broad definition, based on qualitative and not quantitative criteria, allowing the public broadcaster a necessary freedom to adjust its services, in order to achieve Amsterdam Protocol’s objectives [...]”

13 Id., paragraph 40 referring to the Broadcasting Communication, paragraph 48.

14 Yle Act, Section 7.

A. The broad description of Yle’s public service mission does not meet the standards set by established practice

16. Though it is accepted that the remit can be described in broad terms to encompass a wide range of services, it is also established decisional practice of the Commission that its definition should be “*as precise as possible*”.¹⁵ As the Broadcasting Communication explains, a precise definition is necessary to enable the Commission to properly assess whether the derogation under Article 106(2) TFEU is applicable;¹⁶ to allow national authorities to effectively monitor compliance;¹⁷ and to enable private operators to plan their activities.¹⁸ In the absence of a precise definition of the public service mandate, legal uncertainty renders supervision ineffective and undercuts initiatives that commercial providers may wish to undertake. That uncertainty ultimately damages the taxpayer; there can be no accountability on how public money is spent and audiences may be deprived of choice.
17. Yle’s mission consists in providing “*versatile and comprehensive television and radio programming with the related additional and extra services for all citizens under equal conditions*.”¹⁹ This definition is not aligned with the principle set out in the Broadcasting Communication that the mandate “*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*.”²⁰ In fact, in assessing remits similar to that of Yle, the Commission has found that they did not comply with the EU State aid rules, requesting Member States to introduce changes in national legislation in order to ensure clarity and predictability of what constitutes a “public service”.
18. For example, in the case dealing with the scheme supporting Belgian public service broadcaster RTBF, the Commission took issue with the fact that the remit allowed the provision of “*related*

15 Broadcasting Communication, paragraph 45; European Commission, E 2/2008 (ex CP 163/2004 and CP 227/2005) – Financing of ORF, 28 October 2009, C (2009) K(2009)8113, paragraph 138; European Commission, State aid E 4/2005 (ex NN 99/1999) – Ireland: State financing of Radio Teilifís Éireann (RTÉ) and Teilifís na Gaeilge (TG4), 27 February 2008, C(2008)723 final, paragraph 85; European Commission, State aid E 5/2005 (ex NN 170b/2003) – Annual financing of the Dutch public service broadcasters – The Netherlands, 26 January 2010, C(2010)132 final, paragraph 143.

16 Broadcasting Communication, paragraph 43.

17 Id., paragraph 46.

18 Ibid.

19 Yle Act, Section 7.

20 Broadcasting Communication, paragraph 45 [emphasis added].

services”.²¹ The Commission found that this definition was not precise enough.²² Belgium committed to clarify RTBF’s public service mission, proposing to include in the revised Management Agreement an exhaustive list of online services that RTBF could offer.²³

19. Likewise, in the case concerning State aids granted to Austrian broadcaster ORF, the Commission required Austria to define in more precise terms the public service remit of ORF, which allowed it at the time to engage in “*the performance of **online services** and teletext connected with the broadcasting activity [...]*.”²⁴ The Austrian authorities and the Commission adopted an approach similar to the outcome of the RTBF case.²⁵
20. Finally, as regards learning services, in *BBC Digital Curriculum*, a decision dealing with the BBC’s online learning services, the UK authorities submitted commitments to address concerns raised by the Commission regarding the launch of those services as “*ancillary services*”. The UK authorities committed to publish a “commissioning plan”,²⁶ which would set out the subjects to be covered during the first five years of the service. That plan would be accompanied by explicit criteria for exclusion, providing clarity for users and commercial providers of the subjects that would not be provided by the BBC throughout the duration of the Plan.²⁷
21. It is clear from the above that Yle’s mission “*to provide related additional and extra services*” and “*to provide an opportunity to learn and study*” cannot be regarded as sufficiently precise. As a result, the definition of the remit is incompatible with the EU State aid rules.

B. The Finnish State’s freedom to define the remit on the basis of qualitative criteria is not absolute. It is subject to the condition that the definition does not disproportionately affect competition

22. The Finnish State argues that the broad criteria governing Yle’s public service mission are sufficient to ensure compliance with the applicable rules, referring to *TV2 Danmark v*

21 European Commission, Aide d’Etat SA.32635 (2012/E) – Financement de la RTBF Belgique, 7 May 2014, C(2014) 2634 final, paragraph 22 [free translation]. A “related” service, was defined as an audiovisual service other than an audiovisual media service, e.g., a text-based online information service or an information society service, having as its object to support, enrich, complete, extend or anticipate an audiovisual service and which is directly or indirectly linked to it, whatever the electronic means of communication used.

22 Id., paragraph 253.

23 See Id., paragraphs 287-292. See also paragraphs 303-306 on the matter of the prior evaluation procedure.

24 European Commission, E 2/2008 (ex CP 163/2004 and CP 227/2005) – Financing of ORF, 28 October 2009, C (2009) K(2009)8113, paragraph 16 [emphasis added].

25 Id., paragraph 180.

26 European Commission, State aid No N 37/2003 – United Kingdom: BBC Digital Curriculum, 1 October 2003, C(2003)3371 fin, paragraph 43.

27 Ibid.

Commission, a judgment that acknowledges that Member States may use qualitative parameters to describe the public service mandate.²⁸ The Finnish State further mentions that reliance on such parameters safeguards the editorial independence of public broadcasters.²⁹

“Member States’ competence to define public remit using broad yet sufficiently precise terms ensures that the entire population benefits from services that provide quality, versatility and diversity, while allowing public service media to innovate and respond to the evolving needs of the audiences they serve. In addition, qualitative requirements ensure that a public service broadcaster enjoys editorial independence from political authorities.

The General Court has recognized that Member States’ discretion in defining public service remit allows for a wide and broad definition, based on qualitative and not quantitative criteria, allowing the public broadcaster a necessary freedom to adjust its services, in order to achieve Amsterdam Protocol’s objectives.”³⁰

23. The Finnish State chooses to tell only part of the story. As a result, it fails to accurately describe the applicable legal standard. Unlike what the Finnish State would like the Commission to believe, the Member States’ freedom to define the remit is not absolute. The Amsterdam Protocol acknowledges

“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.”³¹

24. Essentially, the Amsterdam Protocol establishes that Member States are free to define the remit as they deem fit, but only to the extent that this definition does not disproportionately affect competition. It is for this reason that the General Court ruled in *SIC v Commission* that “*qualitative requirements are the justification for the existence of broadcasting SGEIs in the national audiovisual sector and there is [...] no reason for a widely defined broadcasting SGEI which sacrifices compliance with those qualitative requirements in order to adopt the conduct of a commercial operator [...] to continue to be financed by the State on the same conditions as if*

28 First Reply of the Finnish competent authorities, paragraph 34, referring to Judgment of the General Court of 22 October 2008, *TV 2/Danmark A/S v Commission*, T-309/04, T-317/04, T-329/04 and T-336/04, ECLI:EU:T:2008:457 (“**TV2 Danmark v Commission**”), paragraphs 113 and 116-118.

29 *Id.*, paragraph 33, referring to *TV2 Danmark v Commission*, paragraphs 117-118.

30 *Id.*, paragraphs 33-34.

31 Protocol on the system of public broadcasting in the Member States [1997] OJ C 340/109 [emphasis added].

*those qualitative requirements were complied with.*³² As will be explained in greater detail in Sanoma’s second reply, Yle has adopted a conduct similar to that of a commercial operator.

25. In other words, the qualitative parameters that should govern Yle’s offering cannot give Yle a *carte blanche* to provide any service that is deemed to pursue vaguely worded objectives. The effects on competition created by Yle’s imprecise remit are further aggravated by the fact that there is no effective control over whether those qualitative standards are met (see Part IV below).
26. Moreover, the Finnish State incorrectly assumes that a precise definition would interfere with the editorial independence of Yle.³³ There is a difference between compromising the editorial autonomy of a media organization (e.g., by imposing straightjacketed content rules or by dictating what content should be broadcast) and lacking any specific benchmarks against which both the national regulator and the Commission can assess how State aid is used. No such benchmarks have been set for Yle.

C. A manifest error in the definition of the remit does not exist only where commercial activities are not allowed. It also exists when the public broadcaster instrumentalizes a broad remit to offer services that do not justify the harm to competition

27. In support of their argument that the definition of Yle’s remit complies with the EU State aid rules, the Finnish State refers to the Broadcasting Communication and contends that there has been no manifest error in the definition of the public service remit because Yle’s mandate does not encompass the provision of commercial services.³⁴ The Finnish State purposefully omits to refer to the full wording of paragraph 48 of the Broadcasting Communication, only referring to a part thereof which would support its own position:

“The definition of the public service remit would [...] be in manifest error if it included 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’. That would normally be the position in the case of advertising, e-commerce, teleshopping, the use of premium rate numbers in prize games, sponsoring or merchandising, for example.”³⁵

28. The rest of the relevant text, however, explicitly states that:

32 Judgment of the Court of First Instance of 26 June 2008, SIC - Sociedade Independente de Comunicação, SA v Commission of the European Communities, T-442/03, paragraph 211, ECLI:EU:T:2008:228 [emphasis added].

33 First Reply of the Finnish Competent Authorities, paragraph 33.

34 Id., paragraph 40, referring to the Broadcasting Communication, paragraph 48.

35 Broadcasting Communication, paragraph 48 [emphasis added].

“Moreover, a manifest error could occur where State aid is used to finance activities which do not bring added value in terms of serving the social, democratic and cultural needs of society.”³⁶

29. The above sentence clearly indicates that checking for manifest error is not limited to checking whether the law expressly excludes (or refrains from including) certain commercial activities in the public remit. This only goes *partway* towards assessing that no manifest error has been committed. For the Commission to be able to conduct such an assessment, the State authorities *additionally* need to have in place a precise description of the activities a public broadcaster is allowed to develop and how those activities contribute to the accomplishment of the public service mission. This is what allows the Commission to assess whether the harm to competition is justified.
30. In other words, two different types of safeguards are required in the legal framework in order to allow the Commission to carry out an assessment of whether a manifest error has been committed. First, as the public broadcaster receives State aid to meet the democratic, social and cultural needs of society, safeguards are needed to ensure that the public broadcaster’s activities fall within its remit and that their impact on competition is not disproportionate (e.g., a sufficiently precise definition, rules on the amount of State aids received in the previous year that a public broadcaster can retain to withstand revenue cost and revenue fluctuations).³⁷ Second, in cases where a public broadcaster engages in commercial activities (i.e., activities which do not meet the democratic, social and cultural needs, such as advertising and e-commerce), specific safeguards are needed to avoid cross-subsidization (e.g., a clear remit that does not include commercial services, separation of accounts).
31. Put bluntly, contrary to what the Finnish State argues, rules ensuring that commercial activities are not part of the remit do nothing to show what the actual remit is. A control for manifest error can only be conducted where the remit does not include commercial activities *and* where the remit is defined in sufficiently precise terms. Both elements are key to the assessment of whether the State subsidies that are used to support public broadcasting services are proportionate to the costs of the public service mission.
32. The lack of transparency governing Yle’s remit cannot continue to exist, for it renders commercial operators unable to plan their future activities. If Yle expands into new segments without any clarity over the services that fulfil the remit, commercial providers are discouraged from innovating. Contrary to Yle, commercial providers do not receive public funding. In order to survive, private operators must be able to expect a reasonable return from investing into a new service. This return on investment is difficult to achieve if the market is emptied by Yle or if Yle

36 Ibid [emphasis added].

37 Id., paragraph 73.

benefits from a “first-mover advantage” because of its ability to lavishly spend public money before the market has developed enough. A case in point is Yle Areena, which was launched in 2007 in the (then) emerging segment for VOD services. As the Finnish State acknowledges in its reply, Yle Areena was the first VOD platform that was launched in Finland³⁸ and is now the most popular domestic VOD brand.³⁹

33. The circumstances under which Yle can offer its VOD services differ significantly from those facing commercial providers. The content offered by Yle Areena is not accompanied by advertisements nor does Yle charge viewers a fee to access the platform. In other words, in the market for viewers’ attention, Yle has a strong competitive advantage that cannot be replicated by commercial operators. The advantage of receiving public funds enables Yle to divert viewers away from commercial operators which need those viewers to obtain ad or subscription revenues in order to serve the needs of the Finnish audiences.
34. The market for online learning services is currently where the segment for VOD services was in its early years. Learning is no longer restricted to what is taught in classrooms and print textbooks, for teachers and pupils are increasingly relying on a variety of supplementary materials and new teaching methods. Similar to Yle, commercial operators are keen to respond to these changes, providing Finns the opportunity to study and learn. For that to happen, greater legal certainty about Yle’s mission is imperative. Setting clear rules on Yle’s remit should not be restricted to VOD and online learning services. For example, the consumption of audio content is not limited to linear radio programming. It now includes subscriptions to podcasts and news consumption through voice assistants. As market boundaries are becoming increasingly blurred and technological developments facilitate the launch of innovative services, a precise definition of Yle’s remit is necessary so that Sanoma and all other commercial players can find their way into the Finnish audiences. Yle’s compliance with the EU State aid rules would enable commercial operators to contribute to media pluralism and to the long-term viability of the Finnish media landscape.
35. Where a precise description of the remit was absent, Member States have committed to amend the applicable rules in order to ensure that the remit would be defined in a manner that sets out

38 See Second Reply of the Finnish competent authorities, paragraph 36.

39 See Sanoma, “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”)", 23 April 2021, paragraph 94 (Figure 6). According to AudienceProject, Yle Areena is the domestic VOD provider that ranks the highest in the preferences of Finnish consumers. See also <https://yle.fi/aihe/artikkeli/2020/09/21/yle-areena-jatkaa-suomen-arvostetuimpana-verkkobranda> [Yle Areena will continue to be Finland’s most respected online brand], which mentions that, in 2020, this will be so for the eighth time in a row.

the *value* that services offered by public broadcasters add to the commercial offering.⁴⁰ This has not been the case with Yle. A case in point is “inspiring entertainment content” that Yle is expected to provide, which is developed in the following Section.

D. Yle’s ability to offer entertainment content on Yle Areena needs to be qualified

36. In its response to the Commission, the Finnish State argues that Yle Areena made it possible to provide Finns with a wide range of content, such as documentaries, science, art and other cultural content.⁴¹ The Finnish State further mentions that providing “*inspiring entertainment content*” through Areena clearly falls under Yle’s remit.⁴² It specifically refers to the provision of “reality” shows and attempts to justify their significance by contending that such content “*encourages discussions about the relationships and family value in realistic depiction of today’s Finnish everyday reality, human relationships and life situations.*”⁴³
37. Yle’s ability to offer entertainment content needs to be put in perspective in order to assess whether the provision of such content fulfils the public service remit.
38. First, though the Commission has accepted that entertainment content could form part of the public service mission, it found that a vague reference to “entertainment” (and even specific types of entertainment content, such as sports competitions) is not compatible with the EU State aid rules and that the scope of the service concerned needed to be defined in more precise terms. For example, in the case concerning the funding of Austrian public broadcaster ORF, the Commission found that the mission of a specialist television channel to “*provide full information to the general public on all sports questions and helping to promote the interests of the population in active sports activity*” was not precise enough.⁴⁴ Austria committed to clarify that the programme of the sports channel would comprise sport and sport competitions “*which do not have a broad space in the Austrian media coverage (minority sports).*”⁴⁵

40 See, for instance, European Commission decision State aid E3/2005, Financing of public service broadcasters in Germany [2007] C185/1, paragraph 362; European Commission, State aid E 4/2005 (ex NN 99/1999) – Ireland: State financing of Radio Teilifis Éireann (RTÉ) and Teilifis na Gaeilge (TG4), 27 February 2008, C(2008)723 final, paragraph 142; European Commission, Aide d’Etat SA.32635 (2012/E) – Financement de la RTBF Belgique, 7 May 2014, C(2014) 2634 final, paragraph 171.

41 First Reply of the Finnish competent authorities, paragraph 21.

42 Ibid.

43 Id., paragraph 21. The Finnish States repeats this position in its Second Reply. See Second Reply of the Finnish competent authorities, paragraph 84: “even certain reality type of programming that show lives of different members of the Finnish society can contribute to the discussion, raise awareness and fulfil Yle’s public service mission.”

44 See, for instance, European Commission, E 2/2008 (ex CP 163/2004 and CP 227/2005) – Financing of ORF, 28 October 2009, C (2009) K(2009)8113, paragraphs 146-149.

45 Id., paragraphs 194-195.

39. Second, the Finnish State has provided no arguments or evidence as to how “reality” shows distributed through Areena foster public debate. In linear television, offering entertainment content may (but does not necessarily) lead to the consumption of content that is of greater societal value, such as current affairs programming and political documentaries. However, in an on-demand environment where users have control over what content to consume and when to consume it, they may simply move on to the next item (which may well be another “reality” show). In other words, the freedom over the content viewed on a VOD platform does not demand the packaging of entertainment content together with content that advances discussions about important societal matters. As will be seen below (and as Sanoma will discuss in its second reply), the most popular Areena content is entertainment content.
40. Third, the Finnish State further argues that “reality” shows constitute only “*a small portion of the VOD content.*”⁴⁶ Focusing on “reality” shows does not paint the full picture, as it unduly limits the discussion to one sub-category of entertainment content. The Finnish State contends that Yle Areena is the appropriate platform through which it could distribute niche and commercially unpopular content because of the limitations that are inherent in traditional broadcasting (limited time, considerable distribution costs).⁴⁷ While such content needs to reach Finnish audiences and its provision is at the core of Yle’s public service mission, in an on-demand environment, it is of utmost importance to distinguish between the content that is made available for consumption and the content that is *actually* consumed.
41. If “*documentaries, science, art or other cultural content items*” are made available on Areena but draw fewer viewers, Areena is in effect an entertainment-oriented platform and thus a vehicle to attract mass audiences through commercial programming. This is substantiated by the fact that the vast majority of content that is watched on Areena qualifies as “entertainment”. Based on an analysis of all titles available on Yle Areena, the combination of the genres that qualify as “entertainment” (“Domestic Children”, “Foreign Children”, “Domestic Drama”, “Foreign Drama”, “Entertainment” and “Sports”) accounts for:⁴⁸
- 50% of titles;
 - 77% of total views;

46 First Reply of the Finnish competent authorities, paragraph 21.

47 Ibid.

48 Yle Areena data contain information on all video content available on Yle Areena on 27 August 2021, the date when Yle Areena data were initially scraped. Information on total views of specific titles was scraped from the Yle Areena webpage on 3 September. Each video on the webpage lists the number of times the video has been viewed. E.g., it shows that this Peppa Pig episode <https://areena.yle.fi/1-50513436> had 49,899 total views as of 11 October at noon EET. The data would report the total views when data was scraped, i.e., in this case on 3 September.

- 84% of total average views per day.⁴⁹

Figure 1: Titles available on Areena / Distribution of titles and views by genre [Source: Compass Lexecon]

Genre	Number of titles	Share of titles	Share of total views	Share of average views per day
Children domestic	10 072	20 %	21 %	7 %
Children foreign	3 316	7 %	10 %	38 %
Drama domestic	2 918	6 %	29 %	12 %
Drama foreign	1 564	3 %	9 %	20 %
Entertainment	4 203	8 %	6 %	2 %
Sports	3 003	6 %	3 %	6 %
General entertainment total	25 076	50 %	77 %	84 %
Culture	2 506	5 %	1 %	0 %
Current affairs	2 416	5 %	2 %	2 %
Informative	12 383	25 %	16 %	9 %
Learning and science	449	1 %	0 %	0 %
Music	1 214	2 %	0 %	0 %
News	5 160	10 %	3 %	4 %
N/A	532	1 %	0 %	0 %
Other total	24 660	50 %	23 %	16 %
Total	49 736	100 %	100 %	100 %

42. Finally, the Finnish State wrongly suggests in its response that the Complaint relies on a strict market failure standard to prove that Yle’s financing is illegal State aid.⁵⁰ There is a difference between subjecting the entire public broadcasting offer to market failure considerations and completely ignoring what the market already offers. For example, in setting out the principles that should guide the provision of new online services, the Broadcasting Communication lays down

49 The number of average views per day has been calculated by dividing the number of total views by the number of days the title had been available on Yle Areena at the time of the scraper run was completed. If the data showed that a title’s broadcast had ended prior to the scraper taking place (between the two scrapings, 27 August and 3 September), the broadcast end date was instead used to calculate the average views per day.

50 Id., paragraphs 67-69.

that “[i]n assessing the impact on the market, relevant aspects include, for example, the existence of similar or substitutable offers, editorial competition, market structure, market position of the public service broadcaster, level of competition and potential impact on private initiatives.”⁵¹ In a similar vein, in *BBC Digital Curriculum*, one of the factors the Commission took into account to approve the BBC’s plan to offer digital learning services was the “key condition” imposed on the BBC that the services “should be distinctive from and complementary to services provided by the commercial sector.”⁵² Outside the realm of State aid practice, the BBC Charter imposes on the BBC the obligation to offer “distinctive output and services”, which means output and services “that are substantially different to other comparable providers”⁵³ (Ofcom holds the BBC to account for the delivery of “distinctive” output and services).⁵⁴

43. This crucial element (that is, adequate consideration of what the market provides so that the public service adds value to the existing offering) lacks *altogether* in the case of Yle’s remit, including its VOD and online learning services. Against this background, it is quite ironic that the Finnish State agrees with the Complaint (and indeed provides evidence) that the segment for VOD and the market for online learning services are “highly competitive”.⁵⁵
44. Overall, in its responses to the Commission, the Finnish State largely focuses on the *technological* developments that have marked audiovisual markets in recent years. Those responses also depict in detail *market* developments, most notably how competitive the markets are and how consumption patterns have changed. The Finnish State, however, fails to acknowledge the *legal* developments that have accompanied the expansion into new markets with public money. According to the Finnish State, contrary to the relevant regulatory changes that other Member States have introduced in recent years to comply with the EU State aid rules, Yle should be able to use the Internet to reach audiences without any specific conditions attached to the provision of online services.

E. Yle’s mission to promote content of European origin and to serve minorities and expats

45. In its second response, the Finnish State argues that Yle Areena is aligned with Yle’s public service mission, which includes the obligation to serve minorities and to provide varied content:

51 Broadcasting Communication, paragraph 88.

52 European Commission, State aid No N 37/2003 – United Kingdom: BBC Digital Curriculum, 1 October 2003, C(2003)3371fin, paragraph 41.

53 BBC Charter, Section 63, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/577829/57964_CM_9365_Charter_Accessible.pdf.

54 See, for instance, <https://www.ofcom.org.uk/research-and-data/tv-radio-and-on-demand/tv-research/bbc-distinctiveness-report>.

55 First Reply of the Finnish competent authorities, paragraphs 96 et seq.

“A part of Yle’s public service mission is to provide versatile, comprehensive and valuable content to special and minority groups, as part of its obligation to provide services to all under equal conditions in public communications networks nationally and regionally. According to Yle’s strategy referred to in the First Response: “Yle helps people feel that they are part of the society around them” and Yle’s “services to special groups are unique”.

Yle’s obligation is essentially fulfilled by the offering on Yle Areena, which provides a unique value also to those groups of viewers. In addition, Yle Areena fulfills Yle’s statutory obligations, which include supporting the preservation of Finnish cultural heritage, tolerance, equal treatment, equality and cultural diversity and programming for minority and special groups (Section 7 subsection 2, subpoint 5 of the Yle Act), and promotion of cultural interaction and maintaining production addressed to abroad (Section 7, subsection 2, subpoint 6 of the Yle Act), together with other specific tasks set in the Yle Act. These all relate to accessibility services addressed to special and minority groups.”⁵⁶

46. It further sets out what services Yle offers to ensure that all Finns access its programming and presents Yle’s contributions to content of European/domestic origin.⁵⁷
47. The Finnish State portrays Yle as the only media organization in Finland that provides services to *disadvantaged groups of the society* or that offers content to promote the *European cultural industry*. This could not be further from the truth as commercial operators also provide such services and content. The Finnish State refrains from referring to the regulatory obligations which commercial operators, including Sanoma, must adhere to in order to promote European content and to make their services accessible.

1. The provision of “European content”, including independent productions

48. In an attempt to argue that Yle Areena does not focus on entertainment content, the Finnish State mentions that the majority of its content is of European origin.⁵⁸ There are two aspects that are not explained in the response of the Finnish State: first, that the provision of European content is a regulatory duty that binds commercial and public broadcasters alike, and second, that content of European origin does not exclude that it may qualify as commercially attractive/entertainment content.
49. First, pursuant to Section 209 of the Finnish Act on Electronic Communications Services, which transposes Article 16(1) of the Audiovisual Media Services (“AVMS”) Directive, both public and commercial broadcasters are required to reserve the majority of their transmission time for

56 Second Reply of the Finnish State, paragraphs 68-69.

57 Id., paragraph 70 et seq.

58 Id., paragraph 87.

“European works”, i.e., works of European origin.⁵⁹ It is clear from the table that the Finnish State provided to the Commission⁶⁰ that Sanoma’s channels comply with this rule. Moreover, Section 210, which transposes Article 17 of the AVMS Directive,⁶¹ requires both public and commercial broadcasters to reserve 19% of their transmission time (or programming budget) for independent productions.⁶² It is worth pointing out that the 19% threshold concerning independent productions is stricter than the 10% that the Directive sets as a minimum. Considering that many Member States have either not adopted rules regarding the support of independent productions or have set the minimum (10%) threshold established in the Directive, commercial operators in Finland – and not only Yle – must meet high regulatory standards to support the European cultural industries, including independent domestic productions.

50. Such content quotas are not limited to linear television broadcasting. Pursuant to Section 209 of the Finnish Act on Electronic Communications Services, VOD service providers are required to reserve at least 30% of their programme catalogue for European works and to ensure their visibility.
51. Second, the Finnish State instrumentalizes the figures displayed in the aforementioned table (more than 80% of the content offered on Yle is of European origin) to argue that the content offered on Yle’s channels and, by extension, on Yle Areena is not entertainment content.⁶³ Nevertheless, the fact that content is of European origin does not mean that it does not qualify as entertainment content. In fact, the table the Finnish State uses shows whether (and to what extent) public and commercial broadcasters operating in Finland comply with their obligation stemming from the AVMS Directive to transmit “European works”.⁶⁴ The definition of “European works” provided by the Directive explicitly excludes “news” and “teletext services”.⁶⁵ In other words, offering

59 Finnish Act on Electronic Communications Services (917/2014), as amended (Finnish Act on Electronic Communications Services)

60 Second Reply of the Finnish State, paragraph 88 (Chart 14).

61 Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (“**Audiovisual Media Services Directive**”) in view of changing market realities [2018] OJ L 303/69. Article 17 reads as follows: Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve at least 10 % of their transmission time, excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping, or alternately, at the discretion of the Member State, at least 10 % of their programming budget, for European works created by producers who are independent of broadcasters.

62 Section 210 of the Finnish Act on Electronic Communications Services defines independent productions defines independent producer as follows: “An independent producer means a producer of audiovisual programmes, the share capital of whom an individual audiovisual content service provider controls at most 25 % or several providers at most 50 %, and who, during the past three years, has produced no more than 90% of its programmes for the same provider.”

63 Second Reply of the Finnish State, paragraph 88 (Chart 14).

64 Audiovisual Media Services Directive, Article 16.

65 Id., Article 16(1).

content of European origin does not necessarily mean that Yle complies with its obligation to offer “versatile and diversified” programming.

2. The provision of functionalities that serve minorities, including expats

52. As regards minority groups, the Finnish State describes the functionalities that Yle offers to minorities, including various forms of subtitling.⁶⁶ What the Finnish State does not mention is that commercial broadcasters are also bound by relevant regulatory obligations depending on objective and proportionate parameters, such as the reach (national vs regional) of the channel concerned.⁶⁷
53. Moving away from the description of the law to its actual implementation, the Finnish State creates the impression that serving minorities is a big part of its public service agenda.⁶⁸ Yet, only certain programme titles of the current Areena offering include audio descriptions,⁶⁹ and content offered in plain language is restricted to news.⁷⁰
54. What is important for the purposes of this case is that both Areena and several commercial VOD services are now subject to the same accessibility obligations (the relevant amendments to the Finnish Act on Electronic Communications Services were introduced in 2021⁷¹). For example, as the law currently stands, Areena, MTV and Sanoma’s Ruutu are all bound by a 30% quota for voice-over (i.e., narration) and subtitling services.⁷² The guidance provided by the Finnish State on the standards that must be met does not distinguish between public and commercial providers that are bound by this obligation.⁷³ Both types of providers are required to provide subtitling services “*to a high standard so that the subtitles are sufficiently clear and understandable for the user.*”⁷⁴ That high standard is assessed against various qualitative criteria, such as the match between subtitles and programme content, the correctness of the subtitling language, the

66 See Second Reply of the Finnish State, paragraph 70.

67 Finnish Act on Electronic Communications Services, Section 211: “Finnish and Swedish television programmes shall be accompanied by subtitling and other programmes shall be accompanied by explanation or service where the text of the subtitled programme is converted to voice (audio-subtitling and subtitling service) as laid down in this section [...]. The proportion of sound and subtitling services shall be 75 % of programmes in the case of television programmes of general interest and programmes for different audiences referred to in paragraph 2 and 100 % of programmes in the case of public service programmes”.

68 Second Reply of the Finnish State, paragraph 70 et seq.

69 See <https://areena.yle.fi/tv/ohjelmat/30-1530>.

70 See <https://areena.yle.fi/tv/ohjelmat/saavutettavuus?t=selkokielella>.

71 Finnish Act on Electronic Communications Services, Section 211

72 For more details see Traficom: Monitoring and guidance on accessibility of audiovisual content services, Section I.1, available at <https://www.traficom.fi/sites/default/files/media/file/AV-sisältöpalvelujen%20esteettömyyden%20valvonta%20ja%20ohjeistus.pdf>.

73 Id.

74 Id. Section I.2.

readability of the text, and synchronization.⁷⁵ Moreover, according to the same guidelines, both public and commercial providers are required to prepare action plans for the continuous and progressive accessibility of services and to report annually to the Finnish regulatory authority on the implementation of accessibility measures.⁷⁶ The guidelines specifically mention that

“the reports should pay particular attention to the implementation of accessibility by on-demand programme services, taking into account the objectives set out in the above-mentioned action plans. Those guidelines leave no doubt that “the action plans and reports to be collected from operators are new regulations that apply to all audiovisual content service providers established in Finland.”⁷⁷

55. The Finnish State mentions in its reply that “*content which is available at Yle Areena for a long-term is an essential prerequisite for the exercise of freedom of expression and participation in the society of special groups.*”⁷⁸ As clearly demonstrated in the analysis of the regulatory framework above, the duty to serve minorities is far from specific to Yle Areena. Depicting Areena as the only VOD platform that can serve those audiences is plainly wrong. Sanoma and other commercial operators must (and are making best efforts to) serve minorities. Moreover, it is Sanoma’s understanding that other Member States which have imposed restrictions on the expansion of public broadcasters into online markets respect the right to receive information as well as the right to equal treatment. In other words, an uncontrolled expansion into online markets cannot be seen as necessary to protect fundamental rights, especially since commercial operators are also required to protect such rights.
56. Finally, the Finnish State attempts to argue that Yle Areena is the means through which it may serve Finns outside Finland. It mentions respectively that

“many Finns travel abroad and they have access to Yle services in Europe through Yle Areena (through Yle account). In addition, approximately 300,000 Finns live abroad and they do not have usually access to traditional TV broadcasting of Yle. Those viewers are only able to view content in Yle Areena, the copyrights of which are not limited geographically. About 80% of Yle’s content is available for watching and listening abroad.”⁷⁹

75 Id. Section I.2.1.

76 Id., Section II.

77 Id., Section II.4.

78 Second Reply of the Finnish competent authorities, paragraph 79.

79 Id., paragraph 80.

57. Two points must be made with respect to the extraterritorial reach of Yle Areena. First, due to the changes brought about by the Portability Regulation, it is not necessary for Yle to incur the significant costs of purchasing worldwide rights so that those Finns who travel in Europe can access Areena. Pursuant to the Portability Regulation, Finns who travel to another EU Member State cannot be restricted from accessing content that is offered on the VOD platforms which they are entitled to access in their domestic territory.⁸⁰ Second, the Finnish State mentions that the purchase of worldwide rights is necessary to serve those 300.000 Finns that permanently reside abroad.⁸¹ 5.5 million British people live abroad and the BBC iPlayer cannot be accessed outside the UK.⁸² Sanoma will let the Commission draw its conclusions on whether this cost is proportionate to Yle’s public service mission.

III. There is no act specifically entrusting Yle with the provision of the contested services

58. The Finnish State argues that the Yle Act entrusts Yle with the provision of VOD and online learning services on the grounds that the Amsterdam Protocol is technology neutral and that public broadcasters must be able to serve the evolving needs of the audience.⁸³ This argument is weak at best. It is widely acknowledged in the Commission’s decisional practice that public broadcasters’ expansion into online markets must meet certain criteria. More particularly, where a public broadcaster offers “significant new” services, a procedure must be followed that leads to a specific act of entrustment. **Section A** demonstrates that VOD services qualify as “significant new” services, and **Section B** explains that the Finnish State ignored the different options it had at its disposal to entrust Yle with the provision of such services.

A. The contested services qualify as “significant new” services within the meaning of the Broadcasting Communication

59. Due to the imprecise definition of Yle’s remit (see Part II above), the contested services qualify as “significant new” services within the meaning of the EU State aid rules. The Broadcasting Communication notes respectively that:

“[i]t is up to the Member States to determine, taking into 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. The ‘significance’ of the service may take into account for instance the

80 See Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market (OJ L 168/1).

81 Second Reply of the Finnish competent authorities, paragraph 80.

82 For more information see: <https://www.bbc.co.uk/iplayer/help/questions/watching-outside-the-uk/outside-uk>.

83 First Reply of the Finnish competent authorities, paragraph 78.

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.”⁸⁴

60. We apply these criteria to the contested services as follows:

- a. **The modality of consuming** VOD content and online learning materials is different from that of consuming content offered through linear broadcasting due to the “on-demand” element. As the Audiovisual Media Services Directive put it, on-demand services are “*different from television broadcasting with regard to the choice and control the user can exercise.*”⁸⁵
- b. As regards **the content**, the learning materials offered online are not offered through Yle’s linear channels. With respect to VOD content, there are titles that premier on Areena first as well as titles that are provided on Areena on an exclusive basis.
- c. **The financial resources** required for the development of the contested services can be regarded as “significant”. This is clearly illustrated by the figures provided in the Copenhagen Economics report that was commissioned by Yle. According to that report, in 2020, Yle spent €27 million on Areena content.⁸⁶ That amount concerned content alone (and took into account only part of the costs of content that appeared on both linear TV and the VOD platform).⁸⁷ A VOD platform, however, has several other operating expenses, including expenses relating to infrastructure and human resources. Given that in 2020 Yle’s net revenue was €483.7 million,⁸⁸ Yle invested 5.6% of its budget in content for its VOD platform (this percentage does not account for the operating expenses referred to above). It should be noted that in several State aid decisions it was found that a service qualifies as a “significant new service” if it exceeded a much lower threshold (e.g., 2% of the total budget).⁸⁹

84 Broadcasting Communication, paragraph 85.

85 Audiovisual Media Services Directive, Recital (55).

86 Copenhagen Economics report, paragraph 3.11.

87 This is because of the way Yle allocates to Yle Areena and to Yle’s linear TV channels the costs that are incurred in the production or acquisition of content made available on both distribution platforms. See Id., paragraphs 3.10-3.11.

88 Yleisradio Oy, “Board of Directors’ report and financial statements 2020”, page 13.

89 European Commission, E 2/2008 (ex CP 163/2004 and CP 227/2005) – Financing of ORF, 28 October 2009, C (2009) K(2009)8113, paragraph 199.

B. Contrary to established practice that governs the entrustment of VOD and learning services across Europe, the Finnish State has not done what was necessary to comply with the EU State aid rules

61. The Finnish State argues that public broadcasters “*need to make use of all opportunities provided by new technologies to reach citizens as widely as possible.*”⁹⁰ That argument is based on what is set out in the section of the Broadcasting Communication that deals with the provision of audiovisual services over new distribution platforms.⁹¹ However, that same section also explains that such services must be specifically entrusted to the public broadcaster concerned, an obligation that the Finnish State failed to comply with.⁹²
62. Following two decades of the Commission’s decisional practice in this sector, it is widely acknowledged that Member States can choose which of the following solutions to adopt in order to fulfil the “entrustment” criterion:
- a. The entrustment act(s), such as a management agreement or Charter of Duties, can be revised to include the services in question. This is the case with the BBC Agreement⁹³ and Rai’s Contratto di Servizio,⁹⁴ which *explicitly* refer to the VOD platforms they offer (BBC iPlayer and RaiPlay);
 - b. The entrustment act can be the outcome of an *ex ante* procedure (Public Value Test) whereby both the public value and the market impact of the service (and any significant modifications thereof⁹⁵) are assessed. A good example is Ofcom’s recent assessment of the time restrictions that apply to content made available on the BBC iPlayer;⁹⁶

90 First Reply of the Finnish competent authorities, paragraph 35.

91 Broadcasting Communication. See, for instance, paragraph 81: “public service broadcasters should be able to use the opportunities offered by digitisation and the diversification of distribution platforms on a technology neutral basis, to the benefit of society.”

92 See *Id.*, paragraphs 84 et seq.

93 BBC Agreement, Part 1, Article 2(4), available at http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/2016/agreement.pdf.

94 Rai Contratto di Servizio 2018-2022, Article 5(2)(a) and (b), available at https://www.rai.it/dl/doc/1607970429668_Contratto%20di%20servizio%202018-2022.pdf.

95 Broadcasting Communication, paragraph 85.

96 Ofcom, “BBC iPlayer Competition Assessment, Final Determination”, 1 August 2019, available at https://www.ofcom.org.uk/_data/assets/pdf_file/0029/159725/statement-bbc-iplayer-final-determination.pdf.

- c. The State can notify its plans to the Commission and, following approval, an entrustment act can be adopted or revised to include the service concerned. This was the case with the BBC Digital Curriculum.⁹⁷
63. None of the above has been done in the case of Yle’s VOD and online learning services (nor has it been done for other services, such as podcasts, which Yle started to offer in emerging markets). In its first response, the Finnish State is limited to referring to vague proposals and statements:
- “The Government *Proposal* from 2017 further confirmed the importance of the use of new technologies, especially the Internet, by stating that Yle fulfills its public service tasks by making its content available in the Internet. Further, the Deputy Chancellor of Justice has *considered* that the public service programming shall take into account the change in consumption patterns related to technological development.”⁹⁸
64. The Government Proposal is what its name suggests. As for the decision of the Chancellor of Justice (“CoJ”), the Finnish State conveniently refrains from explaining what the role of the CoJ is, the facts of the case referred to in its response, as well as the arguments put forward by the Administrative Council in the context of that case. Sanoma will set the record straight. The CoJ is an administrative body, which supervises the lawfulness of the official acts of the Government, the President of the Republic and other public bodies. It is entrusted, *inter alia*, with adjudicating on complaints made by citizens about the conduct of public bodies.⁹⁹ The facts of the case the Finnish State refers to and its outcome can be summarized as follows: in 2014, the CoJ received a complaint from a citizen that Yle acted in violation of its remit for making certain content available only online.¹⁰⁰ The citizen in question argued that Yle breaches its statutory obligation to “*make its services available to all on equal terms*” for the reason that not everyone can afford hardware to access that content.¹⁰¹ One of the main arguments put forward by the Administrative Council in that case was that Yle’s requirement to “*make its services available to all on equal terms*” did *not* apply to video content published on Internet-based online services.¹⁰²
65. The argument of the Finnish State that the CoJ decision may be seen as an appropriate act of entrustment is groundless. Case-by-case decisions adopted by administrative bodies on complaints made by citizens cannot serve the primary purpose for which Member States are required to have in place a clear and precise definition of the remit – that is, legal certainty. As already explained in

97 European Commission, State aid No N 37/2003 – United Kingdom: BBC Digital Curriculum, 1 October 2003, C(2003)3371fin, paragraph 1.

98 First Reply of the Finnish competent authorities, paragraph 14 [emphasis added].

99 Dnro OKV/1258/1/2014, Decision of 17 March 2015.

100 Ibid.

101 Ibid.

102 Ibid.

detail in Section III, that certainty is of primordial importance to avoid a disproportionate harm to competition because it enables competent regulators to exercise control over how public money is spent and because it enables commercial operators to plan their activities. If such decisions were sufficient, the Commission and the EU Courts would leave it up to national courts and administrative bodies to determine which services fall under the public service mandate. However, this would clearly go against the spirit and purpose of Article 106(2) TFEU.

66. In addition to the Government Proposal and the CoJ decision on which the Finnish State relies in its first response, the Finnish State makes another unsuccessful attempt to convince the Commission that Yle was specifically entrusted with the provision of the contested services in its second response. That response refers to the strategy of Yle:

““TV and radio channels remain important among the mature adult population, but recognizing the move towards a digital production and publishing environment, Yle ensures that it continue to serve all people in Finland during and after the transition. Such transition means also that content is available in Yle Areena and on mobile services”. If Yle Areena services would be unjustifiably restricted it would negatively influence Yle’s perception and the value it provides to the Finnish society.”¹⁰³

67. As will be explained in detail below (and as Sanoma has already discussed in its Complaint), that strategy is set by the Administrative Council, the body that is also expected to assess whether Yle fulfils its remit. Given that the Finnish State refers to the above as an appropriate entrustment act, Sanoma assumes that the Finnish State is satisfied that the same body can hold executive *and* quasi-judicial (since, according to the Finnish State, the Administrative Council oversees compliance with the remit and can impose sanctions in cases of non-compliance) powers.
68. As regards online learning services, the Finnish State puts forward the following arguments to show that they have been entrusted to Yle. First, the State refers again to Section 7 of the Yle Act, which requires Yle to “*take educational [...] aspects into consideration in its programmes, provide an opportunity to learn and study, and give focus on programming for children and young people.*”¹⁰⁴ Given the outcome of the BBC Digital Curriculum decision, which was discussed above, Sanoma cannot see how this qualifies as a “specific” act of entrustment. Second, the Finnish State refers to a statement made by the Parliamentary Committee that receives the annual report prepared by the Administrative Council, pointing out that “*the Committee drew attention to the task of Yle in respect of free learning materials, which the Committee considers to be an important factor in promoting the equality between children and young people.*”¹⁰⁵ However, as acknowledged by the Finnish State itself, that Committee can only provide “soft guidance” to

103 Id., paragraph 61.

104 Id., paragraph 99.

105 Ibid.

Yle.¹⁰⁶ Finally, the Finnish State refers to the Government Proposal which, if adopted, will allow Yle to offer “*text-based content relating to learning*” without the need for a connection to Yle’s content that contains moving images or sound.¹⁰⁷ The Finnish State submits in its first response that “*under the Government Proposal, Yle could continue for example the publication of Yle’s Abitreenit (translated: exam preparation), Svenska Yle’s and corresponding Vetamix & Abimix in cooperation with the educational authorities.*”¹⁰⁸ Sanoma submits that this is a far-fetched interpretation of the proposal and that this clarification should be understood to mean the exact opposite: to date, there has not been an appropriate act entrusting Yle with the provision of its online learning services.

69. Overall, none of the above documents referred to by the Finnish State can be regarded as a “*specific act of entrustment*” within the meaning of the Broadcasting Communication, which lays down that the public service remit should be assigned to one or more undertakings “*by means of an official act (for example, by legislation, contract, or binding terms of reference).*”¹⁰⁹

IV. There is no effective supervision of Yle’s compliance with its public service remit

70. In its Complaint, Sanoma raises concerns over the system of supervision of Yle’s public service mandate.¹¹⁰ The Finnish State puts forward the following arguments to dismiss those concerns:
- a. The Administrative Council, which is appointed by Parliament, does not receive any instructions from Yle’s management bodies;¹¹¹
 - b. The Administrative Council may impose the following remedies in cases of non-compliance with the remit: report that Yle has not developed its activities in line with its mandate in its annual report to Parliament; clarify Yle’s strategy; set restrictions on or decide to expand Yle’s strategy; remove the Board;¹¹²
 - c. The annual report prepared by the Administrative Council is “handled” by a Parliamentary Committee that hears experts, representatives of commercial media, Yle’s CEO and the

106 Id., paragraph 54.

107 First Reply of the Finnish competent authorities, paragraph 130.

108 Id., paragraph 131.

109 Broadcasting Communication, paragraph 50 [emphasis added].

110 Sanoma, “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”)”, 23 April 2021, paragraphs 33-40.

111 First Reply of the Finnish competent authorities, paragraph 52.

112 Id., paragraph 53.

Chair of the Administrative Council. That committee is able to make remarks on certain matters, which can be considered “soft guidance” to Yle.¹¹³

71. The above elements do not form an appropriate mechanism that would comply with the requirement of effective supervision for the following reasons: First, the Administrative Council is not an independent regulator and does not have the power to impose effective remedies in cases where Yle does not comply with the public service remit (**Section A**). Second, there is no effective supervision of whether overcompensation has taken place (**Section B**).

A. The Administrative Council is not an independent body and does not have the power to impose effective remedies in cases where Yle does not comply with the public service remit

72. As mentioned in the Complaint, supervision of the public service remit by the Administrative Council is not in line with the Broadcasting Communication. The Administrative Council is not an independent regulator. Moreover, a conflict of interest arises from the duties that the Administrative Council is expected to perform.¹¹⁴ Those elements are highly problematic. To address concerns arising from similar issues, Member States introduced (both as a result of State aid decisions and on their own initiative) changes in national legislation to ensure that monitoring compliance with the remit is effective.

73. For example, following its assessment of a system similar to that of Yle, namely the scheme put in place by Ireland, the Commission concluded that the system of supervision of the Irish public broadcaster RTÉ was not effective.¹¹⁵ As a result, Ireland committed to establish an independent regulator that would oversee compliance with the public service mandate.¹¹⁶ The similarities between the two systems and the Commission’s reasoning are examined in more detail below.

74. In the case of Ireland, the RTÉ Authority (i.e., the Authority in charge of supervising RTÉ’s compliance with the public service remit)¹¹⁷ was required to prepare an annual report concerning

113 Id., paragraph 54.

114 Sanoma, “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”)”, 23 April 2021, paragraphs 33 et seq.

115 Id., paragraph 97.

116 Id., paragraph 123.

117 Broadcasting Authority Act 1960, Article 4, available at <http://www.irishstatutebook.ie/eli/1960/act/10/enacted/en/print.html>.

the performance of RTÉ’s functions.¹¹⁸ That report would be submitted to the competent Minister and the Irish Parliament.¹¹⁹

75. The Commission noted the following with respect to the above:

“The RTÉ Authority’s reporting obligations and the preceding responsibility of ensuring that RTÉ complies with its legal obligations would not, in the Commission’s view, be sufficient to ensure effective supervision, since *the RTÉ Authority is not a control body independent from the RTÉ but rather an integral part of it*. As regards the reports transmitted to the Minister [and] the Irish Parliament, the Commission considers that *such reports may be an appropriate basis for a control of the fulfilment of the public service broadcasters’ obligations. However, based on the current legal framework it is not clear how the fulfilment is assessed and what are the possible consequences of non-compliance.*”¹²⁰

76. Yle’s Administrative Council is not a control body independent from Yle.¹²¹ In addition, the annual report prepared by the Administrative Council is submitted to Parliament.

77. Consequently, remarks similar to those made by the Commission regarding the Irish supervision scheme can be made on the Finnish system. First, as the Finnish State itself mentions in its reply, the Parliamentary committee that receives the report “*is able to make remarks on certain matters, which are then recorded in the publicly available committee report, which can be considered a soft guidance given to Yle.*”¹²² Soft guidance, however, is what its name suggests. There are no safeguards to ensure that any steps that experts or the commercial sector propose in the context of this process are properly assessed and potentially lead to appropriate changes in how Yle fulfils the remit.¹²³ Second, similar to the Irish case, there are no effective remedies in cases of non-

118 European Commission, State aid E 4/2005 (ex NN 99/1999) – Ireland: State financing of Radio Teilifís Éireann (RTÉ) and Teilifís na Gaeilge (TG4), 27 February 2008, C(2008)723 final, paragraph 30.

119 Ibid.

120 Id., paragraphs 97-98.

121 Sanoma, “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”)”, 23 April 2021, paragraph 34. The link to government further stems from the fact that the Administrative Council is appointed for the election period of Parliament.

122 First Reply of the Finnish competent authorities, paragraph 54 [emphasis added].

123 As regards the role that the views of interested stakeholders can play in assessing the expansion of public broadcasters into online markets, Sanoma refers to a principle set out in the Broadcasting Communication whereby “[i]n the interest of transparency and of obtaining all relevant information necessary to arrive at a balanced decision, interested stakeholders shall have the opportunity to give their views on the envisaged significant new service in the context of an open consultation. [...] Member States shall assess, based on the outcome of the open consultation, 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”. See Broadcasting Communication, paragraph 88.

compliance. The Finnish State unconvincingly argues that the competence of the Administrative Council to clarify Yle’s strategy and to set restrictions on or decide to expand Yle’s strategy are effective remedies. Those are the duties that the Administrative Council is expected to perform in its day-to-day work rather than a rectification of a problematic situation.

78. Moreover, the aforementioned duties raise a conflict of interest, which is discussed in detail in the Complaint.¹²⁴ Decisions on Yle’s strategy are akin to those that can be made by a management body. A case in point is the example mentioned by the Finnish State in its response:

“[I]n 2016 the Administrative Council approved financial and operational guidelines for Yle, in which the Administrative Council particularly emphasizes the versatility of the public service provided by Yle, as well as Yle’s readiness to face challenges brought by the new ways to use media and the new technologies. According to those guidelines, *Yle should offer extensive and diverse services through appropriate distribution channels to all citizens in accordance with its public service mandate (point 1 of the guidelines) and increase its resources related to online content, services and distribution (point 3 of the guidelines).*”¹²⁵

79. This situation is rather peculiar. A body entrusted with checking compliance with the remit that may *also* (unconditionally) decide on the expansion of a public broadcaster into multiple distribution platforms does not exist in another Member State. In fact, when similar conflicts of interest have arisen in the past, the governance structure was modified to ensure that there is independent supervision. This was, for example, the case with the BBC’s governance structure. In the case of the BBC, members of the BBC Trust were also members of the Executive Board.¹²⁶ While this is not the case with Yle, the same conflict of interest arises because the Administrative Council can decide on Yle’s strategy *and* assess fulfilment of the public service mission. The independent expert conducting the review of BBC’s system had noted respectively: “*the BBC model is flawed. It conflates governance and regulatory functions within the Trust.*”¹²⁷ The system was thus revised, assigning the task of monitoring compliance with the remit to Ofcom, an independent regulator.¹²⁸

124 Sanoma, “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”)”, 23 April 2021, paragraphs 38 et seq.

125 First Reply of the Finnish competent authorities, paragraph 56 [emphasis added].

126 BBC Charter (1997), Article 8(3).

127 See “BBC Trust ‘flawed’ and should be replaced by Ofcom, report says”, *BBC News*, 1 March 2016. Available at <https://www.bbc.com/news/entertainment-arts-35696657>.

128 For more details see: <https://www.ofcom.org.uk/tv-radio-and-on-demand/information-for-industry/bbc-operating-framework>.

80. Overall, the Administrative Council can set Yle’s strategy (which the Finnish State regards as an appropriate entrustment act¹²⁹), control whether Yle fulfils its public service mission, *and* impose restrictions on Yle in cases of non-compliance with the remit. In other words, the same body can hold executive *and* quasi-judicial powers. This is most definitely unique in a European democracy, especially when such an institutional structure applies to a media organization.

B. There is no effective supervision of whether overcompensation has taken place or whether the provision of “significant new” online services can create a disproportionate impact on the market

81. In addition to the absence of an effective supervision of the fulfilment of the public service remit, there is also a total lack of effective supervision of whether overcompensation has taken place (Sub-section 1) or whether the provision of “significant new” online services can create a disproportionate impact on the market (Sub-section 2).

1. There is no effective supervision of whether overcompensation has taken place

82. As explained in the Complaint and in the response of the Finnish State, Traficom has the following duties:

- a. 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;
- b. supervising Yle’s compliance with the prohibition on advertising and on the production of sponsored programs imposed on it by law;
- c. 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); and
- d. 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.).

83. The first task is unrelated to the principle of proportionality. As regards the other three tasks (and as acknowledged by the Finnish State in its response), those are related to the development of

129 See paragraph 72 above.

commercial activities. Since such activities are, in the words of the Finnish State, “*extremely marginal*”,¹³⁰ the relevant control is also at best marginal.

84. In its response, the Finnish State mentions that, because commercial activities are extremely marginal, “*any risk of overcompensation appears to be completely remote.*”¹³¹ This statement is incorrect: a risk of overcompensation does not arise only in cases where the public broadcaster engages in commercial activities. Surely, commercial activities need to be ring-fenced; safeguards such as the public broadcasters’ obligation to keep separate accounts and to treat their commercial subsidiaries at arm’s length are necessary to ensure that there is no cross-subsidization. However, there also needs to be a mechanism ensuring that the money spent is proportionate to the discharge of the public service mandate ***even where the public broadcaster predominantly relies on public funds***. In other words, spillovers of public money to commercial activities, such as advertising, is not the only issue a regulator should be concerned about. Using public money to undercut private initiatives is also of great concern. This is why the Broadcasting Communication sets out several principles guiding such control (e.g., that public broadcasters may not retain more than 10% of the annual budgeted expenses and the rest of the money must be paid back to the State).¹³²
85. Although Sanoma raised in its Complaint the legitimate concern that there is no appropriate system checking whether overcompensation has taken place,¹³³ the Finnish State has so far failed to provide any concrete evidence that such a system is in place, contenting itself to dismiss the issue.
2. There is no effective supervision of whether the provision of “significant new” online services can create a disproportionate impact on the market
86. In addition to the lack of effective supervision over whether overcompensation takes place, there is currently no appropriate mechanism to assess whether a “significant new service” creates disproportionate effects on the market. We will use the example of the 2016 prior evaluation procedure mentioned by the Finnish State in its second response to explain why.
87. Section 6a of the Yle Act broadly refers to the obligation to conduct an *ex ante* assessment prior to the launch of “significant new services”. That assessment is based on the key elements set out in the Broadcasting Communication, including a market impact analysis as well as a public policy

130 First Reply of the Finnish competent authorities, paragraph 60.

131 Ibid.

132 Broadcasting Communication, see paragraphs 70 et seq.

133 Sanoma, “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”)”, 23 April 2021, paragraph 40.

consultation.¹³⁴ The obligation to conduct such an assessment is not restricted to the launch of “significant new” services. The Broadcasting Communication specifically mentions that “*significant modifications to existing services shall be subject to the same assessment as significant new services.*”¹³⁵

88. Sanoma has already explained that no market impact analysis took place *before* Areena was launched. As regards the post-launch period, the Finnish State refers to the prior evaluation procedure that took place in 2016 to assess changes in Areena as an example of how well the impact on the market has been assessed.¹³⁶ Sanoma respectfully disagrees. That procedure dealt with purely cosmetic changes in Areena, i.e., “*content packaging*” and “*content classification into sub-entities*”¹³⁷ (this is also reflected in the Questionnaire that was addressed to the stakeholders interested in submitting a reply to the relevant consultation).¹³⁸ Put simply, the relevant modifications did not deal with any of the substantive aspects that form Sanoma’s Complaint, including the type of content offered on Areena (e.g. entertainment vs current affairs programming), the extent to which Areena could offer standalone content, and whether any time restrictions on the availability of that content should apply.
89. As regards the actual evaluation of the market impact that was conducted at the time, Sanoma makes the following remarks which unequivocally demonstrate that the system is not adequate. First, the evaluation was assigned to a single lawyer. Without any attempt to discredit that person’s skills, an adequate evaluation requires more manpower and a blend of different types of expertise, including the expertise of economists and competition lawyers specializing in media markets.
90. Second, as regards the substantive aspects of the assessment, in its second response to the Commission, the Finnish State mentions that “*all potential negative feedback on the market could have been raised during the public hearing and, while Sanoma explained some concerns [...], commercial players, such as MTV, did not raise any general objections in relation to Yle*

134 Yle Act, Section 6a: “**Prior evaluation.** 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 considerable in terms of significance, duration and cost. At the discretion of the administrative council, an evaluation may be conducted whenever it is deemed necessary on reasonable grounds. A prior evaluation shall be conducted at the request made by the Finnish Broadcasting Company or another legal or natural person and submitted for reasonable grounds, or on the initiative of the administrative council. An evaluation shall include an estimate of the impacts of the planned service or function on the market and competition, along with any other impacts. In drafting an evaluation, the competition and consumer authorities and key operators in the sector shall be provided with the opportunity to present their opinion either in writing or verbally. Any other experts deemed necessary may also be consulted.”

135 Broadcasting Communication, paragraph 85.

136 See, e.g., Second Reply of the Finnish competent authorities, paragraphs 43-44.

137 Second Reply of the Finnish competent authorities, paragraph 43 et seq.

138 *Id.*, footnote 12.

Areena.”¹³⁹ This is completely inaccurate. In fact, the assessment conducted by the lawyer in question explains that several concerns were raised at the time. For example, commercial operators expressed concerns about the fact that Areena’s entertainment content competes directly with what is offered by commercial operators and that such an overlap may prevent them from investing in their services.¹⁴⁰

91. However, those concerns were not “extensively” considered as the Finnish State contends¹⁴¹ (far from it actually). The assessment makes the following remarks:

- a. VOD content available on Areena is “limited” (the costs do not exceed €100.000 per year);¹⁴²
- b. The fact that there is an overlap between the content made available on Areena and that made available on commercial platforms is not in itself restrictive of competition. “Evidence” of this is the Commission’s practice according to which the public service remit of a broadcaster may include the broadcasting of commercially attractive programme content. This could have a restrictive effect on competition if public service broadcasters were to maintain these broadcasting rights unused and did not grant sub-licences;¹⁴³
- c. Public funding would not be increased.¹⁴⁴

92. Sanoma submits the following with respect to the above:

- a. Based on data provided by the Copenhagen Economics report, Yle invested in 2020 €15 million in content published solely on Areena.¹⁴⁵ Sanoma brings to the Commission’s attention that the market impact assessment noted that:

“Yle has invested annually in the development of the functionality of Yle Areena [EUR 1-3] million, which is expected to increase by [EUR 0,2-0,7] million over the next few

139 Id., paragraph 54.

140 Ex Ante Assessment of the Effects on Competition of 20 October 2016, paragraph 14. For more details see: <https://yle.fi/aihe/artikkeli/2016/09/21/yleisradion-televisio-ohjelmiston-tarjontarakenteen-uudistuksen-2017>; and <https://drive.google.com/file/d/0B-v6fV6ewetZcVZzOG9DQTISShIaV1BpVIFfampPTWFnaGNJ/view?resourcekey=0-9fnax7CKsBCWhkrNmm0vg>.

141 Second Reply of the Finnish competent authorities, paragraph 54.

142 Ex Ante Assessment of the Effects on Competition of 20 October 2016, paragraph 10.

143 Id., paragraph 53.

144 Id., paragraph 46.

145 Copenhagen Economics report, paragraph 3.11.

years, adding together the Finnish and Swedish-language Yle Areena. **Only a limited amount of video content will be acquired for Yle Areena - less than EUR 100 000 per year.**¹⁴⁶

The increasing investment of financial resources in Areena could, in and of itself, trigger a new evaluation procedure. No such procedure has been conducted to date.

- b. As regards entertainment content, the Commission’s practice to which the analysis refers concerns *linear* broadcasting content and, more particularly, rights to major sports competitions. As regards online services, the report mentions that “*EU case law has not considered it necessary to restrict the right of broadcasters to offer online content.*”¹⁴⁷ Yet, by 2016, the Commission had developed sufficient case law in that area that the assessment should have adequately considered. In the absence of any reasonable restrictions, Yle acquired worldwide rights for Areena.¹⁴⁸
- c. With respect to funding, the Finnish State mentions that a factor that was considered was that the envisaged changes would not lead to an increase in public funding.¹⁴⁹ What the Finnish State does not mention (and what the competition analysis fails to assess thoroughly) is that it was decided at the time that a channel would be discontinued and that its budget would be devoted to Areena.¹⁵⁰ In addition, as was already explained above, investments in Areena went beyond what the assessment had noted.

93. In its attempt to portray the above procedure as effective the Finnish State concludes:

“it is apparent that Yle Areena and its VOD services have been extensively considered already in the 2016 prior evaluation, during which all potential negative feedback on the market could have been raised during the public hearing and, while Sanoma explained some concerns described above, commercial players, such as MTV, did not raise any general objections in relation to Yle Areena.”¹⁵¹

94. Given our analysis of the assessment, this conclusion is absurd, if not intentionally misleading.

146 Ex Ante Assessment of the Effects on Competition of 20 October 2016, paragraph 10 [emphasis added].

147 Id., paragraph 51.

148 Second Reply of the Finnish competent authorities, paragraph 80.

149 Id., paragraph 50.

150 Id., paragraph 46.

151 Second Reply of the Finnish competent authorities, paragraph 54.

95. The concerns Sanoma has raised about the interpretation and implementation of the Yle Act are far from novel. In 2009, the Finnish Competition Authority (FCA) set out its proposals for Yle's public service and financing. After examining in detail the drawbacks of the regulatory framework that governs Yle's activities, the FCA concluded that the definition of the remit is unclear, there is no proper mechanism that assesses the impact of Yle's services on the market, and supervision is not exercised by an impartial and expert body that is independent from Yle. The Finnish State has still not brought the Yle Act in line with the EU State aid rules and it is high time the Commission acted.¹⁵²

V. The Commission should dismiss the findings of the Copenhagen Economics report commissioned by Yle

96. As explained above, Sanoma will submit in due time a second reply to the Finnish State's observations, which will explain why the State-funded provision of Yle's VOD and online learning services has disproportionately affected competition. As part of this subsequent submission, Sanoma will also set out in detail why the Commission should dismiss the findings of the Copenhagen Economics report commissioned by Yle.

97. Sanoma provides below some preliminary observations on the Copenhagen Economics report, briefly explaining that the Commission cannot rely on (i) the analysis concerning the investments made in content that is offered on Areena ("Areena-spend"), (ii) the analysis concerning the overall content spend ("overall spend"), (iii) the analysis concerning the type(s) of content consumed on Areena, and (iv) the results of the survey conducted. These points will be developed thoroughly in Sanoma's second submission.

98. ***The analysis concerning the investments made in content that is offered on Areena ("Areena-spend")***. The Copenhagen Economics report attempts to convince the Commission that Sanoma's range of estimated expenditure made on Areena is questionable. The report refers to the cost allocation method based on which Yle allocates to Yle Areena and to Yle's linear TV channels the costs that are incurred in the production or acquisition of content made available on both distribution platforms.¹⁵³ Based on that cost allocation method, approximately €12 million are allocated to Areena, whereas €15 million are used for content published solely on Areena.¹⁵⁴ As regards the first figure (€12 million, reflecting the cost allocated to Areena for content distributed on linear TV and VOD), there is complete lack of transparency regarding the methodology that

152 Finnish Competition Authority. Proposals of the working group on the public service and financing of Yleisradio oy. The Finnish Competition Authority's statement to the Ministry of Transport and Communications (10.6.2009). Dnro 505/14.00.20/2009.

153 Copenhagen Economics report, paragraphs 3.6 et seq.

154 Id., 3.11.

Yle applies.¹⁵⁵ It is far from clear whether and, if so, to what extent the multiplier that is used to calculate the relevant costs integrates parameters such as genres (the multiplier should be adjusted to the amount spent on different categories), which would be necessary to draw any conclusions on whether those €12 million reflect the reality. For example, as Sanoma’s second reply will demonstrate, “foreign children” and “foreign drama” are disproportionately popular on Areena compared with linear channels and this needs to be accounted for when calculating the cost of Areena. As regards the second figure (€15 million used for content exclusively published on Areena), this corresponds to 3.1% of Yle’s net revenue for 2020.¹⁵⁶ That figure *alone* shows that Areena qualifies as a “significant new” service. As already mentioned, based on the Commission’s decisional practice in the sector, a service may qualify as a “significant new service” if it costs more than 2% of the total budget. Even if one accepted that the cost allocation method did not suffer from any drawbacks, the investment of €27 million *in content alone* demonstrates that Sanoma’s initial estimate that Areena may be costing Yle at least €36 million on an annual basis¹⁵⁷ is entirely realistic. This is because in addition to costs incurred in content production/acquisition, a VOD platform incurs many other types of costs, including costs relating to infrastructure and human resources.

99. ***The analysis concerning the overall content spend (“overall spend”).*** The Copenhagen Economics report contends that Yle has not invested excessively in Areena.¹⁵⁸ The report seeks to corroborate this claim by assessing whether Yle has disproportionately increased its investment in Areena content, relative to that in linear-TV content.¹⁵⁹ The report finds that Yle’s expenditure on content and services has remained stable and that Yle spent 13% of its total expenditure on content and service on drama, a content category which is “*central to Sanoma’s complaint*”.¹⁶⁰ There are at least three problems that arise from the above. First, the figures refer to overall content spend. This says nothing about how much Yle invested in entertainment content available on Areena *only*. Second, the report arbitrarily distinguishes between “drama”, “sports”, and “(culture and) entertainment” content.¹⁶¹ Sanoma takes issue with the provision of entertainment content *in general*. The figures included in the report conveniently separate “drama” from “other” categories. Presumably, “other” content includes reality shows as much as it does news. Third,

155 Yleisradio Oy, “Board of Directors’ report and financial statements 2020”, page 13.

156 Sanoma, “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”)”, 73.

157 Copenhagen Economics report, paragraphs 3.13 et seq.

158 *Id.*, paragraph 3.13.

159 *Id.*, paragraph 3.15.

160 *Id.*

161 *Id.*

the investment of €27 million made in content offered on Areena is significantly higher than the investment that was envisaged for Areena in 2016 (see above, paragraph 92).¹⁶²

100. ***The analysis concerning the type(s) of content consumed on Areena.*** The Copenhagen Economics report claims that Yle’s viewers watch programs from a wide range of content categories (such as children’s programs, domestic and foreign fiction, and factual/cultural/lifestyle programs), and that the most popular genre on Ruutu and MTV AVOD services accounts for only a relatively small percentage of content consumed on Yle Areena.¹⁶³ In the same vein, the Copenhagen Economics report argues that viewers watch different genres/languages on Areena compared to commercial services.¹⁶⁴ Aside from the fact that the report does not account for demographics to reflect the fact that different age groups watch different types of content, Sanoma will provide evidence that the items that are most watched on Areena qualify as “commercially attractive” content.
101. ***The results of the survey.*** The survey was designed in a way that it would have been impossible to reach accurate conclusions on the viewers’ willingness to switch. Survey questions such as “*What would you have done if Yle Areena was not available?*” and “*What would you have done if Yle Areena was a strict 7-day catch-up service?*” cannot capture the correct counterfactual. Such questions do not make it clear to respondents that, if Areena was not available, commercial providers would be able to build broader libraries, offering some of the commercially attractive content currently available on Areena (this would enable them to attract more views and viewers). Moreover, such survey questions do not allow for the possibility that a reduction in the Yle tax, which would be feasible after a reduction in Areena’s offering (e.g., through savings in Yle Areena’s content acquisition costs), would free up funds that consumers could use to purchase SVOD services. Put simply, the questions were designed in a way that leads to an underestimation of switching to commercial operators.

VI. Conclusion

102. As explained in this response, the Finnish State’s arguments in its two Replies to the Commission’s request for information of 30 April 2021 are based on a flawed understanding of the legal standards that must be met for Yle’s public funding to be compliant with the EU State aid rules. Moreover, the Finnish State fails to provide any concrete evidence that Yle’s financing does not amount to illegal State aid.
103. Contrary to what the Finnish State argues, Sanoma has proven that: (i) Yle’s public service remit has not been properly defined; (ii) Yle has not been entrusted to offer Yle Areena and online

162 Copenhagen Economics report, paragraphs 6.15-6.16.

163 Id., paragraph 6.17.

164 Id., footnote 102.

learning services; and (iii) Yle is not subject to an effective control mechanism. In a subsequent submission to follow in due course, Sanoma will also prove that the public funding of Yle for the provision of VOD and online learning services fails the proportionality test. In this second submission, Sanoma will also explain in detail why the Commission should dismiss the findings of the Copenhagen Economics report commissioned by Yle. As a result, public funding supporting the provision of Yle's VOD and online learning services does not fulfil the requirements set by Article 106(2) TFEU, the Amsterdam Protocol and the Broadcasting Communication, thereby constituting illegal State aid.

104. Since the funding for Yle's online learning services and VOD constitutes new aid and this funding constitutes aid incompatible with the EU State aid rules, the Commission should order Finland to recover the unlawful aid granted to Yle for the provision of those services on the basis of Article 16 of the Procedural Regulation, to the extent the aid is not time barred.
105. Should the Commission find, however, that the funding for Yle's VOD and online learning 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.
106. Finally, Sanoma would also welcome the establishment of an effective supervisory regime, making sure that Yle complies with its public service remit and that its financing does not create disproportionate effects on competition.
