

Case number SA.62830

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European Commission, Competition DG

Subject

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

Contents

1.	INTRODUCTION	3
2.	SUMMARY OF THE VIEW OF THE FINNISH COMPETENT AUTHORITIES	3
3.	YLE AND ITS PUBLIC BROADCASTING SERVICES	5
3.1	General introduction	5
3.2	Yle's public service remit	5
3.3	Yle's VOD services	7
3.4	Yle's online learning services	10
4.	COMPATIBILITY OF YLE'S VOD AND ONLINE LEARNING SERVICES WITH THE INTERNAL MARKET	12
4.1	Yle's public remit is consistent with the State aid rules applicable to broadcasting	12
4.2	There is no manifest error in the definition of Yle's public remit and VOD and online services fall within its scope	15
4.3	There is an effective supervision over Yle's public broadcasting services and there is no overcompensation for its public services	17
4.4	Provision of VOD or online learning services does not significantly affect competition and is not manifestly disproportionate to the objectives pursued by Finland	20
4.4.1	The correct legal standard for assessing public service broadcasting impact on competition	20
4.4.2	VOD online services are part of the relevant market that includes all audiovisual services	22
4.4.3	Changes in the audiovisual services market are driven by SVOD providers and Yle's FVOD offer has no manifestly disproportionate effect on competition	23
4.4.4	There is no legal basis or justification for any <i>a priori</i> time limitations on the Yle's VOD services	31
4.4.5	Provision of online learning services does not significantly affect competition and is not manifestly disproportionate to the objectives pursued by Finland	34
5.	ADDITIONAL QUESTIONS ASKED BY THE COMMISSION	36
5.1	Could the financing of the VOD and online learning services be considered existing aid?	36
5.2	Please explain whether the VOD and online learning services are included in Yle's public service remit? Please explain whether the new wording of Section 7 sufficiently clarifies Yle's public remit for those services.	37
5.3	Please clarify whether VOD service offered by Yle amount to a self-standing commercial offer, different from the classical catch-up services.	38
6.	CONCLUSION	39

1. Introduction

1. On 23 April 2021, Sanoma Media Finland Oy (*Sanoma* or *Complainant*) submitted a complaint (*Complaint*) to the European Commission (*Commission*) in which it alleges that the Finnish national broadcasting company Yleisradio Oy (*Yle*) has received an unlawful State aid in relation to VOD¹ and online learning services.
2. This letter constitutes the response of the Finnish competent authorities to the Commission's letter of 30 April 2021, *SA.48486 – State aid to public service broadcaster YLE for VOD and online learning services – FI*, and focuses on the general comments in relation to the Complaint and provides answers to specific questions asked by the Commission.
3. Unless the Commission decides not to proceed the matter further, the Finnish competent authorities envisage to submit to the Commission a subsequent response that will include additional factual background and additional assessment. For that purpose various fact-finding work streams (e.g. in relation to Yle's internal data and more detailed analysis of the Finnish market) are ongoing, but have not been finalised at the time of the deadline specified by the Commission. Such subsequent response to the Commission's letter could be submitted at the end of September 2021.
4. The Finnish competent authorities have conceived the public handling of the matter of particular importance in this case, in order to protect the right to freedom of speech, and for allowing a broad and open public debate of the matter, especially given that decisions regarding the Finnish public broadcasting company are made by the Finnish Parliament. Therefore, the Finnish Ministry of Transport and Communications sent the Commission a separate letter on this point.

2. Summary of the view of the Finnish competent authorities

5. In the Finnish competent authorities' view, the Complaint is unfounded and incorrect in relation to both its factual and legal assessment. Contrary to the view of the Complainant, VOD and online learning services are within the scope of Yle's public service remit and do not constitute an unlawful State aid under Article 107(1) TFEU.

¹ The Complaint concerns both VOD and catch-up services, though focuses on VOD services, i.e. the catalogue of content offered through Yle Areena. The Complainant defines catch-up services as services that allow viewers to watch content already broadcasted on TV channels made available for a limited duration, such as 7 days after broadcast. According to the Complainant's definition, catch-up services do not include content that has not already been broadcasted on TV nor catalogue offer available for an unlimited time. According to the Complaint, such catalogue content is offered by VOD providers, i.e. commercial operators that offer audiovisual content on demand. The Complainant admits that the provision of catch-up services falls undisputedly within the definition of Yle's public service remit (Complaint, Annex 5, paragraph 85).

6. The Finnish competent authorities disagree with the Complaint that Yle's VOD and online services are not compatible with the internal market. The Complainant does not apply the proper legal standard, which should be Article 106(2) TFEU and Amsterdam Protocol as interpreted by the European Courts.
- The Yle public remit has been sufficiently clear and precisely defined in relation to VOD and online learning services as the Member States have competence to define the public remit in broad terms using qualitative criteria. VOD and online learning services are within the scope of public service remit.
 - There have been no manifest errors in the definition of Yle's public service remit as the contested services clearly fulfill Yle's public mandate to serve the "social, democratic and cultural needs of society".
 - Yle public remit has been properly entrusted to Yle and there is an effective supervision over the exercise of that mandate. The supervision mechanism in place further prevents overcompensation for Yle's public service broadcasting activities.
 - Contrary to the established case law, the Complainant has not shown that Yle's publicly funded activities cause manifestly disproportionate effects on the market and make it impossible or excessively difficult for private operators to conduct their business on the market.²
 - The funding provided to Yle does not constitute new aid. The contested services cannot be regarded as new significant services, as it is merely a question of use of new technologies and new distribution platforms and VOD and online learning services are related to and based on other Yle's broadcasting services developed by Yle for many decades.
 - Yle is only using new technologies and distribution platforms in order to adapt to the changes in the media landscape and consumer behaviour as "on-demand" access is becoming a very popular modality of content consumption.³ Yle has an obligation to perform its public service mandate and serve all Finns. The competitive pressure in the wide audiovisual market is exercised by growing subscription VOD (*SVOD*) and other international and national service providers and not by free VOD (*FVOD*) service provided by Yle.
 - There is no justification for including any *a priori* content or time limitations for availability on the Yle's FVOD activities, which are part of the public remit and meet the democratic, social and cultural needs of the society. The Complainant has not shown that such limitations are necessary to address the alleged manifestly disproportionate effect of Yle's services on competition.

² 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.

³ See, for instance, EBU MIS (2020). *SVOD Market Trends*, Slides 8 and 9.

7. Based on the above, the Finnish competent authorities argue that provision of VOD and online learning services by Yle is compatible with Article 106(2) TFEU, the Amsterdam Protocol and the internal market, since it is based on a sufficiently defined public remit, that has been expressly entrusted and there is no disproportionate effect on competition.

3. Yle and its public broadcasting services

3.1 General introduction

8. In Finland public service broadcasting has been entrusted to Yle, which operates under the administrative branch of the Ministry of Transport and Communications. 99.98% of Yle's shares are owned by the State of Finland. Yle operations are financed through Yle tax and any broadcasting of advertising or sponsored content by Yle is prohibited. Yle public remit and functioning have been specified in the Yle Act⁴, which Commission already examined in the context of an investigation into Yle's online news services.
9. Yle operates in Finland since the 1920s starting from reading Finnish News Agency news on the radio. Yle's online operations started in 1995, and a year later, Yle also started to publish online news. The evolution of Yle's services reflects the technological development and Yle's obligation to reach the majority of the Finnish citizens.
10. Currently, Yle offers four television channels broadcasted on three channel slots, and the Teksti-TV teletext service. Yle's online and mobile services consist of news, web tv and radio (Yle Areena/Arenan), several children's apps, and the accessibility app Yle Kielikoulu/Yle Språkskolan. The special service to teachers, Yle Triplet, is published and operated by HundrEd on the app stores and online. Yle's learning contents are further described below. Yle has 24 regional editorial offices, which cover the entire country. Yle reaches 96 % of Finns every week and 79 % every day (autumn 2020).⁵

3.2 Yle's public service remit

11. Pursuant to section 7 of the Yle Act:

The company shall be responsible for the provision of versatile and comprehensive television and radio programming with the related ancillary and additional 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.

The public service programming shall in particular:

- 1) *support democracy and everyone's opportunity to participate by providing a*

⁴ Act on Yleisradio Oy (Finnish Broadcasting Company) (1380/1993, as amended) (*YLE Act*), English translation available at: <https://www.finlex.fi/en/laki/kaannokset/1993/19931380>.

⁵ <https://yle.fi/aihe/yles-year-2020>.

wide variety of information, opinions and debates as well as opportunities to interact;

- 2) *produce, create, develop and maintain Finnish culture, art and inspiring entertainment*
 - 3) *take educational and equality aspects into consideration in the programmes, provide an opportunity to learn and self-development⁶, give focus on programming for children and young people, and offer devotional programmes;*
 - 4) *treat the Finnish and Swedish speaking⁷ population equally in programming (...) activities*
 - 5) (...)
 - 6) (...)
 - 7) (...)
12. Yle is therefore responsible for the provision of versatile and comprehensive television and radio programming and related ancillary and additional services for all citizens under equal conditions. In practice, this means that Yle is required to make all its services available to the entire Finnish public. Section 7 of the Yle Act contains a non-exhaustive list of special duties Yle is required to perform independently of its other activities and these include an obligation to provide everyone a wide variety of information, provide inspiring entertainment content and take educational aspects into account.
13. Television and radio programming and related ancillary and additional services, with the possibility to share content also through other telecommunications networks (i.e. also through Internet and mobile connections, etc.) were incorporated in the definition of the public service remit by the act which entered into force in 2002.⁸ Prior to the enactment of the law, the first parliamentary working group gave its final report on the topic in 2001, in which the working group specifically proposed that Yle should also extend its public service activities to the new distribution channels.⁹
14. The Government Proposal from 2017¹⁰ 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.¹¹

⁶ The translation provided by the Complainant is incomplete in relation to this subsection as “self-development” wording has been omitted.

⁷ In Finland, Finnish and Swedish are two official languages.

⁸ Laki Yleisradio Oy:stä annetun lain muuttamisesta 492/2002 (Act on the amendment of the Act on Yleisradio Oy).

⁹ Report of the parliamentary working group headed by Jouni Backman: Televisiotoiminnan toimintaedellytysten parantaminen [Enhancement of the operating conditions of television broadcasting services], Publications series of the Ministry of Transport and Communications 29/2001, p. 34.

¹⁰ The Government Proposal 13/2017

¹¹ The reply of Deputy Chancellor of Justice to a complaint, OKV/1258/1/2014, dated 17.3.2015.

15. This is in line with the long-established principle of technology neutrality. While the above allows Yle to perform its public service mandate and serve all Finns, there is no intention to “expand as much as possible” as the Complainant alleges.¹²

3.3 Yle’s VOD services

16. VOD services can be seen as covering both catch-up services, which include content previously or subsequently broadcasted on one or more Yle’s linear channels and VOD-only content which has not been and will not be broadcasted.¹³ Yle Areena also includes live video streams as Yle’s TV channels are streamed simultaneously in Yle Areena and there are live streams that are only available through Yle Areena.¹⁴
17. YLE Areena was launched in 2007 and was preceded by Yle Elävä arkisto (Yle Live archive), which founded in 2006. Yle Live archive celebrated 80 years of Yle by opening up the archives of Yle. Both initiatives were part of the state administration’s 2005 initiative “*Broadband services for the Finnish people*” - an effort to digitalize Finland. Mobile Yle Areena application was launched in 2008. The simulcast streams of TV channels were made available on Yle Areena in 2013. When Yle launched Elävä Arkisto and Yle Areena, the Internet content in general was very limited and many currently available services had not been established.
18. The development of Yle VOD/catch-up services was driven by the changes in the consumer habits, which could not be addressed by traditional broadcasting. Those changes are part of significant changes in the operating environment for public broadcasters, which include rapid digitalization, globalization, development of online communication and related changes in customer behavior patterns. As research shows¹⁵, especially younger audience prefer to choose not only what but also how and when they consume the content and often they prefer to watch e.g. the whole series instead of only one single episode at the time chosen by each customer (“on-demand”) and not at a scheduled time that fits traditional broadcasting logic.
19. First the program collection of Yle Areena was based on 250 program titles and included few domestic current affairs TV programs such as: Tv-uutiset (TV-news); Ajankohtainen Kakkonen (Current topics) and Aamu-tv (Morning TV). TV programs

¹² Complaint, Annex 5, footnote 13.

¹³ As explained further below, it is crucial to make series available as full seasons, sometimes even prior to the premiere on conventional TV channels. The public mission of Yle is to make its services available to all Finns. As the growing number of Finns shift to “on-demand” service they want to view the content of their choice, at any time and on any device, and consumption of increasing groups of viewers do not follow the TV-channels’ schedules.

¹⁴ In general, all programming livestreamed in Yle Areena is broadcasted on Yle TV channels simultaneously. As an exception, there are certain limited live streams, such as question sessions of the Parliament, clips from TV programs and news and concerts, that may be livestreamed only through Yle Areena.

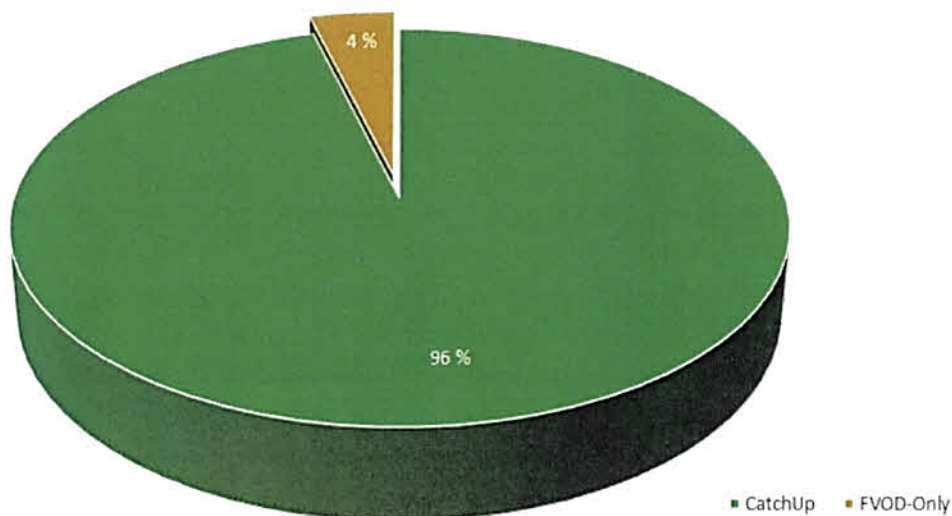
¹⁵ See, for instance, EBU MIS (2020). SVOD Market Trends, Slide 10.

concerned mostly Yle-produced news and current affairs programs. Radio channels were also available online from the beginning of Yle Areena.

20. Yle Areena initially offered only domestic content, as Yle had to overcome initial prejudice of program producers, which considered certain content as dedicated for TV broadcast and not for the Internet. Third-party content was included later separately on the basis of negotiations with the rights owners.
21. Yle Areena made it possible to provide Finns with various content, such as documentaries, science, art or other cultural content. For those types of often very specific or commercially unpopular content, traditional broadcasting was not suitable, due to its limited schedule and considerable broadcasting distribution costs. Yle Areena allows Finns to access that content through the Internet, regardless of their current location, which traditional TV and radio channels do not allow. First VOD “reality entertainment”, which only constitutes a small portion of the VOD content was included in 2008. The value for society in reality TV is that it may e.g. encourage discussions about the relationships and family value in realistic depiction of today’s Finnish everyday reality, human relationships and life situations. As explained below, while Yle Areena content that can be described as “entertainment” is limited, neither Yle Act nor the Amsterdam Protocol exclude that type of content from the public service mandate as it can meet the social and cultural needs of the society. All these programs are also part of Yle’s public remit as they provide value for civil society and e.g. encourage public debate. Yle’s mission is to guarantee Finns, regardless of age, social status, and place of residence, an equal access to information, societal issues and shared experiences. Further, according to Section 7 subsection 2 (subpoint 2) of the Yle Act Yle’s programming shall produce, create, develop and maintain Finnish culture, art and inspiring entertainment.
22. The vast majority of Yle Areena content is broadcasted on Yle TV channels and VOD-only content is very limited. First FVOD-only agreement for third-party content was signed in 2011 and the service was experimental in the first years. FVOD-only content does not include “true crime”-genre and “true crime” content, which even if so defined, has been part of Yle’s linear offering for a long time. A first FVOD-only reality title was launched in 2015.

23. **Chart 1:** Yle Areena broadcasted (catch-up) and FVOD-only content in 2020

Areena CatchUp & FVOD-Only video programmes,
% of hours published in 2020 (not inc. clips and streaming)



Source: Yle internal data.

24. Yle Areena's offering and related consumption are more balanced as Yle covers various public needs, in accordance with Yle's public service broadcasting mandate and in accordance with the Amsterdam Protocol. Also for that reason, any potential impact of Yle Areena on competition is limited since its offering and related consumption differs essentially from that of the commercial operators.

25. **Chart 2:** Comparison of BVOD¹⁶ services' consumption by content type
[redacted from the public version]

26. In relation to all types of content available on Yle Areena (excluding only clips and live-streams), most of the content is available for 30 days or more, while some content is available for shorter periods.

3.4 Yle's online learning services

27. Further to Section 7(3) of the Yle Act¹⁷, Yle provides certain limited online learning services within its general public broadcasting remit and on the basis of other Yle content and materials. Yle has been developing and offering educational content since 1926. Similarly to VOD, online educational services aim at addressing changes in consumer needs driven by the continuous digitalization of the Finnish society and increasing reliance on the Internet and the use of on-demand material at any time. Yle's public mandate requires Yle to support education and learning and ensure that all Finns have equal access to societal issues and shared experience. The offering of educational content focuses on life-long learning, media literacy and civics of the digital age of all Finnish citizens. Yle has been developing and offering educational content for many decades and online learning services just make use of modern means of making Yle's content available to its audience.

28. Currently Yle's online learning services include:

- a) Yle Oppiminen (yle.fi/oppiminen). This service aggregates all Yle's educational content. It curates also content from Yle's school-tv (Koulu TV, Opettaja TV) archives and other formerly published educational content (such as language courses from previous decades). Current and new content consists of media literacy, digital skills, learning skills and citizen skills and provides themed content packages. This service includes learning programs for schoolchildren initially based on Koulu TV (established in 1962) and Opettaja TV content that was transferred to Yle Oppiminen in 2011, while the TV offer was discontinued. Yle Oppiminen content is exclusively produced by Yle, available for free and it does not relate to schools' curriculum, which is covered by commercial companies;
- b) Yle Abitreenit. This service (which was established in 2000) includes currently old matriculation and exams that can be used by students. Yle cooperates with Matriculation Examination Board and this service includes live matriculation exam

¹⁶ BVOD means Broadcaster Video-On-Demand and includes content made available on-line and on-demand from the traditional TV broadcast stations; compilation by categories and service providers may vary.

¹⁷ Section 7(3) of Yle Act requires that public service programming shall: *"take educational and equality aspects into consideration in the programmes, provide an opportunity to learn and self-development, give focus on programming for children and young people, and offer devotional programs"*.

broadcast, during which teachers and experts from Matriculation Examination Board answer questions raised by students. Those discussion were also previously broadcasted on Yle Teema, but when they no longer found audiences in broadcast television, they were continued as Areena only livestreams from 2011 onwards. The experts from the Examination Board describe in the program what is expected of a good answer to the exam questions. These criteria of good answers are also published in Abitreenit for future students and make the core of the service. Similar service (Yle Abimix) is provided also in Swedish;

- c) Yle Uutisluokka. This service is a media education project by Yle's news and current affair activities, in which young people become journalists with Yle's journalists helping as mentors. It is aimed at school classes and it includes media education content for teachers and schoolchildren, which is based on Yle's news and current affair content. As part of the service, Yle Triplet is used, which utilizes Yle's news videos with additional tasks and answers that teachers can use for the educational purposes. Yle Triplet publishes three Yle's news videos every weekday and the service focuses on media education and teaching schoolchildren the difference between true and fake news. The aim of the application is to teach students media literacy and to create a link between the content taught at school and the news. The Yle Triplet is provided as a service commissioned by Yle from the independent production company HundrED. Similar service to Yle Uutisluokka (but not Yle Triplet) is provided also in Swedish (Yle Nyhetsskolan). At the centre of the service is schoolchildren's own content, as well as other content related to media education. Yle Nyhetsskolan constantly visits schools, which can "order" a reporter to discuss different topics, such as fake news;
- d) Yle Kielikoulu / Yle Språksskolan. This service uses Yle's broadcasted programs and related subtitles as materials for learning Finnish and Swedish. This service is developed according to accessibility standards and especially aimed at integration of immigrants, and subtitles and related translations can be provided in the language of customer's choice. Yle Kielikoulu is an application created by Swedish non-profit organization Språkkraft and Yle is licensing the application on yearly basis. Also Swedish public service companies SVT and UR are using the same application. The other current online language course contents on yle.fi/oppiminen have been produced before 2010 and they are regularly updated. Yle has broadcasted language courses since 1926, when English language course for adults was broadcasted in the radio.
- e) Yle Vetamix. Vetamix is a web service with audiovisual and text-based material in Swedish intended for all Finns and available to everyone even if part of the material is produced with schoolchildren in mind. This service is a result of cooperation with Finnish National Agency for Education. The cooperation has continued for several years and the current contract covers 2021-2022. It includes mainly previously developed Yle's content (such as science and nature content) that can be used for learning purposes. This service does not include material related to schools

curriculum. The content of Svenska Yle Vetamix gives schools the opportunity to choose Finnish-Swedish content (Swedish in Finland is partly different from Swedish in Sweden). Both parties participate in the project organization and financing of this service.¹⁸

29. Yle online learning services are very limited and the content is produced internally by Yle with no third parties involved (except for the Triplet entity). Yle does not develop any learning platforms and the content is developed on the same publishing system and platform as the other online content. Triplet platform and Yle Kielikoulu application are developed by third parties and licensed on yearly basis. In 2021 Yle Oppiminen editorial team consists of [REDACTED].
[REDACTED] Yle Abitreenit editorial team in 2021 consists of [REDACTED].
[REDACTED]. The relevant teams include only journalists and not teachers, or experts preparing learning materials.

4. Compatibility of YLE's VOD and online learning services with the internal market

4.1 Yle's public remit is consistent with the State aid rules applicable to broadcasting

30. The compatibility of Yle's activities as a public broadcaster, in particular its VOD and online learning services must be assessed under Article 106(2) TFEU interpreted jointly with the Provisions of the Amsterdam Protocol¹⁹ and the Broadcasting Communication, which require the following conditions to be fulfilled:
- (i) the service in question must be a service of general economic interest and clearly defined as such by the Member State (**definition**);
 - (ii) the undertaking in question must be explicitly entrusted by the Member State with the provision of that service (**entrustment**);
 - (iii) the application of the ban on State aid must obstruct the performance of the particular tasks assigned to the undertaking and the exemption must not affect the development of trade to an extent that would be contrary to the interests of the Union (**proportionality**).²⁰
31. The Amsterdam Protocol reflects the particularities of the media sector and the Commission acknowledges that: "*public service broadcasting, although having a clear*

¹⁸ Finnish National Agency for Education provides EUR [REDACTED] per year and Yle provides EUR [REDACTED] per year.

¹⁹ The Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts was signed in Amsterdam on 2 October 1997. Annexed to the Treaty is the Protocol on the System of Public Broadcasting in the Member States (*Amsterdam Protocol*).

²⁰ Broadcasting Communication, paragraph 37-38.

economic relevance, is not comparable to a public service in any other economic sector".²¹

32. Amsterdam Protocol, which is an integral part of the TFEU, recognizes that Member States have broad discretion in defining the public remit.²² That wide discretion has been also acknowledged by the Council in its resolution concerning public broadcasting.²³ The EU State aid rules applicable to public service broadcasting therefore acknowledge that the definition and organization of public service broadcasting lies within the competence of the Member States, in accordance with their national legal order. This is in line with the competence of the EU in the field of media as Article 167(5) TFEU explicitly does not allow the EU to adopt any measures that would harmonize media laws and regulations of Member States.
33. 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.²⁴
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:

"though TV2's broadcasting obligation is of a qualitative nature and rather widely defined, ...this wide definition of the operator's task [is] in line with the Broadcasting Communication'

"Admittedly, the definition chosen by the Danish authorities is broad since, being essentially qualitative, it leaves the broadcaster free to establish its own range of programmes. None the less, it cannot be called imprecise, as alleged by the applicants.

²¹ Broadcasting Communication, paragraph 9.

²² Amsterdam Protocol (Protocol No 29 to the TFEU): *"The provisions of the Treaties shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting 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."* See also: F.J. Säcker, F. Montag (ed.) *European State Aid Law, A Commentary*, Beck 2016, page 1219.

²³ Council Resolution of 1999 concerning public service broadcasting (1999/C 30/01): *"The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading, conditions and competition (...)"*

²⁴ Joined cases T-309/04, T-317/04, T-329/04 and T-336/04 *TV2/Danmark A/A v Commission*, paragraphs 117-118.

On the contrary, TV2's mandate is perfectly clear and precise: to offer the entire Danish population varied television programming which aims to provide quality, versatility and diversity."²⁵

35. The Amsterdam Protocol is also technologically neutral and does not contain any restrictions as to the acceptable publishing platforms or formats that can be used for public broadcasting, as public broadcasters need to make use of all opportunities provided by new technologies to reach citizens as widely as possible and, thus, to better meet "the democratic, social and cultural needs of each society and the need to preserve media pluralism". Similarly, the Broadcasting Communications recognized the need of public broadcasting to adapt to the rapidly changing new media environment and allows public broadcasters to respond "fully and effectively" to the challenges of the information society.²⁶
36. In the context of Member States' wide discretion in defining public remit, the Council resolution interpreting the Amsterdam Protocol expressly recognizes the need to use new technologies by public broadcasting organizations since: "the fulfillment of the public service broadcasting's mission **must continue to benefit from technological progress**" and "according to the definition of the public service remit by Member States, public service broadcasting has an important role in bringing to the public the benefits of the new audiovisual and information services and **new technologies**".²⁷
37. The Complaint's objections to the definition of Yle public remit that meets the above broad and qualitative criteria and covers VOD and online learning services are unfounded. The Member States have discretion in defining public remit, which cannot depend on whether the service uses new or old technologies or on the market situation of commercial providers.²⁸
38. The above principles have to be taken into account in the current situation where television and radio no longer reach the entire audience. Consequently, these publishing platforms alone are no longer sufficient to achieve the objectives laid down in the Amsterdam Protocol, as the use of the media has changed. If Yle does not utilise all the available publishing platforms and publishing formats and makes programming

²⁵ 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, paragraphs 113 and 116-118. See also Commission Decision of 15 October 2003 on *ad hoc* measures implemented by Portugal for RTP (2005/406/EC), paragraph 162.

²⁶ Broadcasting Communication, paragraphs 14 and 81. The 25 January 1999 Council Resolution, to which the Broadcasting Communication refers, also recognises that public service broadcasting need to "utilise technological progress, bring the public the benefits of the new audiovisual and information services and the new technologies and to undertake the development and diversification of activities in the digital age." (Resolution of the Council and of the Representatives of the Governments of the Member States, Meeting within the Council of 25 January 1999 concerning public service broadcasting (1999/C 30/01), paragraphs 3-6.

²⁷ Council Resolution of 1999 concerning public service broadcasting (1999/C 30/01), Recital 3 and 5.

²⁸ P. Werner & V. Verouden (ed.) *EU State Aid Control, Law and Economics*, Wolters Kluwer 2017, page 731.

available at the time preferred by the viewers, such as VOD and online learning services, it cannot fulfil the special role provided to it by Finnish society and the Yle Act. As explained below, this is of a paramount importance as traditional media (TV channels) no longer reaches significant parts of the society, which are increasingly shifting towards “on-demand” services.

4.2 There is no manifest error in the definition of Yle’s public remit and VOD and online learning services fall within its scope

39. While the public service mandate has to be sufficiently precise, it can be widely defined and rest upon the qualitative requirements. The role of the Commission in relation to the definition of the public service remit is limited to checking for manifest errors.²⁹
40. A manifest error in the definition of public service remit, which the Commission would be allowed to question, may refer to a situation where the public service includes 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.³⁰
41. There is no manifest error in the definition of Yle’s public service remit, which is sufficiently precisely defined and it is not vague, imprecise or unusual, which is the legal threshold required from an incompatible aid.³¹
42. The Complaint is not based on the application of the above State aid principles applicable to public broadcasting, but rather, on arguments commonly used by commercial operators that public service media should be active only in the fields where commercial operators do not provide competing services.
43. Section 7 of the Yle Act has been formulated further to the Amsterdam Protocol and Broadcasting Communication and includes broad definition based on qualitative criteria, so it makes possible for the public service broadcaster to take technological developments into account in fulfilling its public service mandate.
44. In relation to VOD and online learning services it is exactly a question on providing a broad public access, without discrimination and on the basis of equal opportunities, to various channels and services. Yle Areena is part of Finns daily media use and limiting

²⁹ Broadcasting Communication, paragraph 39, 44, 45. See, e.g., judgment of the General Court of 15 June 2005, *Fred Olsen SA v Commission*, T-17/02, ECLI:EU:T:2005:218, paragraph 216. See also Commission Decision of 15 October 2003 in Case *RTP (2005/406/EC)*, paragraph 161; Commission Decision of 23.03.2011 *Danish radio channel FM4*, paragraph 73; F.J. Säcker, F. Montag (ed.) *European State Aid Law, A Commentary*, Beck 2016, page 1228.

³⁰ Broadcasting Communication, paragraph 48.

³¹ Joined cases T-309/04, T-317/04, T-329/04 and T-336/04 *TV2/Danmark A/A v Commission* (2008), paragraphs 95-96.

Yle's VOD activities would reduce significantly Yle's ability to fulfil its public service mandate, especially among children and young people, that requires providing programmes and related additional and extra services to all citizens under equal conditions.

45. This is further supported by the strategy of Yle, which
 - a) aims to strengthen its relationship with audiences and to increase its presence among people, create new kinds of partnerships, invest in personal user experience and move on in a controlled way towards digital publishing at the pace of changing media use;
 - b) is present in the whole of Finland, and Yle's activities are available to everyone without extra charge;
 - c) archives are the memory of the nation and help build Finland of the future;
 - d) invests in both the high-quality streaming service Yle Areena and assesses the quantity and scope of its TV and radio channels as the use of the media and the operating environment change. 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.³²
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.
47. Yle's VOD and online learning services clearly fall within the scope of Yle's public service remit and are merely applications of the principle of technological neutrality, as Yle is using new technologies and new distribution platforms in order to allow all Finns access to Yle's services to address the democratic, social and cultural needs of the Finnish society, consistently with the Amsterdam Protocol.
48. As explained above, Yle's VOD and online learning services are closely related and build on its other broadcasting activities and content that has been part of Yle's public service remit. The history of those services shows that Yle has not developed new services that may be considered as outside of the public service remit and Yle is adapting to the changing media landscape and proactively fulfilling its mission to address current and future needs of the Finnish society. In order to remain relevant and meet its public obligations, Yle needs to recognize the digital development of the Finnish society and

³² Yle Strategy available at: <https://yle.fi/aihe/strategy>.

provide viewers with experience and services they expect, including through the use of new distribution methods and platforms. Contrary to the Complaint, these services are a continuation of Yle's traditional broadcasting activities.

49. There is no manifest error in the definition of Yle public service remit and Finland has exercised its discretion, according to the EU State aid rules, by allowing for the necessary flexibility and used wide definition with qualitative criteria in order to allow the public broadcaster to use new technologies to fulfil its public service mandate.

4.3 There is an effective supervision over Yle's public broadcasting services and there is no overcompensation for its public services

50. Further to the Broadcasting Communication, the choice of the mechanism that ensures effective supervision over public service broadcasting is within the competence of the Member State.
51. The responsibility for the supervision of Yle lies with bodies which are effectively independent of the management of public service broadcaster and which have adequate capacity and resources to regular supervision and imposition of appropriate remedies³³: the Administrative Council and the Finnish Transport and Communications Regulatory Authority (which uses the name of Traficom, until 1 January 2019 the Finnish Communications Agency, FICORA)³⁴, the supervisory tasks and roles of which complement each other.
52. The Administrative Council oversees and supervises Yle's public service programme activities and how they are carried out. According to the Yle Act, the members of the Administrative Council are elected by the Finnish Parliament for an election period of the Parliament (the operative management of Yle does not have the power to appoint or dismiss members of the Administrative Council and members of Yle's Board of Directors may not be members of the Administrative Council). Contrary to the Complaint, it is not an issue that members of Administrative Council are members of the Parliament. Neither operative management nor the Yle's Board may give any instructions or guidance to the Administrative Council.
53. The Administrative Council may impose appropriate remedies based on its supervision insofar it is necessary to ensure respect of the public service obligations. It may

³³ Broadcasting Communication, paragraph 54.

³⁴ The Finnish Transport and Communications Regulatory Authority Traficom started its operations on 1 January 2019. The Finnish Transport Safety Agency (Trafi), the Finnish Communications Regulatory Authority (FICORA) and certain functions of the Finnish Transport Agency merged to form the Finnish Transport and Communications Agency Traficom.

intervene if Yle is not fulfilling its public service remit properly, through the following actions:

- a) reporting to the Parliament - by the end of April every year the Administrative Council shall also submit to Parliament a report on the implementation of public service referred to in section 7 of the Yle Act and on the guidance and supervision activities conducted by the Administrative Council during the previous calendar year;
- b) clarifying the strategy of Yle;
- c) setting restrictions or expansions to Yle's activity; and
- d) ultimately by changing the Board which is the most heavy and effective mean to affect the activities of Yle.

54. According to Parliament's Rules of Procedure the reports, such as the Administrative Council's report submitted to the Parliament are preliminarily handled by a committee that conventionally hears experts, representatives of commercial media and also the CEO of Yle and the chair of the Administrative Council. A committee report is submitted to the Parliament and discussed in the plenary session. In relation to Yle's Administrative Council's reports the Traffic and Communications Committee has usually made a statement proposal in which it proposes to the Parliament whether any remarks should be made. The committee 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.

55. The Administrative Council has provided the Parliament with its statutory report on the implementation of Yle's public service for 2019 in October 2020. The Administrative Council consulted an independent expert, who concluded that Yle has fulfilled its tasks in a commendable manner in 2019.³⁵ The Parliament considered the report as described above and the Committee on Transport and Communications:

- a) welcomed the high-level reach of Yle, and emphasized that Yle should be present on all platforms available in the media field; and
- b) emphasized the importance of co-operation with domestic production companies in Yle's operations and welcomed the fact that Yle has increased its purchases from domestic operators.

The Parliament made a decision that it has no comments on the report by the Administrative Council.³⁶

³⁵ https://www.eduskunta.fi/FI/vaski/KasittelytiedotValtiopaivaasia/Sivut/K_6+2020.aspx

³⁶ https://www.eduskunta.fi/FI/vaski/KasittelytiedotValtiopaivaasia/Sivut/K_6+2020.aspx.

56. Further, in 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).³⁷
57. Under Section 12 of the Yle Act, Traficom supervises that there is no price undercutting and no cross-subsidization. The costs related to the service in question are recorded in the financial statements of Yle, which shall differentiate between public and commercial services, in accordance with Section 8 in the Yle Act.
58. As it can be seen from Traficom's statements, Traficom assesses whether the remuneration Yle receives from the state television and radio fund is correctly proportionate to the net cost incurred in the provision of the public service. Traficom supervision ensures that the financing originating from the Yle fund is only used for implementing the public service tasks and not for commercial, market distorting purposes.
59. Yle is financed through the State Television and Radio Fund (an off-budget fund of the state of Finland) managed by the Finnish Traffic and Communications Regulatory Authority. The Council of State, on the basis of the Finnish Traffic and Communications Regulatory Authority proposal, decides annually on division of funds for different purposes in the allocation scheme of the Fund, which decision is publicly available.
60. Each and all the above shows that there are effective means which ensure the fulfillment of Yle's public service obligations. The supervision of Yle by the Administrative Council and Finnish Transport and Communications Agency is effective, independent and ensures that no over-compensation takes place. The marginal commercial activities of Yle are separated from public service and as said, effective supervision preventing cross-subsidization and overcompensation is already in place. Taking into account that Yle's commercial activities are extremely marginal (they considered 0,8% of Yle's total revenue in 2019 and 0,6% of Yle's total revenue in 2020), any risk of over-compensation appears to be completely remote.
61. Further, the Commission did not have any remarks regarding the supervision of Yle when the Ministry of Transport and Communication gave a presentation to the Commission in 2012 on the amendments made to the Yle Act. Yle Act has been further

³⁷ The report of the Administrative Council of Yle on the activities of the company for 2016, p. 13. (<http://view.24mags.com/mobilev/be42de831e8c7724dda2830729050cfe%20-%20/page=4>).

amended by including the Administrative Council's right to decide on strategy of Yle and to ask opinions from experts, which strengthen the role of the Administrative Council. The Administrative Council organised a consultation before its first decision on Yle's strategy and it called for opinions from industry operators and different organisations. This was the procedure also applied in relation to the current strategy decided on 19 May 2020.³⁸

4.4 Provision of VOD or online learning services does not significantly affect competition and is not manifestly disproportionate to the objectives pursued by Finland

4.4.1 The correct legal standard for assessing public service broadcasting impact on competition

62. The Amsterdam Protocol limits the competence of Member States to provide public service broadcasting funding only to the extent to which such funding does not affect trading conditions and competition in the Union contrary to the common interest. The Broadcasting Communication further specifies this requirement by stating that public broadcasters shall not engage in activities which would result in disproportionate distortions of competition that are not necessary for fulfilling the public service mission.³⁹

63. The EU Courts case law further specifies the requirement that public service broadcasting does not have disproportionate effects on competition:

"It follows that, in order for an aid scheme for the benefit of an operator entrusted with a public service broadcasting mandate to be regarded as not fulfilling the condition laid down in Article 106(2) TFEU, it must affect trade and competition significantly and to an extent which is manifestly disproportionate to the objectives pursued by the Member States."

*"Indeed, in order to support a finding of such an effect, it would be necessary to establish that RTVE's funding scheme, as altered by Law No 8/2009, renders it impossible or excessively difficult for a private operator to conduct business in the Spanish broadcasting market."*⁴⁰

64. Therefore, Yle's public broadcasting remit may be questioned under EU State aid rules only if it leads to manifestly disproportionate effects on competition and renders it impossible or excessively difficult for private operators to conduct their business.

³⁸ Press release of Yle dated 19 May 2020 is available in Finnish on: <https://yle.fi/aihe/artikkeli/2020/05/19/ylle-uusi-strategia-yle-on-kaikille-yhteinen-jokaiselle-oma>.

³⁹ Broadcasting Communication, paragraph 92.

⁴⁰ 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, paragraphs 155 and 159–160, and judgment of the Court of Justice of 10 November 2016, *DTS Distribuidora de Televisión Digital, SA v European Commission*, C-449/14 P, ECLI:EU:C:2016:848

65. The Complaint does not meet the above high threshold for showing that the proportionality criterion would have been violated by the wide definition of public service remit. The Complaint's own estimates of the likely impact of Yle's public services on competition are based on a number of assumptions and incorrect conclusions and ignore the crucial factors and characteristics of the market. Yle's public service activities do not lead to any manifestly disproportionate effects and Yle is far from being an important or main source of competitive pressure exercised on the Complainant as described in section 4.3.3 below. Further, as explained below, Yle's VOD and online learning services are only an adaptation of Yle traditional broadcasting activities to the news media environment through the use of new distribution channels and new technologies.
66. The Complainant also seems to apply the incorrect legal standard and questions Yle's activities in relation to VOD and online learning services as there are private companies, including the Complainant, offering already similar services on the market and "*there is no real public service need for a state-financed actor, as user demand is already met by existing private operators*"⁴¹.
67. The EU State aid rules, including the Amsterdam Protocol and Broadcasting Communication, recognize the need for public service broadcasting, which as a sector cannot be compared to other sectors, and it is within Member States' discretion to define the scope of the public service remit in order to address the democratic, social and cultural need of the society. Therefore, the market failure standard does not apply to public broadcasting services.
68. The market failure approach ignores the fact that the Amsterdam Protocol provides Member States with a wide discretion to define the public remit in order to meet "*democratic, social and cultural needs of the society*" and in its extreme version would exclude public broadcasting operators from covering new media, sport, fiction, entertainment and even news coverage. Such market failure rationale has been "*vigorously rejected*" by the European Courts.⁴² In relation to public broadcasting the EU courts expressly held that it is wrong to claim that public service broadcaster should be limited to the broadcasting of non-profitable programming.⁴³

⁴¹ Complaint, paragraph 202. See also paragraphs: 5; 55; 138.

⁴² Judgments of the General Court of 9 June 2016, *Magic Mountain Kletterhallen and others v Commission*, T-162/13, ECLI:EU:T:2016:341, paragraphs 78-79, and of 18 January 2017, *Jorgen Andersen v Commission*, T-92/1, ECLI:EU:T:2017:14, paragraph 69; P. Werner & V. Verouden (ed.) *EU State Aid Control, Law and Economics*, Wolters Kluwer 2017, page 721; See also: Judgment of 30 April 1974, *Sacchi*, paragraph 14: "*Nothing in the Treaty prevents Member States, for considerations of public interest of a non-economic nature, from removing radio and television transmissions, including cable transmissions, from the field of competition by conferring on one or more establishments and exclusive right to make them*".

⁴³ Judgement of the General Court of 22 October 2008, *TV 2/Danmark v Commission*, joined cases T-309/04, T-317/04, T-329/04 and T-336/04, ECLI:EU:T:2008:457, paragraphs 107-109.

69. The Complaint seems to question Yle's activities in relation to certain content, such as entertainment VOD content. As the Complainant argues that VOD segment should be considered part of a wider market together with traditional linear services, consequently, the faulty market failure approach would lead to the conclusions that e.g. entertainment services cannot be part of public remit also in relation to traditional Yle's services.

4.4.2 VOD online services are part of the relevant market that includes all audiovisual services

70. Potential effects of Yle's public broadcasting service remit on competition and whether they can be considered as manifestly disproportionate in relation to VOD services should be assessed in relation to the correct relevant market definition.
71. Traditionally, the Commission made a distinction between linear TV content broadcasted to end users on free-to-air TV (*FTA TV*) and pay-TV basis on the ground that in case of FTA TV viewers do not pay for the content broadcast.⁴⁴ Recently, the Commission has not made a strong distinction between linear and non-linear content as viewers increasingly replace linear content with non-linear content because access to the latter is possible either for free or by paying a low subscription fee. The precise market definition was therefore left open.⁴⁵
72. The Commission also noted in recent years that TV broadcasters are increasingly complementing their traditional linear TV channel offering with non-linear services, such as VOD.⁴⁶ In the 2019 merger case concerning Finland the Commission explained that most respondents in the market investigation indicated that the market for retail supply of TV services in Finland should not be segmented into linear and non-linear services, or divided by distribution technologies. The Commission left the precise product market definition open.⁴⁷
73. In addition, the conclusion that linear and non-linear content belong to the same market is also supported by technological developments. The switching costs viewers would incur by switching from one technology to another are very low as in recent years the investment costs associated with the choice of a distribution platform have decreased. For example: satellite dishes have become an inexpensive tool for receiving television broadcasts; cable providers offer decoders on a rental basis and channels broadcast on digital terrestrial television are free-to air. Popular media service offered directly via Internet, such as Netflix, are already available on a wide range of devices, including smart TVs, laptops, smartphones, and game consoles. Subscribers only need an Internet

⁴⁴ Case M.5932 – News Corp/ BskyB, paragraph 97-99.

⁴⁵ Case M.7000 - Liberty Global / Ziggo, paragraph 72; Case M. 8354 *Fox / Sky*, paragraph 101.

⁴⁶ Case M.8665 - Discovery / Scripps, paragraph 28; Case M.9370 - Telenor / DNA, paragraphs 47 and 51.

⁴⁷ Case M.9370 - Telenor / DNA, paragraphs 18 and 22.

connection to access the desired content. The Commission has *not* distinguished between terrestrial, satellite, cable, and other distribution modes⁴⁸ and e.g. the market investigation conducted for the purposes of *Newscorp/BSkyB* led to the conclusion that content distributors consider the various means of delivery as substitutable from the viewers' point of view.⁴⁹

74. The above illustrates that due to the market and technological developments, the boundaries between previously distinct markets have blurred. Therefore, distinguishing between linear and non-linear content would not reflect the parameters that determine demand-side substitutability in the consumption of audiovisual media services.
75. The Complainant contradicts itself with respect to the above issue. On the one hand, in order to include Yle's free services in the market, it argues that FTA TV and pay-TV should be considered as one market and "*the Commission should move away from such segmentation of the audiovisual services market and define a single market comprising all audiovisual services, including both linear and non-linear services*".⁵⁰ On the other hand, the Complaint exclusively focuses on how Yle's VOD allegedly distorts competition in the on-demand segment.
76. The Finnish competent authorities recognize the recent developments in the Commission's approach to the changing audiovisual markets and linear and non-linear audiovisual services should be considered as part of the same market, which includes all audiovisual services. The Complainant also argues that the relevant market should not be limited only to non-linear services, such as VOD, but also include linear offering. However, the Complainant focuses exclusively on the VOD segment and ignores the wide market definition which includes all audiovisual services, making allegations about Yle causing disproportionate effects on the market.

4.4.3 Changes in the audiovisual services market are driven by SVOD providers and Yle's FVOD offer has no manifestly disproportionate effect on competition

77. The Internet blurs the boundaries between different media and publishing formats and has changed, and will continue to change the media landscape. For example, while linear TV viewing has decreased considerably over the past years, the consumption of VOD services has increased exponentially.

⁴⁸ See Commission Decision of 27 May 1998 (Case IV/M.993 Bertelsmann/Kirch/Premiere), 1999 O.J. (L 53) 1, paragraph 21; Commission Decision of 2 April 2003 (Case COMP/M.2876 NewsCorp/Telepiù), 2004 O.J. (L 110) 73, paragraphs 40 and 47; Commission Decision of 18 July 2007 (Case No COMPM.4504 SFR/Télé 2 France), 2007 O.J. (L 316) 57, paragraph 40.

⁴⁹ Commission Decision of 21 December 2010 (Case No COMP/M.5932 News Corp/BSkyB), 2011 O.J. (C 37) 2, paragraphs 103 *et seq.*; Commission Decision of 2 June 2008 (Case COMP/M.5121 Newscorp/Premiere), 2008 O.J. (C 219) 4, paragraph 20.

⁵⁰ Complaint, Annex 5, paragraph 82.

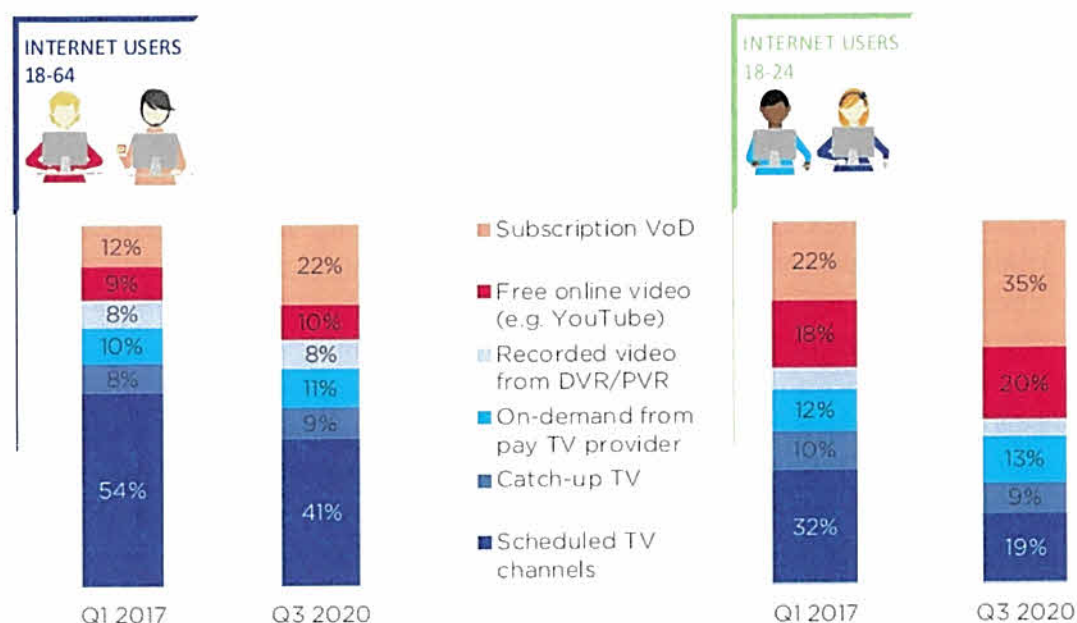
78. While almost all Finns use the Internet⁵¹, traditional television and radio no longer reach the wide audiences as they used to. As a result, traditional publishing formats are no longer sufficient to achieve the objectives recognized by the Amsterdam Protocol and entrusted by the Yle Act. It can be expected that as consumers increasingly switch to the “on-demand” content, the consumption of linear services will further decline (see Chart 4 below).
79. Therefore, it is of paramount importance for Yle to continue to effectively provide value to the whole Finnish society and face challenges to Yle’s public mission created by the converging and globalizing media landscape and digitalization and personalization of user experience. As the media landscape is going through dramatic changes, the Finnish society’s needs for democratic, social and cultural content can no longer be met by traditional broadcast channels, which no longer address needs of significant groups of the Finnish society. The traditional TV channels do not allow for personalized and interactive content consumption and free choice of content at any time and through any device, which factors are becoming crucial for many viewers not only in Finland, but throughout the world. Accordingly, Yle needs to adjust its services, utilize available platforms and publishing formats in order to achieve the public broadcasting objectives.
80. The 2016 Public Service News And Digital Media report states that *“the media environment public service media organisations operate in will go on changing as digital technologies continue to evolve rapidly, often faster than even the most innovative legacy media organisations (whether private or public) can follow”* and *“unless public service media organisations develop organisational forms, platforms, and distribution strategies tailored to this changing environment, they will lose touch with their audience – the public they exist to serve”*.⁵²
81. Changes in the consumption of media audiovisual content and shift towards non-linear media are driven by the SVOD segment of the market and SVOD as a proportion of daily viewing time has almost doubled between 2017 and 2020 as shown in the chart below.
82. **Chart 3:** Distribution of daily viewing time per media type.

⁵¹ Finland has one of the highest rates of Internet penetration in the EU. According to the Eurostat 2020 data: 97% of Finns used Internet and 96% of households in Finland had Internet access. Already in 2018, 78% of Finns used Internet on portable computer or handheld device away from home and work (<https://ec.europa.eu/eurostat/web/digital-economy-and-society/data/database>).

⁵² <https://reutersinstitute.politics.ox.ac.uk/our-research/public-service-news-and-digital-media>, p. 40.

Distribution of Daily Viewing Time Spent per Media (in %)

Detail per age group



Source: EBU data concerning 10 European countries – EBU SVOD Market Trends, November 2020 report, page 8.

83. Those changes in viewers' consumption patterns are very visible in Finland. Young people (under 30) no longer can be effectively reached by linear TV channels as especially within that group linear media consumption is random. In order to meet its public service obligations and provide services to all viewers, Yle cannot exclude young people and therefore must adapt to the changing market, also through the use of Yle Areena, which continuously tries to reach that demanding audience.

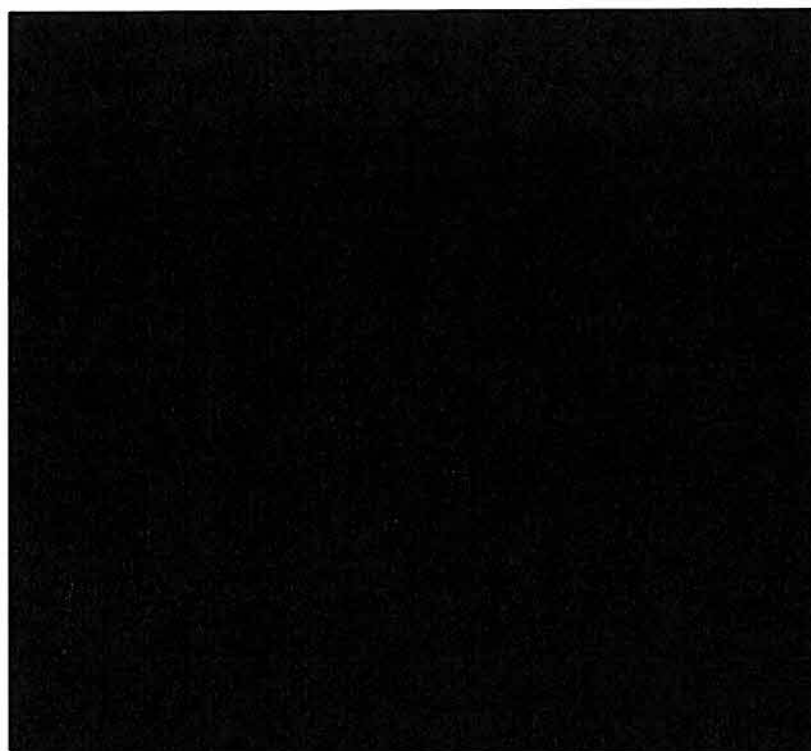
84. **Chart 4: Linear TV consumption 2000-2021**

[redacted from the public version]

85. While Yle has operated in the Finnish market for several decades and is adapting to the changing media landscape, commercial media companies face strong competition, mainly from global international companies, including global social media that have impact on commercial media add revenues. Yle's activities in comparison to commercial media companies have not significantly changed over time and contrary to Complaint, Yle's activities have not contributed to the increasing competitive pressure that the Complainant is facing due to the growing role of other SVOD operators. The role of public media is already diminishing as the total audiovisual market is growing rapidly, especially due to the expansion of global international companies. Any further limitations on Yle would not be justified by the market situation and will have negative impact on Yle's public mission to ensure democracy and diversity for all Finns and prevent further spread of misinformation through the digital channels.
86. The SVOD segment, which is only part of overall audiovisual market encompassing both linear and non-linear content, has shown an enormous growth in the EU from EUR 12.1 million in 2010 to EUR 9.7 billion in 2020. Especially in the Nordic countries, the SVOD market is developing very rapidly. On the demand side there is an enormous shift in the content consumption (change toward access to content anytime, on any device and anywhere), while on the supply side there are numerous international and national SVOD service providers.⁵³ While such international SVOD service providers are increasingly investing in the original content, they still rely heavily on the acquired, third-party content. Public service broadcasters, on the other hand, invest predominantly in the original content and acquired third content generally concerns only part of their offering.

[REDACTED]

⁵³ European Audiovisual Observatory, *Trends in the VOD market in EU28*, January 2021, page 6.



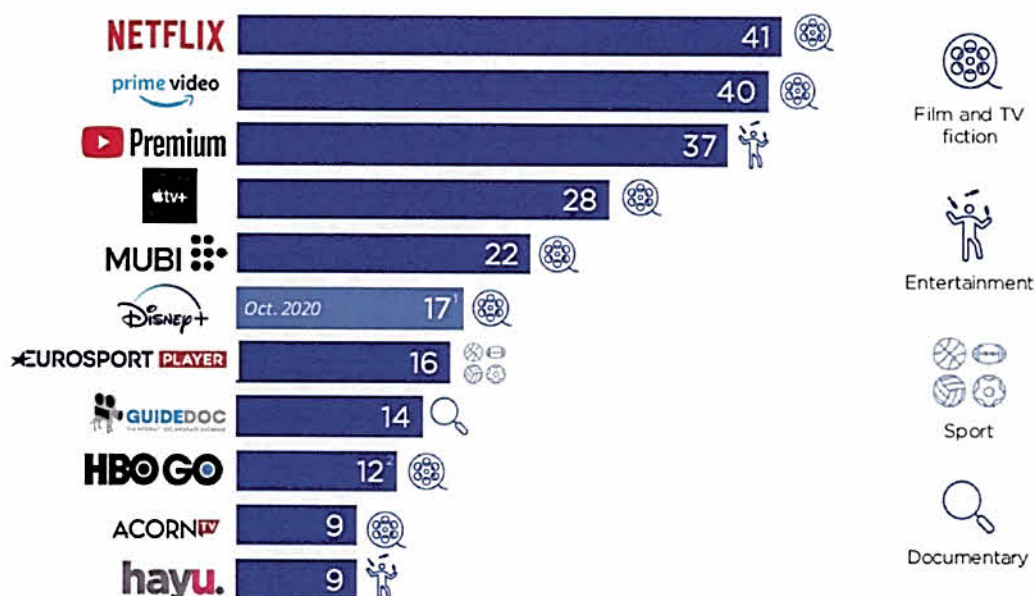
88. In every EU Member State there are many SVOD services (22 in Finland) offered mainly by global technology and entertainment players, such as: Amazon, Apple, Discovery, Google, Netflix, Walt Disney Company. It is expected that several players will coexist and compete in the SVOD segment but only few will dominate the market.⁵⁴
89. The most spread SVOD market players in Europe are global international players, which capitalize on their popular brands, content that attracts mass audience, and vast amounts of viewer data. Netflix and Amazon already dominate the EU markets in relation to both subscribers and revenues, while other global service providers are successfully increasing their market share (Apple, Disney).⁵⁵
90. **Chart 6:** Most spread SVOD offer in Europe

⁵⁴ European Audiovisual Observatory, *Trends in the VOD market in EU28*, January 2021, page 27.

⁵⁵ European Audiovisual Observatory, *Trends in the VOD market in EU28*, January 2021, pages 15 and 18.

Most Spread SVOD Offers in Europe in 2019

In number of countries with a specific offer

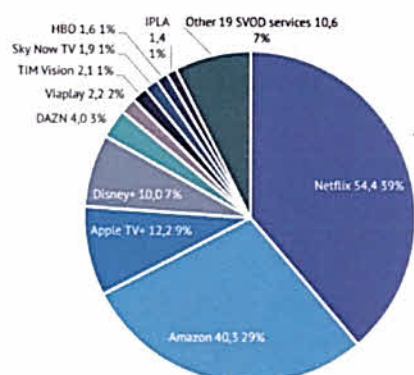


Source: EBU data concerning 41 European countries – EBU SVOD Market Trends, November 2020 report, page 12.

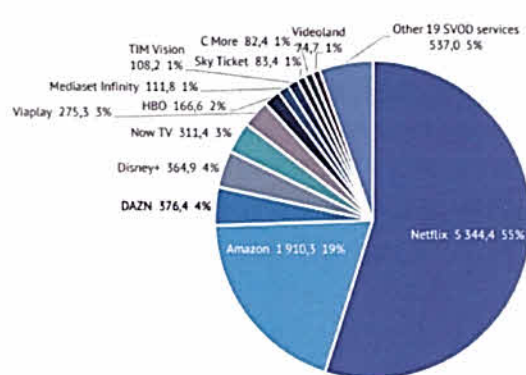
91. As the main competitive force, the SVOD segment exercises pressure on traditional media broadcasting formats and the subscriber base and revenues of those global international market players has been growing rapidly and is expected to grow further.

92. Chart 7: EU28 subscriber and revenue by company

EU28 - SVOD subscribers by company
In million of subscribers, 2020



EU28 - SVOD revenues by company
In EUR million, 2020



Others: Mediaset Infinity, Joyn Plus, TV Now, Videoland, Dplay, TV2 Play, Voyo, C More, Sky Ticket, ITV Hub+, Streamz, Player.pl, Atresplayer Premium, cda.pl, Ruutur+, Mitel Plus, Rakuten TV, Go3, Eleven Sport

Source: Ampere Analysis



Source: European Audiovisual Observatory.

93. In Finland, taking into account the number of total SVOD subscribers, the Complainant held in 2020 third position behind the market leader Netflix and Viaplay – SVOD offered by Nordic Entertainment Group (NENT).⁵⁶
94. The rapid growth of well-funded on-demand broadcasters with global reach, such as Netflix and Amazon is accompanied by the rapid increase of broadband connected devices (TV sets, smartphones and tablets) and development of high-speed fixed and mobile connection. Therefore, audiences are moving away from watching scheduled linear content broadcasted on traditional channels. Public service broadcasters in the EU need to develop their services to meet the demand for online and on-demand viewing.⁵⁷ Yle Areena meets those consumer demands and makes media content available on different devices, ensuring that the whole society can benefit from publicly funded Yle's broadcasting activities.
95. The audiovisual market can be characterized by rapid changes in market conditions, including consumer behavior. Due to the structural shift towards direct-to-consumer subscription services, SVOD services are evolving and growing, while services offered through traditional distribution means are stagnant or declining. It cannot be doubted that the audiovisual market is changing dramatically.⁵⁸
96. The Complainant correctly describes that VOD segment in Finland is highly competitive with global, international and domestic players being active on that segment.⁵⁹ While the Complainant questions Yle's VOD activities, it makes numerous references to the global international players identifying them correctly as an important competitive force.⁶⁰
97. The Complainant emphasizes that Yle Areena's domestic content allegedly strongly competes with that of the commercial operators, while it also acknowledges that global market players, such as Netflix, are expected to increasingly offer domestic content (produced or acquired) in the foreseeable future (as it has been already the case in the Swedish market). It further explains that some international market players, such as NENT (Elisa Viihde Viaplay service) already offer domestic content in addition to their other Nordic offering. The Complaint acknowledges that international VOD providers, such as NENT and C More offer content in the Swedish language that addresses Swedish-speaking viewers in Finland.
98. Taking the above characteristics of the changing audiovisual media services landscape, competition from domestic and international service providers, and the wide market

⁵⁶ European Audiovisual Observatory, *Trends in the VOD market in EU28*, January 2021, page 19.

⁵⁷ Ofcom, *The Future of Public Service Media*, 4 July 2019, page 2.

⁵⁸ European Audiovisual Observatory, *Trends in the VOD market in EU28*, January 2021, page 28.

⁵⁹ Complaint, Annex 5b, paragraphs 88-89.

⁶⁰ Complaint, Annex 5b, paragraphs 5, 43.

definition argued by the Complainant, the Complainant concludes without a sufficient justification that it faces difficulties to operate on that “highly competitive” market due to the Yle’s FVOD offer.

99. Furthermore, while acknowledging the impact of SVOD service providers on the market, the Complainant claims that Yle’s FVOD offer has a negative impact on its revenues.⁶¹ The Complainant’s analysis is unfounded as it appears to show a general impact of the SVOD segment on the traditional FTA TV and pay-TV segment, which is common for all market participants active in those sectors, including Yle. In addition, while the Complaint seems to question only part of Yle’s FVOD offer (with focus on certain titles available in Yle’s catalogue offer) it cannot reasonably predict that even if Yle’s FVOD offer would be limited, the demand will shift to the Complainant and not to other competitors, such as other SVOD service providers.
100. The Complainant argues that Yle’s users would otherwise have been served by commercial operators, therefore Yle Areena has negative impact on the market and on all commercial operators subscription and advertising revenues.⁶² Those claims are based on various unverified assumptions, such as that by its very presence on the market Yle is “stealing” customers from the market.
101. The common “crowding out” argument often raised by commercial broadcasters assumes that public service broadcasters are reducing demand for services provided by the private sector. However, research conducted in the EU shows that such arguments generally do not find support in the data and properly conducted analysis. Recent empirical research conducted by experts in the field has shown no significant correlation between public service broadcasters funding and revenues of commercial operators. On the contrary, there is evidence that commercial players can benefit from inhabiting a market with well-funded public service broadcasters and both can grow together, with commercial media possibly benefiting from the services, content and audiences public funding has developed.⁶³ Yle Areena contributed to the development of domestic Finnish SVOD segment on which the Complainant is active and which is under a competitive pressure from global international operators.
102. The Complaint uses an unfounded assumption that in the absence of Yle Areena the Complainant would capture Yle’s current viewers and monetize additional viewing time through advertising.⁶⁴ Based on the publicly available 2020 research data 62% of Finns

⁶¹ Complaint, Annex 5, paragraphs 165-172.

⁶² Complaint, Annex 5, paragraphs 151-164.

⁶³ A. Sehl, R.Fletcher, R.G.Picard, *Crowding out: Is there evidence that public service media harms markets? A cross-national comparative analysis of commercial television and online news providers*, European Journal of Communication, Volume 35, Issue 4, August 2020.

⁶⁴ Complaint, Annex 5, paragraph 164.

use four or more TV and video services and that trend is increasing.⁶⁵ There is therefore no basis for the assumption that Yle Areena prevents viewers from using Complainant's services or that viewers will shift even partially to the Complainant's services if Yle Areena would not exist. As presented on Chart 2, Yle Areena's content and reflected consumption is significantly different from content and reflected consumption offered by commercial operators and Yle addresses wide needs of the Finnish society and does not focus on mere entertainment.

103. Therefore, due to the characteristics of the changing audiovisual services market and growing role of SVOD providers it cannot be concluded that Yle's VOD offer has manifestly disproportionate effects on competition. Yle Areena does not make it impossible or excessively difficult for commercial operators to conduct their business, on the contrary, commercial operators and the SVOD market will likely further grow. The EU case law sets a very high threshold on the Commission, which requires public funding to create manifestly disproportionate effects on competition, which is different from the Complainant's incorrect market failure approach that would require Yle not to provide services, if there is any competing commercial offering.

4.4.4 There is no legal basis or justification for any *a priori* time limitations on the Yle's VOD services

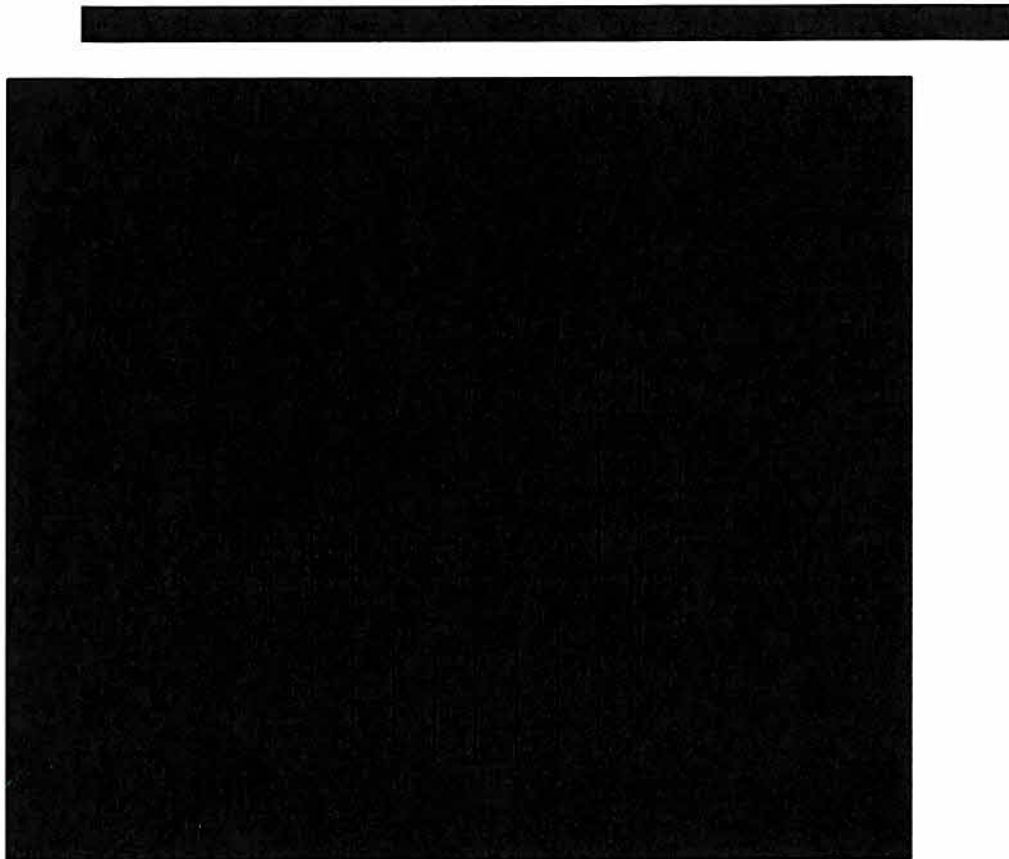
104. Contrary to the what the Complaint suggests, there is no legal or economic justification for excluding *a priori* VOD-content from the public broadcasting service remit or imposing strict time limitations on that catch-up or VOD-only content offered by public broadcasters.
105. Both catch-up (regardless of the time for which it is available) and VOD-only content constitute broadcasting in the meaning of Amsterdam Protocol and Broadcasting Communication and are just examples of distributing the same content that is or would be distributed through standard TV channels, but is also distributed through the use of new technologies and new distribution platforms in order to address the needs of the audience.
106. As explained, the vast majority of Yle's VOD content constitutes catch-up content broadcasted in the TV channels and only a minor part of such service concerns VOD-only catalogue (i.e. not broadcasted on TV channels). Catch-up services (with availability which the public service broadcasters see appropriate in each case) and VOD-only service ensure that all viewers have access to the content offered and that the public funding is effectively used for the benefit of the whole society. As the "market failure" rationale does not apply to public broadcasting services, there is also no

⁶⁵ Sanoma: TV - Nyt ja tulevaisuudessa 2021 / Kantar TNS Oy <https://media.sanoma.fi/kirjoituksia-markkinoinnista/2021-03-30-miten-suomalaisten-tv-katselu-tulee-muuttumaan>.

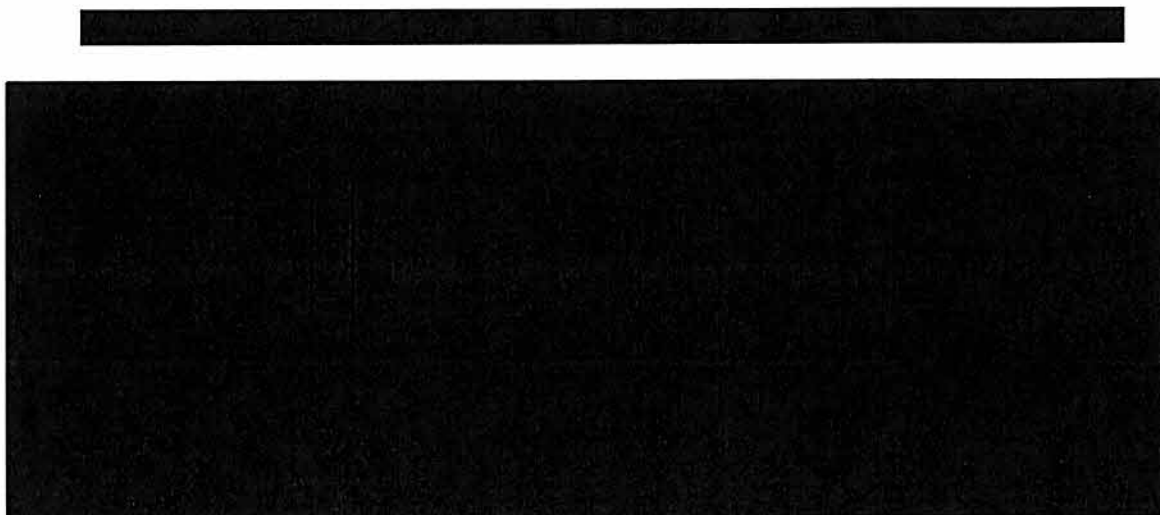
justifications for excluding certain content or genres from the Yle's VOD offer only because these can also be offered by commercial operators.

107. The Complaint further fails to establish why time limitations on the provision of catch-up content are necessary. The Complaint does not include a market analysis that would support its argument that: (i) Yle's offer of catch-up content disproportionately distorts competition, and (ii) as a result, the time limitations are necessary. The Complaint arbitrarily mentions that a 7-day window would address competition concerns without an adequate consideration of the market dynamics that were described above.
108. An arbitrary 7-days limitation imposed on the catch-up content would have significant adverse effects on the audience, Yle's mission and effective use of public funds. Taking into account viewers' behavior patterns and their increasing need to watch content of their choice at any time and on any device, it cannot be reasonably expected that e.g. viewers would watch all episodes of the whole series within 7-days (this would also incorrectly assume that all viewers know and follow TV broadcasting schedule, and in reality information about the available content spreads slowly, so it can take months or a year rather than weeks before information about the new content reaches audience and they are able to watch the content). Imposing any arbitrary short-term limitations on the VOD content availability would create a situation in which wide groups of the Finnish society will not be able to access content that meets their needs and Yle's public mission. As a result, public funding used for original productions and acquired content would be inefficiently spend as viewers would not be able to effectively access such content.
109. According to the 2020 data gathered by the European Broadcasting Union (**EBU**) catch-up remains the main source of VOD content made available by public broadcasters, while a quarter of the surveyed EBU TV Members⁶⁶ rely equally on the catch-up and online-only content on their platforms.

⁶⁶ <https://www.ebu.ch/about/members>.



111. According to the data below, public broadcasters made their original content available for the public for different periods of time in order to meet expectations of the audience and fulfill their public service broadcasting mandate. While some content is available online for a very short period of time (below 7 days) a majority of content is available for a longer time or even for an unlimited time. Similar approach is followed by Yle, which makes content available for different periods of time.



113. It must be noted that in relation to BBC VOD service, the UK regulatory authority has accepted a general change in relation to catch-up programs available previously for 30 days after broadcast to programmes being available for 12 months as a standard, with some content being available for 5 years.⁶⁷ The changes in the general catch-up content availability are a result of the market assessment, which shows that viewers' expectations are changing and SVOD global providers, such as Netflix and Amazon are rapidly growing and increasing their market share.⁶⁸ This further indicates that current market conditions and growing role of SVOD providers do not justify at all any short-term limitations on the public broadcasters' content made available online.
114. Therefore, there is no justification for putting strict *a priori* limitations on the type of VOD content made available on Yle Areena or strictly limiting catch-up content to only e.g. 7 days. Any theoretical restrictions would have to be a consequence of detailed market analysis and strong evidence that public service broadcasting manifestly disproportionately affects competition and makes it impossible or excessively difficult for commercial operators to compete. As explained above, Yle's VOD offer does not have manifestly disproportionate effects on competition that would justify any such restrictions under the EU State aid rules.
- 4.4.5 Provision of online learning services does not significantly affect competition and is not manifestly disproportionate to the objectives pursued by Finland
115. The Complainant alleges that Yle partially diminishes the added value of the publishers' learning material for media literacy with the provision of Yle Uutisluokka. The provision of Yle service is not related to school curriculum. Further, there are multiple providers of media literacy learning material for free, such as the Finnish Society on Media Education (a non-governmental organisation promoting media literacy and media education in Finland) and National Audiovisual Institute (state agency under the Ministry of Education and Culture), whose statutory tasks include the promotion of audiovisual culture and media education. The National Audiovisual Institute support media education and educators, e.g. through the online Media Literacy School.
116. Yle does not produce its online learning material in cooperation with any authority such as Finnish National Agency for Education, which has a role in drafting curriculum of schools. In Finland, the curricula for basic education are based on curriculum determined by the National Board of Education. The Government decides on the division of hours, i.e. how many hours per week are taught per subject and curriculum must be approved by the education provider, for example municipalities, which take into account each school designs and school-specific plans. Commercial service

⁶⁷ Ofcom, *BBC iPlayer Competition Assessment. Final determination*, 1 August 2019.

⁶⁸ Ofcom, *BBC iPlayer Competition Assessment. Final determination*, 1 August 2019, page 2, 3, 9.

providers cooperate in the preparation of curriculum determined by the National Board of Education, which is updated regularly.

117. The main focus of Yle's online learning is on media education, media literacy and digital skills. Yle's role provides general offering together for free as other third parties, such as Red Cross. Yle does not address directly the needs of the schools which are obligated to follow the basics of curricula.
118. In Finland online learning materials are available for free through several different sources, such as the Library of Open Educational Resources⁶⁹, which shares open educational resources from all levels of education. This service is made available for teachers, learners and all Finns. Open educational resources can also be found in Finna.fi, which gathers materials from museums, libraries and archives, and which content resembles Yle Oppiminen⁷⁰. The Library of Open Educational Resources is developed by the Ministry of Education and Culture and the Finnish National Agency for Education.
119. Yle Abitreenit, which includes old matriculation exams that can be used by students for free. It ensures equal access to education materials. There are several service providers, such as universities and commercial operators that provide learning courses against a service fee as part of the Matriculation Exam training. Old matriculation exams are available to teachers in the Matriculation Examination Board's own Examina-service, which includes subject-specific digital exams.
120. Yle Vetamix is a web service with audiovisual and text-based materials in Swedish and is based on co-operation with Finnish National Agency for Education is required in order to support schools in relation to current topics and world-explanatory content in Swedish as the market for Swedish-language digital learning materials is extremely small.
121. As explained, Yle's online learning service activities are marginal, do not relate directly to schools' curricula and do not compete with a wide variety of commercial services available. The Complainant has not shown that the limited Yle's online learning services offer could have any disproportionate effects on competition. Online learning services are part of Yle's public remit and they play an important role for the society by supporting learning and self-development.
122. Given the focus on strengthening skills such as digital literacy, which will enable young audiences to use the Internet responsibly and address major societal issues, such as the spread of disinformation, the public value of Yle's online learning services far outweigh

⁶⁹ <https://aoe.fi/#/etusivu>

⁷⁰ https://www.finna.fi/Content/about_finnafi

the theoretical impact on competition, which has not been substantiated by the Complainant.

5. Additional questions asked by the Commission

5.1 Could the financing of the VOD and online learning services be considered existing aid?

123. Contrary to the Complaint, Yle's VOD and online learning services should be considered as existing aid as VOD constitutes broadcasting within the meaning of Amsterdam Protocol, and online learning is a direct continuation of the Yle's broadcasted learning services. Those services constitute means of using new technologies and distribution platforms, so Yle can reach the whole Finnish society and fulfil the public service mandate that has been entrusted with Yle before Finland joined the EU. Therefore, any aid granted for the fulfilment of those services should be considered as existing aid.
124. According to Article 1(b)(i) of the Procedural Regulation, "*existing aid*" means aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the TFEU in the respective Member States.⁷¹ In the case of Finland, this means aid measures introduced before the entry into force of the EEA Agreement on 1 January 1994 are regarded as existing aid.
125. Since the accession of Finland to the European Union in 1995, Yle has not implemented any changes relevant for the assessment of the nature of State aid and there have been no significant changes in the financing of Yle or in the definition of Yle's public service remit that would justify considering VOD and online learning services as new aid.
126. VOD and online learning services does not constitute "significant new audiovisual services", but just use of new technologies and new distribution platforms as allowed by the wide, qualitative definition of public service remit and consistently with Amsterdam Protocol and Broadcasting Communication that allow for the use of new technologies and distribution platforms. VOD and online learning services are related and based on other Yle's broadcasting services and a type of content that Yle has been developing for many decades.
127. The importance of meeting the objectives laid down in the Yle's public service remit and in the Amsterdam Protocol continue to grow as the consumers are increasingly shifting towards online media use. It is therefore natural that Yle reacts to such developments and adjusts its broadcasting activities and ensures that all Finns have access to services that address their democratic, social and cultural needs. For many Finns, the Internet has become the most important, if not the only, source of information,

⁷¹ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (*Procedural Regulation*).

so in order to continue to achieve the key objectives of public broadcasting, Yle must utilise the platforms and publishing formats also used by the public.

128. The Commission correctly considered previously Yle financing scheme as an existing aid, since it has not been significantly changed since Finland joined the European Union. This also applies to the definition of the public remit, which covers provision of VOD and online learning services. Yle financial scheme is an existing scheme since and no alterations that affect the actual substance of the original scheme has been made. Therefore, it has not been transformed into a new aid scheme, especially by introduction of any significant new services.⁷² Provision of VOD or online learning services does not constitute any new financing scheme for new services.⁷³

5.2 Please explain whether the VOD and online learning services are included in Yle's public service remit? Please explain whether the new wording of Section 7 sufficiently clarifies Yle's public remit for those services.

129. As explained above in section 3.2, Yle's VOD and online services are included in Yle's public service remit.
130. The Finnish Government Proposal from 2020 to amend the Yle Act⁷⁴ focuses on text-based content that belongs to Yle's public service remit, but the provision of which would be generally restricted to the published contents containing moving images or sound, i.e. audiovisual content and radio programmes. However, the new suggested wording of Section 7 clarifies that the Yle's online learning services are indeed included in the Yle's public service remit.
131. According to the Government Proposal text-based content relating to learning would not be required to have a connection to Yle's published content containing moving images or sound (the sixth indent). According to current Subsection 2 (3) of the Yle Act, Yle's duty is to provide an opportunity for self-development.⁷⁵ Therefore, it is important that Yle can further offer text-based content relating to learning and education without a connection to the company's broadcasting containing moving images or sound. Thus, under the Government Proposal, Yle could continue for example the publication of Yle's Abitreenit, Svenska Yle's and corresponding Vetamix & Abimix in cooperation with the educational authorities.

⁷² Joined Cases T-195/01 and T-207/01 *Government of Gibraltar v Commission* ECR II-2309; P. Werner & V. Verouden (ed.) *EU State Aid Control, Law and Economics*, Wolters Kluwer 2017, page 728.

⁷³ As new services Commission considered e.g. provision of online learning material or services funded by new, ad hoc payments subject to prior authorisation - Decision 37/2003 of 01.10.2003 - *BBC digital curriculum*; Joined Cases T-231/06 and T-237/06 - *Netherlands and NOS v Commission*, paragraph 183.

⁷⁴ The Government Proposal 250/2020

⁷⁵ The translation provided by the Complainant is incomplete in relation to this subsection as "self-development" wording has been omitted – see footnote 6.

132. The Section 7 proposed amended wording is as follows:

“The company shall be responsible for the provision of versatile and comprehensive television and radio programming with the related additional and extra services for all citizens under equal conditions. The above-mentioned and other content services related to public service may be provided in public communications networks nationally and regionally. The main focus of content services shall be in published content containing moving images or sound. Apart from the exceptions laid down in subsection 3, text-based content shall be related to the company’s published content containing moving images or sound.

The company may, by way of derogation from subsection 1, provide the following text-based content in public communications networks even if they are not related to the company’s published content containing moving images or sound:

6) text-based contents relating to learning.”

133. Therefore, the amended Yle Act will keep a sufficiently precise Yle’s public service mandate, which includes online learning services.
134. The Government Proposal does not concern VOD services other than it states that the main focus of content services shall be in published content containing moving images or sound, which may be provided in public communications networks nationally and regionally.
- 5.3 Please clarify whether VOD service offered by Yle amount to a self-standing commercial offer, different from the classical catch-up services.
135. Yle Areena is not a commercial offer, but a free VOD offer addressed to all Finns, especially those who increasingly switch from linear to non-linear content. Yle Areena ensures the fulfilment of objectives entrusted with Yle in accordance with the Yle Act and the Amsterdam Protocol. Yle Areena is the most trusted and most respected online brand.⁷⁶ It allows all Finns to have access to the past and present content, history of Finnish television, culture and journalism.
136. Yle Areena also does not constitute a commercial offer different from classical catch-up services that made broadcasted programming available online on-demand for any period of time.
137. As explained, Yle Areena (excluding live-streams) predominantly consists of catch-up content, broadcasted on Yle TV channels. There is not a complete overlap between

⁷⁶ <https://yle.fi/aihe/artikkeli/2020/09/21/yle-areena-jatkaa-suomen-arvostetuimpana-verkkobrandina>.

linear and non-linear content as there is certain content live-streamed as explained in Section 3.3 above, and there is some very limited content available only on Yle Areena. That fact does not change the fact that Yle Areena is not a self-standing commercial service and as explained above generally for all catch-up services offered by public broadcasters there is no (and probably could not be) complete overlap between linear and non-linear services.

138. The Complainant also recognizes that Yle offers free of charge VOD and is not offering a commercially funded VOD services (such as ad-funded AVOD, subscription SVOD, or transaction, pay-per-view TVOD).⁷⁷

139. There are no plans to turn Yle Areena into a subscription-based service.

6. Conclusion

140. For the above reasons, in the Finnish competent authorities' view the Complaint is unfounded and incorrect in relation to both its factual and legal assessment. Contrary to the view of the Complainant, VOD and online learning services are within the scope of Yle's public service remit and do not constitute an unlawful State aid under Article 107(1) TFEU.

⁷⁷ Complaint, Annex 5, paragraph 87.

