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 II

8 December 2021

Strictly confidential – Contains business secrets

Confidential

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I. Introduction

1. On 23 April 2021, Sanoma Media Finland Oy ("**Sanoma**") submitted a Complaint (the "**Complaint**") to the European Commission ("**Commission**") regarding the State aid scheme supporting Yleisradio Oy ("**Yle**"), Finland's public service broadcaster. The Complaint sets out that the provision of video on-demand ("**VOD**") and online learning services by Yle 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.

2. On 21 June 2021, the Finnish State submitted a First Reply to the Commission's request for information (dated 30 April 2021), which unsuccessfully attempts to convince the Commission 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 essentially repeats the weak arguments put forward in its first response.[2]

3. The present submission, alongside Sanoma's first submission that the Commission received on 22 October 2021 ("**Sanoma's First Reply**"),[3] addresses the observations made by the Finnish State in its two replies, which are based on a flawed (and opportunistic) understanding of the legal standards that must be met for Yle's public funding to be in line with the EU State aid rules.

4. 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:

   - 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***);

   - Yle must be explicitly entrusted with the provision of those services (***entrustment***);

   - An appropriate authority must monitor compliance with Yle's remit in a transparent and effective manner (***effective supervision***); and

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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 State**"), 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 State**"), 30 September 2021.

3 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 ("**Sanoma's First Reply**").

- Yle's funding must not affect competition in the common market in a disproportionate manner (***proportionality***).[4]

5. Sanoma's First Reply focused on the first three criteria referred to above. It demonstrated that, contrary to the allegations made by the Finnish State, Yle's excessively broad mission to provide services "*related and additional to*" television and radio programming as well as "*other content*" services[5] is far from clear and precise. Given the vague wording of Yle's remit, neither the Commission nor private operators could have expected the launch of Yle's VOD platform Areena and a series of online learning services. Moreover, the Finnish State has not taken any steps to entrust Yle with the provision of VOD and online learning services, which are offered without regard for what the market offers. Appropriate entrustment could have taken place through notification to the Commission, a revision of the Yle Act or a proper prior evaluation procedure pursuant to Section 6a of the Yle Act. The Finnish State did none of the above, increasing legal uncertainty and allowing Yle to distort the market as it pleases. Sanoma's First Reply also showed that the mechanism the Finnish State has put in place to ensure compliance with the public service mission is inadequate. This is mainly due to the fact that the Administrative Council, the body that oversees whether Yle complies with its public service obligations, is also entitled to decide on Yle's strategy, a function akin to that performed by a management body. No safeguards exist to address that conflict of interest.

6. The present submission demonstrates that Yle's aid scheme falls short of fulfilling the fourth condition mentioned above whereby State aid must be proportionate to the discharge of Yle's public service obligations. This submission will show that:

   - **The applicable legal standard is taken out of context:** In its replies to the Commission, the Finnish State mentions on several occasions that Yle's financing is compatible with the EU State aid rules because it has not "*made it impossible or excessively difficult*" for private operators to compete in the Finnish market.[6] This standard was set by the EU Court of Justice ("**the Court**") in the *DTS* judgment that concerned the aid scheme supporting Spanish public broadcaster RTVE.[7] The Finnish State takes this standard out of context. It conveniently ignores the specific restrictions (budget and content quotas) imposed on RTVE that sought to ensure proportionality of funding. It was those restrictions that

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

5 Act on the Finnish Broadcasting Company 1380/1998 ("**Yle Act**"), Section 7.

6 See First Reply of the Finnish State, paragraphs 63, 64, 103 and 114; Second Reply of the Finnish State, paragraphs 5, 59, 90, 112, 118, 123 and 124.

7 Judgment of the General Court of 11 July 2014, DTS Distribuidora de Televisión Digital, SA v European Commission, T-533/10, ECLI:EU:T:2014:629, paragraph 160.

determined the outcome of the *DTS* case. However, no such restrictions apply to Yle. The Finnish State thus engages in an opportunistic interpretation of the *DTS* judgment, arguing that the standard applies in a vacuum (i.e., irrespective of whether the law sets limitations on how public funds are used). This is plainly wrong: such an interpretation would be against the spirit of the EU State aid rules, which establish a general prohibition on State aids and set the condition that, in those circumstances where the State intervenes to support the provision of certain services, that intervention must not be contrary to the "common interest".[8] The Broadcasting Communication explains that "*it is in the common interest to maintain a plurality of balanced public and private media offer.*"[9] In light of the above, arguing that State aids become a problem only in cases where commercial broadcasters are on the verge of exiting the market or find it excessively difficult to serve their audiences is not only contrary to the objectives of Article 106(2) TFEU and the Amsterdam Protocol, but also completely illogical (**Part II**).

- **The framework governing Yle's activities does not meet the minimum standards that ensure proportionality of public funding:** The Finnish State argues that it is free to design Yle's financial supervision as it deems fit. However, this freedom must be qualified. In order to draw clear competence boundaries between the Commission and the Member States, the EU Court of Justice has ruled that the Commission is not entitled to decide on the economic efficiency of the public broadcaster.[10] However, in none of these cases did the Court give Member States a *carte blanche* to behave as they please: a set of minimum standards must be met that enable the Commission to assess whether State funding is restricted to what is necessary for the fulfilment of the public broadcaster's mission. Based on the Broadcasting Communication, Member States must at least establish:

    a. rules to avoid spillovers of State funds to commercial activities (i.e., cross-subsidization);[11]

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8 Treaty on the Functioning of the European Union [2012] OJ C 326/1, Article 106(2). Moreover, Protocol No. 29 (the Amsterdam Protocol on Public Service Broadcasting) reads as follows: "The provisions of the Treaties be without prejudice to the competence of Member States to provide for the funding of public service broadcasting and in so far 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 ***in so far as such funding does not affect trading conditions and competition in the Union 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" [emphasis added].

9 Broadcasting Communication, paragraph 16.

10 Judgment of the (then) CFI in Joined Cases T-568/08 and T-573/08, Métropole télévision (M6) and Télévision française 1 SA (TF1), [2010] ECR II3397, paragraph 141; Judgment of the (then) CFI, Case T-275/11 Télévision française 1 (TF1) v. European Commission, ECLI:EU:T:2013:535, paragraphs 130, 133-4 and 138.

11 Broadcasting Communication, paragraphs 92-97.

b. rules to preclude overcompensation;[12] and

c. rules to ensure that any "significant new" services are subject to a rigorous market impact assessment checking whether the anti-competitive effects that arise from the provision of those services are disproportionate to the public value they generate.[13]

The Finnish State argues that the rules established in the Yle Act that seek to prevent Yle from cross-subsidizing commercial activities are sufficient to ensure that State financing is limited to what is necessary for the discharge of Yle's public service obligations. However, since Yle's commercial activities are, in the words of the Finnish State, "*extremely marginal*",[14] the relevant control is also at best marginal. Moreover, the Finnish framework does not establish any concrete rules to avoid overcompensation. Finally, the few market impact assessments that have been conducted did not properly consider the harm to competition caused by the launch of "significant new" services offered by Yle. As a result of the above, the framework governing Yle's activities does not meet the minimum standards that ensure proportionality of public funding (**Part III**).

- In its Complaint, Sanoma suggested that it is necessary to set out specific restrictions that would apply to the contested services offered by Yle as a means to ensure that their provision does not disproportionately affect competition. The Finnish State contests that argument because Sanoma did not include a market analysis, thereby failing to demonstrate that such limitations are necessary. Contrary to what the Finnish State argues, Sanoma's proposal to introduce restrictions is far from arbitrary. Not only does Sanoma's proposal reflect common practice followed in many jurisdictions across the EU, it also reflects good practice because it rests on the impact of the services concerned on competition. As regards the alleged lack of economic analysis that would support its proposal, Sanoma respectfully submits that carrying out an economic analysis with a view to specifying the restrictions that should be imposed on Yle's VOD and online learning services is a task for the Finnish State to carry out. That analysis should take the particularities of the Finnish market into account (**Part IV**).

- To substantiate the disproportionate effects on competition generated by Yle's VOD and online learning services, Sanoma further submits an economic analysis prepared by

12 Id., paragraphs 40, 70-76 and 78.

13 Id., paragraph 88.

14 First Reply of the Finnish State, paragraph 60.

Compass Lexecon.[15] That analysis challenges the methodology and findings of the Copenhagen Economics report which was conducted at the request of Yle and accompanied the Finnish State's Second Reply.[16] The report prepared by Compass Lexecon shows that, contrary to the allegations made by the Finnish State, most content that is consumed and promoted on Yle Areena is commercial content.[17] Moreover, the report demonstrates that Sanoma's VOD revenues are [redacted] than they would have been in the absence of Areena.[18] Contrary to the suggestions of the Copenhagen Economics report, the Compass Lexecon report reveals that Sanoma's television (SVOD, AVOD and FTA) operations have [redacted][19]

- In addition to proving that the aid granted to Yle for the provision of VOD and online learning services is illegal, Sanoma's Replies show that the Finnish framework regulating public service broadcasting raises numerous problems that must be addressed. Yle's excessively broad remit, the conflict of interest arising from the fact that the Administrative Council exercises both managerial and regulatory duties, and the lack of a mechanism ensuring that Yle's funding is proportionate to the public service mission are problems that go beyond the legality of Yle's VOD and online learning services. In recent years, market players other than Sanoma have expressed to the Commission similar (or identical) concerns.[20] As market boundaries are becoming increasingly blurred and technological developments facilitate the launch of innovative services, the need for reforming the Finnish framework is imperative so that Sanoma and other commercial players can find their way into the Finnish audiences. Quick fixes are not appropriate to resolve the systemic issues underlying the Yle Act, as they can only lead to more litigation, to the detriment of competition and Finnish citizens.

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15 Compass Lexecon, "Public service broadcasting and the impact of Yle Areena on commercial operators" ("**Compass Lexecon Report**"), 1 December 2021.

16 Copenhagen Economics, "Economic Assessment of Sanoma's State aid complaint concerning video-on-demand and learning services" ("**Copenhagen Economics Report**"), 29 September 2021.

17 Compass Lexecon Report, Section 3.

18 Id., Section 4.

19 Id., paragraph 4.33.

20 See, for instance, Avance on behalf of the Finnish Media Federation, "A legal assessment of State aid incompatible with the internal market Funding for text-based journalistic online content to the Finnish public service broadcaster Yleisradio Oy", available at https://www.medialiitto.fi/wp-content/uploads/2020/09/Annex-4-Legal-assessment-of-state-aid-incompatible-with-the-internal-market.pdf. In its Complaint, the Finnish Media Federation took issue with Yle's excessively broad remit, the conflict of interesting arising from the duties exercised by the Administrative Council, and the way in which prior evaluation procedures, including market impact assessments, have been conducted to date.

II. <u>The Finnish State takes the legal standard out of context by arguing that State aid is illegal where it makes it "*impossible or excessively difficult*" for private operators to compete</u>

7. In its replies to the Commission, the Finnish State argues that the State aid granted to Yle complies with the proportionality requirement for the reason that it does not make it "***impossible or excessively difficult***" for private operators to conduct business in Finland.[21] That legal standard was set by the EU Court of Justice in the *DTS* judgment.[22]

8. The Finnish State conveniently takes the above standard out of context as it chooses to ignore the factual and legal background to the *DTS* judgment. That judgment concerned the compatibility with the common market of the aid scheme supporting Spanish public broadcaster RTVE. In that case, pay-TV service provider DTS had argued that RTVE's acquisition of rights to premium content (e.g., major sports competitions and feature films) impoverished its own programming and had an adverse effect on its subscriptions.[23] After considering the restrictions imposed on RTVE, the Court dismissed DTS's argument because DTS failed to explain why such restrictions were not sufficient to ensure proportionality of funding:

> "[to establish disproportionate effects,] it would be necessary to establish that RTVE's funding scheme ***renders it impossible or excessively difficult*** for a private operator to conduct business in the Spanish broadcasting market. ***In this connection it must be observed that Law No 8/2009 lays down limits on RTVE's activities the purpose of which is to ensure that the business of private operators is not affected disproportionately***. […]
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> [I]t must be observed that Article 9(1)(i) of Law No 8/2009 provides that ***RTVE must limit to 10% of its total annual budget for supplies, purchasing and external services the cost of acquiring rights to broadcast official sporting events*** that are classified as being of general interest and of major importance to the public and which are identified in the programming agreements, with the exception of the Olympic and Paralympic Games.
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> Furthermore, Article 9(1)(m) of that law provides that, ***in any year, RTVE may not broadcast at peak viewing times, on all of its channels together, more than 52 recently released films produced by major international film production studios***, that is to say, films

21 First Reply of the Finnish State, paragraphs 63, 64, 103 and 114; Second Reply of the Finnish State, paragraphs 5, 59, 90, 112, 118, 123 and 124.

22 Judgment of the General Court of 11 July 2014, DTS Distribuidora de Televisión Digital, SA v European Commission, T-533/10, ECLI:EU:T:2014:629, paragraph 160.

23 Id., paragraph 113.

which have already been shown in cinemas and which were released between two and four years previously.

The applicant has not, however, explained in what way, ***despite the limits mentioned*** […] ***above, it has been made impossible or excessively difficult for private operators to conduct business in the Spanish broadcasting market***."[24]

9. The Court, therefore, makes it abundantly clear that proportionality must be assessed against the specific restrictions that govern the public broadcasting scheme under consideration. In the case of Yle, limitations similar to those that apply to RTVE are nowhere to be found.

10. The Finnish State argues that the standard established in the *DTS* judgment that State aids are illegal where it is "impossible or excessively difficult" for private operators to compete applies in a vacuum. In other words, the Finnish State attempts to convince the Commission that the standard in question applies irrespective of whether a public broadcaster is subject to rules that ensure the proportionality of State financing. The interpretation proposed by the Finnish State is against the logic of State aid law for the following reasons:

    - First, Article 107(1) TFEU prohibits State aids which "***distort or threaten to distort competition***" and which "***affect trade between Member States***". The EU Court of Justice has set low thresholds for the fulfilment of those conditions.[25] A "distortion of competition" within the meaning of Article 107(1) of the TFEU is generally found to exist when the State grants a financial advantage to an undertaking.[26] This is clearly met in the case of Yle because, contrary to commercial providers, Yle receives public funding. Moreover, Yle enjoys several other financial advantages that have been afforded to it by the Finnish State. For example, as opposed to private operators, Yle "*has the right to carry out digital terrestrial public service television and radio broadcasting without a licence*."[27] Yle also benefits from "must-carry" rules whereby telecommunications network operators are required to transmit Yle's programming without charge.[28]

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24 Id., paragraphs 160-165 [emphasis added].

25 The relevant case law is codified in Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union [2016] OJ C 262/1, paragraphs 185 et seq.

26 Id., paragraph 187, referring to Judgment of the General Court of 15 June 2000, Alzetta, Joined Cases T-298/97, T-312/97 etc., ECLI:EU:T:2000:151, paragraphs 141 to 147; Judgment of the Court of Justice of 24 July 2003, Altmark Trans, C-280/00, ECLI:EU:C:2003:415.

27 Finnish Act on Electronic Communications Services, Section 22.

28 Id., Section 227.

For the "effect on trade" condition to be fulfilled, it is not necessary to establish that the aid has an actual effect on trade between Member States but only that the aid is likely to affect such trade.[29] Furthermore, the Broadcasting Communication explains that State aids granted for the provision of public broadcasting services fulfil "the effect on trade" condition for the following reasons: public broadcasters often acquire programme rights on an international or European level (this applies to Yle), the ownership structure of commercial broadcasters usually extends to more than one Member State (this applies to Sanoma) and services provided on the internet normally have a global reach.[30] In decisions assessing aids to public broadcasters, the Commission has found that there is an effect on trade even where the aid under scrutiny is granted to public broadcasters that do not operate outside their domestic territory.[31] Yle operates outside Finland. For example, in its Second Reply to the Commission, the Finnish State mentions that Areena can be accessed by Finns residing abroad and that the rights to the content offered on Areena "are not limited geographically".[32] Therefore, it would be against the rationale of EU State aid rules which prohibit State aids that distort or threaten to distort competition and which affect trade between Member States (both conditions being fulfilled if low thresholds are met) to interpret the *DTS* judgment as mandating that State aids only be prohibited if they make it impossible or excessively difficult for private operators to compete (a condition which would only be fulfilled if a very high threshold is met).

- Second, for an aid scheme to benefit from an exemption from the general prohibition of State aid, specific conditions set by the Treaty must be met. In the case of SGEI, Article 106(2) TFEU lays down that State aids must not affect competition to "***such an extent as***

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29 Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union [2016] OJ C 262/1, paragraph 190, referring to Judgment of the Court of Justice of 14 January 2015, Eventech v The Parking Adjudicator, C-518/13, ECLI:EU:C:2015:9, paragraph 65; Judgment of the Court of Justice of 8 May 2013, Libert and others, Joined Cases C-197/11 and C-203/11, ECLI:EU:C:2013:288, paragraph 76.

30 Broadcasting Communication, paragraph 22.

31 For example, in the assessment of whether the scheme supporting RTVE is compatible with the common market, the Commission dismissed Spain's argument that the scheme does not affect trade because RTVE does not operate outside Spain. The Commission found that when "where a Member State grants aid to undertakings operating in the service and distribution industries, it is not necessary for the recipient undertakings themselves to carry on their business outside the Member State for the aid to have an effect on trade in the Union. […] RTVE itself is active on the international markets (sale of programmes and acquisition of broadcasting rights). Through the European Broadcasting Union it exchanges television programmes and participates in the Eurovision system. Furthermore, in the acquisition and sale of broadcasting rights, RTVE is in direct competition with commercial broadcasters that are active in the national and international broadcasting market and that have an international ownership structure". See European Commission, State aid scheme No C 38/2009 (ex NN 58/2009) which Spain is planning to implement for Corporación de Radio y Televisión Española (RTVE) C (2010) 4925 final, paragraphs 42-44.

32 Second Reply of the Finnish State, paragraph 80.

would be contrary to the interests of the Union". In the same vein, the Amsterdam Protocol establishes that State funding of broadcasting activities is legitimate only "***insofar as such funding does not affect trading conditions and competition in the [Union] to an extent which would be contrary to the common interest***." Those provisions essentially mean that a balance must be struck in order to ensure that the harm to competition caused by State aids is outweighed by the added value of public broadcasting.[33] The Broadcasting Communication explains how this balance is achieved in broadcasting and online content markets:

> "commercial broadcasters […] also play a significant role in achieving the objectives of the Amsterdam Protocol to the extent that they contribute to pluralism […]. [C]ommercial media providers are concerned by the potential negative effects that State aid to public service broadcasters could have on the development of [online services]. As recalled by the Audiovisual Media Services Directive "the coexistence of private and public audiovisual media service providers is a feature which distinguishes the European audiovisual media market." ***Indeed, it is in the common interest to maintain a plurality of balanced public and private media offer also in the current dynamic media environment***."[34]

11. The above elements of State aid law essentially boil down to the following: Granting State subsidies to favor certain undertakings is the exception rather than the rule. In order to protect certain public policy values, such as media pluralism, the State may intervene to support the provision of certain services in the general interest, including public broadcasting services. However, neither the State nor the favored undertaking(s) are given a blank check. Specific conditions must be met for the aid scheme to be compatible with the common market. One of those conditions is that the aid must be limited to what is necessary for the fulfilment of the public service mission. If this condition is not met in the case of public service broadcasting, competition is unnecessarily distorted (e.g., spillovers of public money to commercial activities undercut private initiatives) and media pluralism is undermined (e.g., audiences are deprived of content offered by a variety of providers). Against the above background, the Finnish State contends that State aids become a problem only in cases where commercial broadcasters are on the verge of exiting the market or find it excessively difficult to serve their audiences. As set out above in detail, this far-fetched interpretation cannot be not supported by the spirit of the Treaty rules. In fact, it is against it.

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33 See, for instance, Judgment of the Court of 21 September 1999 in Case C-67/96, Albany International BV v Stichting Bedrijfspensioenfonds Textiel industrie [1999] ECR I-05751.

34 Broadcasting Communication, paragraph 16 [emphasis added].

12. If anything, due to specific market realities, the Commission should carefully assess the proportionality of Yle's funding. The Broadcasting Communication mentions that:

> "The analysis of the compliance with the State aid requirements must be based on the specific characteristics of each national system. ***The Commission is aware of*** the differences in the national broadcasting systems and in ***the other characteristics of the Member States' media markets***. Therefore, the assessment of the compatibility of State aid to public service broadcasters under Article [106](2) TFEU is made on a case-by-case basis."[35]

13. The characteristics of the Finnish market that should guide the Commission in its assessment of Yle's scheme are described in detail in the report of the Media Pluralism Monitor ("**MPM**"), a tool diagnosing (low, medium and high) risks to media pluralism.[36] The 2020 implementation of the MPM shows that media concentration in Finland is excessive, indicating a high risk to media pluralism.[37] Based on the findings of the MPM report, this is largely attributed to the inadequate framework governing Yle. The report notes respectively that:

> "[t]he risk arising from media concentration is […] increased by the public service broadcaster Yleisradio: ***no effective mechanism exists that would adjust Yleisradio's funding to prevent it from undermining commercial media.***"[38]

14. Concerns over media viability also indicate a high risk to media pluralism in Finland.[39] The MPM report notes that revenues of all media sectors in Finland decreased from 2019 to 2020.[40] Ad spending in traditional media had already been in decline before the COVID-19 pandemic and the increase in online advertising has not managed to offset the losses.[41] The report also mentions that

35 Id., paragraph 41 [emphasis added].

36 For more information see: https://cmpf.eui.eu/mpm2021-results/.

37 Ville Manninen and Cecilia Hjerppe, "Monitoring Media Pluralism in the Digital Era. Application of the Media Pluralism Monitor in the European Union, Albania, Montenegro, the Republic of North Macedonia, Serbia & Turkey in the Year 2020. Country Report: Finland" ("**MPM Finnish Report**"), (2021) *2021.2812*, available at https://cadmus.eui.eu/bitstream/handle/1814/71945/finland_results_mpm_2021_cmpf.pdf?sequence=1&isAllowed=y, page 10.

38 Ibid. [emphasis added].

39 Ibid.

40 Ibid.

41 Ibid.

the pandemic caused an even heavier dip in advertising revenue in most sectors (from -9% in 2019 to -65% in 2020).[42] By contrast, Yle's net revenue ***increased by 11.8 million*** from 2019 to 2020.[43]

15. In assessing whether Yle's aid scheme fulfils the proportionality condition, the Commission must adequately consider the aforementioned conditions of the Finnish market, for "***it is in the common interest to maintain a plurality of balanced public and private media offer***."[44]

16. It is clear from the above that the argument of the Finnish State that the State aid granted to Yle is compatible with Article 106(2) TFEU on the ground that it does not make it "impossible or excessively difficult" for commercial providers to operate should be dismissed. This also applies to the findings of the Copenhagen Economics report, which relies on the same standard to prove that Yle's funding has not produced disproportionate effects on competition.

III. The Finnish system lacks appropriate safeguards to ensure that Yle's funding is proportionate to the cost of the public service mission

17. In its submissions, the Finnish State attempts to convince the Commission that it should not be concerned about whether Yle's funding exceeds the costs incurred in the fulfilment of its public service remit. In this regard, the Finnish State argues that:

    - As per the Amsterdam Protocol, it is free to choose the mechanism of Yle's financial supervision;[45]

    - The mechanism it has established is in line with the EU State aid rules: the Finnish Transport and Communications Agency ("**Traficom**") properly oversees whether Yle engages in price undercutting and cross-subsidization,[46] whereas the prior evaluation procedure that was conducted for Yle Areena in 2016 indicates that the impact of Yle's services on the market is adequately considered.[47]

18. None of the above arguments holds water for the reasons set out below.

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42 Ibid.

43 Yle's net revenue in 2019 amounted to €471.9 million in 2019 and €483.7 million in 2020. See Yleisradio Oy, "Board of Directors' report and financial statements 2019", page 12 and Yleisradio Oy, "Board of Directors' report and financial statements 2020", page 13.

44 Broadcasting Communication, paragraph 16.

45 First Reply of the Finnish State, paragraph 50.

46 Id., paragraphs 57-58.

47 Second Reply of the Finnish State, paragraphs 43 et seq.

19. In its First Reply to the Commission, the Finnish State starts the description of Yle's control system by stating that "*the choice of the mechanism that ensures effective supervision over public service broadcasting is within the competence of the Member State.*"[48] However, the Member States' freedom to decide on how financial control over public service broadcasters is exercised must be qualified.

20. The EU Court of Justice has often ruled on the Commission's power to assess public broadcasters' finances. The Court has held in relevant cases that the Commission is not entitled to decide on matters of economic efficiency, including the level of costs incurred in the discharge of the public service remit.[49] The objective of the Court in those cases was to draw clear competence boundaries between the Commission and the Member States in a way that respects the limited powers conferred on the EU in the media sector (on the basis of Article 167(4) TFEU) and in the provision of SGEI (as per Article 106(2) TFEU), including public broadcasting (with the Amsterdam Protocol).

21. However, in all the cases where the Court circumscribed the Commission's powers when exercising financial control over public broadcasters, it by no means gave Member States a *carte blanche* to behave as they please: despite the EU's competence limitations in this area, the Court held that the Commission should in all circumstances be in the position to examine whether State financing exceeds the net costs incurred in the fulfilment of the public service mission.[50] In other words, the Member States' freedom is not absolute and certain minimum standards must be set that would enable the Commission to conduct an effective proportionality control.

22. The Broadcasting Communication lays down that, in order to ensure proportionality, Member States should at least establish:

    - rules to avoid spillovers of State funds to commercial activities (where relevant);[51]

    - rules to preclude overcompensation;[52] and

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48 First Reply of the Finnish State, paragraph 50.

49 Judgment of the (then) CFI in Joined Cases T-568/08 and T-573/08, Métropole télévision (M6) and Télévision française 1 SA (TF1), [2010] ECR II3397, paragraph 139; Judgment of the (then) CFI, Case T-275/11 Télévision française 1 (TF1) v. European Commission, ECLI:EU:T:2013:535, paragraph 133.

50 Id., paragraph 131.

51 Broadcasting Communication, paragraphs 92-97.

52 Id., paragraphs 40, 70-76 and 78.

- rules to ensure that any "significant new" services are subject to a rigorous market impact assessment checking whether the anti-competitive effects that arise from the provision of those services are disproportionate to the public value they generate.[53]

23. Since Yle is mainly financed through a tax, rules to avoid spillovers of State funds to commercial activities, are largely irrelevant (e.g., Section 12 of the Yle Act specifically prevents Yle from offering advertising and sponsored programs). However, the Finnish framework does not include any concrete rules to preclude overcompensation (**Section A**). Moreover, the few market impact assessments that have been conducted did not consider properly the harm to competition caused by the launch of the services concerned (**Section B**). Therefore, as explained in detail below, Yle's aid scheme does not fulfil the above minimum conditions set by the Broadcasting Communication.

A. <u>The Yle Act does not establish appropriate rules to prevent overcompensation</u>

24. In its First Reply to the Commission, the Finnish State argues that Traficom exercises "effective" financial supervision over Yle.[54] However, the mechanism the Finnish State has set up is inadequate to ensure that no overcompensation takes place.

25. Traficom, the body in charge of exercising financial control over Yle's activities, has the following duties:

    - 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;

    - supervising Yle's compliance with the prohibition on advertising and the production of sponsored programs;

    - supervising that Yle does not engage 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; and

    - monitoring that, for accounting purposes, Yle's public service activities are separated from other activities, if any.[55]

53 Id., paragraph 88.

54 First Reply of the Finnish State, paragraph 60.

55 Yle Act, Article 12a.

26. The first task is not related to compliance with the principle of proportionality. As regards the other three tasks (and as acknowledged by the Finnish State in its First Reply), those are related to the development of commercial activities. Since such activities are, in the words of the Finnish State, "*extremely marginal*",[56] the relevant control is also at best marginal.

27. In its submission, the Finnish State mentions that, because commercial activities are extremely marginal, "*any risk of overcompensation appears to be completely remote*."[57] This statement is incorrect: a risk of overcompensation does not arise only in cases where the public broadcaster engages in commercial activities. Even where the public broadcaster predominantly relies on public funds, there needs to be a mechanism ensuring that the money spent is proportionate to the discharge of the public service mandate. 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.

28. Sanoma turns to examples of other European countries that set appropriate rules to avoid overcompensation. In the case of RTVE, in addition to the restrictions examined above that concern the acquisition of premium content (sports competitions and feature films), which still apply, the law further lays down that, at the end of the financial year, RTVE may not retain more than 10% of the annual budgeted expenses and the rest of the public funds must be transferred to the State Treasury.[58] The BBC Agreement prescribes specific limits to borrowings, which should not exceed a specified amount.[59] When it assessed the aid scheme supporting German public broadcasters ARD and ZDF, the Commission took into account that ARD and ZDF had committed to limit online spending to 0.75% of their budget, a commitment that was monitored by the KEF (the body which exercises financial control over ARD and ZDF and the members of which are experts in accounting, investments and media affairs).[60]

29. Contrary to other systems, the Yle Act only imposes a set of reporting obligations, namely the obligation to keep separate accounts for (radio and television) broadcasting services, network services and online services, and the obligation to submit to Traficom an annual report on Yle's

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56 First Reply of the Finnish State, paragraph 60.

57 Ibid.

58 Ley 8/2009, de 28 de agosto, de financiación de la Corporación de Radio y Televisión Española, Article 8(2), available at https://www.boe.es/buscar/doc.php?id=BOE-A-2009-13988.

59 BBC Agreement, paragraph 53(1).

60 European Commission, State aid E 3/2005, Financing of public service broadcasters in Germany [2007] OJ C 185/1, footnote 11 and paragraph 30.

financial statements, profit and loss statements and balance sheets.[61] These requirements alone cannot preclude overcompensation and are (far) below the European standards discussed above.

30. The inadequacy of the Finnish framework is not a novel issue. It is an issue that private operators and interested stakeholders have been facing for decades. For example, in 2009, the Finnish Competition and Consumer Authority ("**FCCA**") set out its proposals for Yle's public service remit and financing in the context of a revision of the Yle Act. As regards proportionality of funding, the FCCA examined in detail the drawbacks of the regulatory framework that governs Yle's activities and concluded *inter alia* that a mechanism should be put in place "*to set content targets for Yle's remit and to define clear guidelines on how to avoid distortions of competition*."[62] The Yle Act was revised in 2012 and the FCCA's recommendations were not reflected in the legislative text.

B. Market impact assessments have not been conducted properly

31. In its Second Reply to the Commission, the Finnish State argues that the prior evaluation procedure that was conducted for Yle Areena in 2016 indicates that the impact of the contested services on the market has been adequately considered.[63] However, an analysis of how the relevant market assessments were conducted tells a different story.

32. Section 6a of the Yle Act establishes the obligation to conduct a prior evaluation of "significant new" services. According to the Commission, several factors can determine whether a service can qualify as such. Those include modalities of consumption (e.g., linear vs on-demand), the content offered through the new service, the financial resources required for its development and the expected impact on demand.[64] One of the main components of prior evaluation procedures is a market impact assessment that seeks to determine the extent to which the service concerned produces disproportionate effects on competition.[65] Member States are free to decide on the parameters underpinning such assessments. Based on the Broadcasting Communication, certain key features include "*the existence of similar or substitutable offers, editorial competition, market*

61 Yle Act, Articles 7(b), 8(a), 12(b).

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

63 Second Reply of the Finnish State, paragraphs 43 et seq.

64 Broadcasting Communication, paragraph 85.

65 Id., paragraph 88.

structure, market position of the public service broadcaster, level of competition and potential impact on private initiatives."[66]

33. Section 6a of the Yle Act does not specify which elements a market impact assessment should comprise. As a result, private operators are expected to rely on the above broad guidelines provided by the Broadcasting Communication *and* well-reasoned decisions that adequately consider the anti-competitive effects of the "significant new" service concerned. However, the implementation of Section 6a has been far from satisfactory so far. For certain services offered by Yle, such as online learning services, no prior evaluation procedure has taken place. For other services, including Yle's VOD and regional news services, the market impact assessments have not been conducted properly, thereby underestimating (or completely ignoring) their disproportionate effects on competition.

34. ***The market impact assessment for Yle's VOD services:*** Sanoma explained in detail in its First Reply to the Finnish State that the prior evaluation procedure that was conducted in 2016 for Areena focused on cosmetic changes (i.e., content packaging and content classification in the catalogue) and did not examine the substantive aspects that form Sanoma's Complaint, including the type of content offered on Areena (e.g., entertainment vs current affairs programming) and the extent to which Areena could offer standalone content.[67] Moreover, the market impact assessment did not examine in detail the services market players offered at the time, the concerns private operators raised in the context of the relevant public consultation, and what might occur in the absence of restrictions on Yle's content spend and content availability.[68] Finally, given that "***significant modifications*** *to existing services [should] be subject to the same assessment as significant new services*,"[69] the investments made into Areena since 2016 (content spend has increased exponentially[70]) should have triggered additional evaluations of Areena's expected impact on the market. The Broadcasting Communication explicitly mentions that the "significance" of the service (or any modifications thereof) may take into account, for instance, "*the financial resources required for its development and the expected impact on demand.*"[71] However, to what extent increasing investments into Areena have produced disproportionate effects on competition has yet to be assessed.

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66 Ibid.

67 Sanoma's First Reply, paragraphs 86 et seq.

68 Ibid.

69 Broadcasting Communication, paragraph 85.

70 Sanoma's First Reply, paragraphs 92 and 98.

71 Broadcasting Communication, paragraph 85.

35. ***The market impact assessment for Yle's online learning services:*** Sanoma has explained in its First Reply to the Finnish State that Yle's online learning services can qualify as "significant new" services: contrary to Yle's linear services, online learning materials are offered on-demand (i.e., the modality of consumption is different). Moreover, online learning materials are not offered through Yle's linear channels (i.e., the content provided through the two distribution channels is different).[72] In spite of the above, Yle's online learning services have never been subject to a prior evaluation procedure. In other words, private operators are still in limbo over the disproportionate effects on competition those services have generated and how those could be addressed.

36. In the absence of any proper assessment of the disproportionate effects on competition that Yle's VOD and online learning services generate, the Finnish scheme cannot be declared compatible with Article 106(2) TFEU and the Amsterdam Protocol. In addition to ignoring the requirements set by the EU State aid rules, the Finnish State has also dismissed the concerns expressed by the FCCA that Yle's unclear remit should be accompanied by an in-depth market impact assessment.[73] Those concerns were voiced in 2009 and have not been addressed yet.

37. ***The market impact assessment for online news services:*** For the sake of completeness, Sanoma submits that the ineffective implementation of Section 6a is by no means limited to Areena and Yle's online learning services. A prior evaluation procedure was conducted in 2017 regarding the provision of regional news online and a personalization functionality offered by Yle.[74] Yle had introduced certain changes to the provision of regional news at the time: it no longer offered regional front pages on its website and it afforded users the possibility to select the news of a municipality or region to be displayed on the main news page of Yle's website.[75]

38. The market impact assessment left open various *lacunae*, such as those discussed below:

    - Though the assessment found that the affected market is the market for regional news, the bulk of the assessment discusses news markets *generally*.[76] Far from an examination of the specific effects of Yle's services on the Finnish regional news market, the assessment is mainly an overview of the findings of international comparative studies (or studies concerning other European public broadcasters) that examine users' willingness to pay (i.e., to what extent users would be willing to purchase a newspaper subscription if a public

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72 Sanoma's First Reply, paragraphs 59 et seq.

73 FCCA Statement.

74 Ex ante evaluation of online services and personalisation of regional news ("Ex Ante Assessment for Yle's Regional News", available at https://yle fi/aihe/artikkeli/2017/03/15/alueellisten-uutisten-verkkopalvelujen-ja-personoinnin-ennakkoarviointi

75 Id., paragraph 7.

76 Id., paragraphs 25 et seq.

broadcaster offered news services for free).[77] The only remark that is made with respect to the affected market is that Yle's regional news services reached at the time a smaller audience than regional newspapers.[78] This finding was clearly not sufficient to conclude that Yle's news services could not produce disproportionate effects on competition: it was evident at the time that the consumption of online news was only expected to increase and that the provision of Yle's free services could affect traffic to the websites of regional newspapers.

- The assessment concluded that it would be advisable for Yle to continue to link to articles produced by commercial providers.[79] It proposed that linking take journalistic principles and the fair and non-discriminatory treatment of commercial operators into account.[80] The implementation of linking would be facilitated by the publication of principles on Yle's website.[81] Following up on this recommendation, Yle published a press release that it was planning to apply such principles and to monitor their implementation on a regular basis.[82] However, there is no publicly available information about the principles themselves or the extent to which Yle implements them.

39. Combined with the concerns that were raised regarding the gaps in the market impact assessment concerning Areena, the above remarks show how superficial and inadequate the examination of the disproportionate effects of Yle's online services has generally been. The situation is not likely to change unless the Commission takes action to address this issue, ensuring that prior evaluation procedures, including market impact assessments, are conducted properly. For example, Yle has recently announced that it will be making several changes to its radio/audio portfolio in order to accommodate the Finnish audiences' increasing appetite for audio on-demand content.[83] One of those changes consists in turning a radio station (Yle Puhe) into a podcast distribution channel (Yle Puhe will no longer broadcast news and the only content transmitted live will be sports content).[84] No prior evaluation procedure has been launched to assess those changes.

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77 Ibid.

78 Id., paragraph 35.

79 Id., paragraphs 50-55.

80 Ibid.

81 Ibid.

82 The relevant press release is available at https://yle fi/aihe/artikkeli/2017/10/30/yle-lisaa-linkityksia-muiden-medioiden-sisaltoihin.

83 The relevant press release is available at https://yle fi/aihe/a/20-10001737.

84 Ibid.

40. ***The assessment of the disproportionate effects on the market that Yle's significant new services may create suffers from systemic issues:*** Currently, Section 6a of the Yle Act provides that, at the discretion of the Administrative Council, a prior evaluation procedure may be conducted whenever it is deemed necessary. Section 6b further lays down that, in support of its operations, the Administrative Council may request statements from experts. Sanoma's First Reply explained the conflict of interest that arises in the discharge of the duties of the Administrative Council.[85] The lack of independence of the Administrative Council and the absence of a body that is equipped with the necessary expertise to oversee Yle's public service activities is what prompted the FCCA to propose that Yle's supervision, including market impact assessments, be conducted by an independent and permanent body that comprises experts in competition, State aid and media law.[86] For the Finnish scheme to be in line with Article 106(2) of the TFEU, such systemic problems need to be addressed sooner rather than later.

IV. Safeguards are needed to minimize the disproportionate effects on competition

41. The Finnish State forcefully rejects the need for any restrictions that would apply to the contested services. For example, it argues that any limitations to the availability of content on Areena would "*run against Yle's obligation to spend the public money efficiently and responsibly*."[87] As opposed to rules that have been established in other jurisdictions to introduce limits to the expansion of public broadcasters into online content markets, the Finnish State essentially argues that Yle should be given absolute freedom to offer the contested services.

42. As Sanoma has already explained, the legal basis for the provision of those services is an excessively broad remit[88] that is not in line with the EU State aid rules. Contrary to other public broadcasters, Yle may make content available on Areena without any constraints (**Section A**). Moreover, Yle's digital learning services are not subject to any conditions (**Section B**). In order to be compliant with the EU State aid rules, the Finnish framework should be modified to introduce safeguards that are necessary to limit disproportionate effects of Yle's online activities on competition (**Section C**).

A. Content made available on Areena is not subject to any constraints

43. In its Complaint, Sanoma suggested that catch-up content be subject to time restrictions (e.g., content should not be made available seven days after linear transmission) as a means to ensure

85 Sanoma's First Reply, paragraphs 72 et seq.

86 FCCA Statement.

87 Second Reply of the Finnish State, paragraph 62.

88 Yle Act, Section 7.

that the provision of such content does not disproportionately affect competition.[89] The Finnish State contests that argument on the ground that Sanoma did not include a market analysis that would support the suggested approach, thereby failing to demonstrate that time limitations are necessary.[90]

44. Applying time restrictions to on-demand content is common across Europe irrespective of whether those restrictions have been the outcome of State aid investigations or not. For example, in the case concerning the aid scheme supporting Austrian public broadcaster ORF, Austria committed to introduce an obligation whereby ORF would offer content on demand as follows:

    a. Television and radio broadcasts up to 7 days;

    b. Programs of premium sport events up to 24 hours;

    c. Archives with time-historical and culture-historical contents without time limits.[91]

45. The German Interstate Broadcasting Treaty lays down similar rules. More particularly, public broadcasters can offer content on demand as follows:

    a. Own productions and independent audiovisual content without time limits;

    b. Purchased European feature films, purchased episodes of television series and productions which have not been commissioned up to thirty days after their broadcasting;

    c. Major events as well as football games of the first and second German leagues up to seven days after their broadcasting;

    d. Historical/cultural archives with informative, formative, and cultural telemedia without time limits.[92]

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89 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 5, 81 and 121.

90 First Reply of the Finnish State, paragraph 107.

91 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 185.

92 Interstate Broadcasting Treaty, Article 30(2), available at https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Gesetze_Staatsvertraege/Interstate_Media_Treaty_en.pdf, Article 30.

46. Similar solutions have been adopted in other Member States, including Belgium. For example, the Belgian authorities committed that content that does not qualify as RTBF's "own production" should not be made available for longer than seven days.[93]

47. As regards the alleged lack of economic analysis that would support its Complaint, Sanoma respectfully submits that carrying out an economic analysis with a view to specifying the restrictions that should be imposed on the availability of on-demand content is a task for the Finnish State to conduct. That analysis should take the particularities of the Finnish market concerned into account. This has been the case in other jurisdictions.

48. For example, Ofcom has recently conducted a thorough assessment of whether the BBC could extend the timeframe within which content made available on the iPlayer could be accessed. This was part of a broader exercise that consisted in the launch of a Public Value Test that would legitimize the BBC's longer-term plans relating to the iPlayer.[94] Despite the fact that Ofcom granted its approval to the extension of the time limits, it noted the following:

> ***"[W]e remain concerned about the competitive challenges created, particularly for other PSBs' VOD services and potential UK entrants*** such as BritBox, and how this could impact audiences. Our conclusion is subject to conditions and guidance to help ensure that the BBC delivers the public value and mitigates risks to fair and effective competition. ***We are imposing conditions on the BBC*** to support analysis of how the new BBC iPlayer will contribute to delivery of the BBC's mission and public purposes set out in the Charter. The BBC will be required ***to establish a revised performance measurement framework*** in consultation with Ofcom by 31 December 2019. ***We are also requiring the BBC to closely track the availability and consumption of programmes on BBC iPlayer, which will support greater transparency over the scale and impact of the service. This will make it easier for the BBC and Ofcom to consider the potential impact on competition of any future developments***."[95]

49. As a result of Ofcom's assessment, the BBC iPlayer is currently subject to a number of restrictions, including time limitations and limitations concerning the number of titles that are distributed through the BBC iPlayer. For example, catch-up content can be made available for no

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93 European Commission, Aide d'Etat SA.32635 (2012/E) – Financement de la RTBF Belgique, 7 May 2014, C(2014) 2634 final, footnote 106.

94 Ofcom, BBC iPlayer Competition Assessment, Final Determination ("**BBC iPlayer decision**"), 1 August 2019, available at https://www.ofcom.org.uk/__data/assets/pdf_file/0029/159725/statement-bbc-iplayer-final-determination.pdf, paragraph 2.4.

95 Id., page 2 [emphasis added].

longer than 12 months. Moreover, the BBC iPlayer can offer a maximum of 50% of current returning[96] scripted titles as "full box sets"[97] (circa 25 titles).[98]

50. No such exercise has been conducted and no similar guarantees have ever existed with respect to Areena.

B. Yle's online learning services are not subject to any conditions

51. Similar to Areena, Yle offers its online learning services without any limitations. Unsurprisingly, this is against what applies to the online learning services offered by other public broadcasters.

52. For example, in *BBC Digital Curriculum*, the Commission expressed the concern that relying on the term "*ancillary services*" to launch the contested digital learning services was not appropriate. As a result, the UK authorities made the following commitments:

- The UK authorities would publish a "commissioning plan" ("the plan") at least fifteen months before the launch of the Digital Curriculum service. The plan would set out the subjects to be covered during the first five years of the service.

- The five-year plan would be accompanied by explicit criteria for exclusion, setting out the subjects and/or learning outcomes that would not be provided by the BBC throughout its duration. The plan was intended to provide the parameters within which the BBC would operate so that any divergence from its scope would be considered a breach of the UK Secretary of State's approval.

- Any license fee funding for the scheme in excess of the £150 million or beyond five years after the date of the Commission's approval would be the subject of a new notification to the Commission.[99]

53. In view of the above, contrary to what the Finnish State argues, Sanoma's proposal to introduce restrictions on Yle's VOD and online learning services is far from "arbitrary".[100] Not only does

96 See Id., footnote 11: A 'returning series' is a TV title that is currently being commissioned, which was also broadcast (or otherwise made available) in previous years. See also footnote 15.

97 Id., footnote 16: Being available as a 'full box set' means that all series (including previous series) of a TV programme title are made available on a VOD service.

98 Id., page 46, paragraphs 4.23-25 and page 55.

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

100 First Reply of the Finnish State, paragraph 107.

Sanoma's proposal reflect common practice, it reflects good practice because it rests on the impact of the service concerned on competition.

54. Overall, Sanoma believes that it is up to the Finnish State to come up with sensible rules that are aligned with the spirit of Yle's remit whilst safeguarding competition.

C. The framework regulating Yle's online activities must be modified to level the playing field in emerging digital markets

55. Sanoma's Replies have demonstrated that the wording and implementation of the Yle Act raise systemic issues as a result of which the aid granted to Yle for the provision of online services is not compatible with the EU State aid rules. The lack of an appropriate legal toolkit will only exacerbate those issues, as Yle will continue to enter into emerging markets (e.g., audio) without any restrictions. This is illustrated by the following examples. First, one of the Key Performance Indicators Yle has set for itself is "*the time that audiences under 45 years old spend on Yle's online services*."[101] This is used as a benchmark that determines the bonuses Yle's senior management receives.[102] In other words, Yle's strategy is driven by the constant growth of its digital portfolio. Second, in the absence of any restrictions, Yle can devote significant resources to its online services, using public funds in a disproportionate manner. For example, [redacted]

56. In the absence of any meaningful procedures assessing the effects on competition created by Yle's digital activities, new cases of aid being used illegally to subsidize online services will continue to emerge. In other words, the Finnish State should address the systemic issues raised in Sanoma's Replies, for quick fixes in fast-evolving digital markets can only be expected to give rise to more litigation, harming competition and the taxpayer.

101 Yle Asiakkuudet 2019 Report, available at https://view.24mags.com/yle/ylen/asiakkuudet-2019#/page=17. The same point was made by Mr. Thomas Wilhelmsson, Chairman of the Board of Directors of Yle, in a presentation at Yle's Annual General Meeting that took place on 30 April, 2021. See Tulospalkitseminen 2020, page 5.

102 This was mentioned during Yle's Annual General Meeting that took place on 19 May 2020.

103 Yle's Areena Audio service is available at https://areena.yle.fi/audioohjelmat/30-279.

V. Conclusion

57. As explained in this submission as well as the First Reply Sanoma submitted to the Commission on 22 October 2021, the Finnish State's arguments 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.

58. Contrary to what the Finnish State argues, Sanoma has proven in its two replies to the Finnish State's observations that: (i) Yle's public service remit has not been properly defined; (ii) Yle has not been entrusted to offer Yle Areena and online learning services; (iii) Yle is not subject to an effective control mechanism; and (iv) the public funding of Yle for the provision of VOD and online learning service fails the proportionality test. As a result, State financing 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.

59. 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.

60. 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.

61. Finally, the Finnish State should establish 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.

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