

A legal assessment of State aid incompatible with the internal market

Funding for text-based journalistic online content to
the Finnish public service broadcaster Yleisradio Oy

AVANCE

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1. BACKGROUND AND FOCUS OF THE COMPLAINT

This memorandum has been prepared on behalf of the Finnish Media Federation (the **Complainant**) in relation to a state aid complaint to the European Commission concerning public funding for text-based journalistic online content to the Finnish public service broadcaster Yleisradio Oy (**YLE**). The memorandum has been prepared by Avance Attorneys Ltd in collaboration with Bech-Bruun law firm and Copenhagen Economics.

The Complainant is a trade association representing the Finnish media industry and printing companies. The Complainant and its member associations include a total of nearly 700 member companies. The Complainant represents among others Finnish newspaper publishers, which are directly affected by the public funding for YLE's text-based journalistic online content.

As a consequence of the public funding for YLE's text-based journalistic online content, Finnish newspapers' ability to attract paying subscribers for their online services as well as to generate advertising revenue from their online services is significantly hampered. Therefore, the Complainant should be regarded as an interested party within the meaning of Article 1(h) of the Council Regulation 2015/1589 (the **Procedural Regulation**).

The scope of this complaint does not cover YLE's vast variety of broadcasting activities across TV, radio and different online platforms. The Complainant acknowledges YLE's right to use the opportunities offered by digitisation and the diversification of distribution platforms and to provide audiovisual services over new distribution platforms in order to address the democratic, social and cultural needs of the Finnish society in accordance with the Amsterdam Protocol.

* * *

The complaint relates to the public funding for YLE's online provision of text-based journalistic content. In 2016, based on the information provided by YLE itself, YLE published online a total of 117,483 text-based journalistic articles. Based on the Complainant's conservative estimate (calculated on the basis of the cost structure of its member organizations), YLE's costs for the provision of such content in 2016 amounted in minimum to MEUR 35. The provision of such content by YLE is funded entirely with funds originating from the Finnish State budget. The public funding for YLE's provision of such content constitutes a new state aid that has not been notified to the Commission.

YLE's online provision of such a vast amount of text-based journalistic does not constitute a "broadcasting activity" within the meaning of the Communication from the Commission on the application of State aid rules to public service broadcasting (the **Broadcasting Communication**). It is submitted that the provision of such content by YLE constitutes an independent service that is not necessary for or intrinsically linked ("ancillary") to YLE's broadcasting activities.

The public funding for YLE's online provision of text-based journalistic content should therefore be assessed in accordance with the general EU legal framework for assessing services of general economic interest under Article 106(2) TFEU, i.e. the Commission's 2012 SGEI Communication.

There exists a substantial private supply of text-based journalistic online content on the Finnish market. Finnish newspapers' text-based journalistic content reaches weekly the highest share of the entire adult population in any EU Member State. In practice the entire Finnish population, regardless of age, social class or place of residence already has access to such content provided by commercial operators, both for free and at a very low subscription fee which is affordable to all Finnish households. As there is no market failure, the provision of text-based journalistic online content by

YLE cannot be defined as an SGEI. It is recalled that outside the area of public broadcasting (covered by the Amsterdam Protocol), it is the Member State in question which must prove to the Commission that there is a market failure justifying that a service be qualified as an SGEI.

Moreover, the provision of extensive newspaper-like journalistic content by YLE has disproportionately distortive effects on competition on the Finnish media market, which go beyond what can reasonably be tolerated under Article 106(2) TFEU. Due to rapid technological development, online platforms will in the future become the predominant distribution form for journalistic content. However, there are no grounds to distort, in Finland or elsewhere in the European Union, the long-standing balance between (printed or online) newspapers (or other media) and the public broadcasting activities. On the contrary, the supervision of the said balance is even more crucial, as without a clear framework for assessing such balance, media pluralism is at great risk.

* * *

This memorandum includes a detailed description of YLE and its activities especially on the market for online text-based journalistic content (Section 3) as well as the Complainant's legal assessment of these activities in the light of Articles 107(1) and 106(2) of the Treaty on the Functioning of the European Union (**TFEU**) (Section 4).

2. EXECUTIVE SUMMARY

Description of YLE and its broadcasting activities

1. YLE is a state-owned Finnish limited liability company responsible for acting as the sole public service broadcaster in Finland. YLE's activities are governed by the Act on Yleisradio Oy (fi. *Laki Yleisradio Oy:stä*, 1380/1993, as amended; the **Act**).
2. Pursuant to the Act, YLE 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. Such and other content services related to public service may be provided in public communications networks nationally and regionally.
3. YLE's broadcasting activities are composed of the offering of audio and audiovisual content on TV, radio and different online services. To this purpose, YLE operates three national TV channels as well as six FM radio channels and three digital radio services. YLE also makes its TV and radio broadcasts available through various online services.
4. YLE's Administrative Council is responsible for supervising YLE's compliance with its public service remit. From a legal perspective, YLE's Administrative Council constitutes an organ of YLE and it is also entrusted with tasks typically belonging to a company's managing body, such as deciding on YLE's economical and operational guidelines. After the most recent amendments to the Act, the same Administrative Council will also be responsible for deciding on YLE's strategy.
5. The Act provides for an *ex ante* test, whereby a prior evaluation shall be carried out of such YLE's new services and functions that have more than insignificant influence on the available content services as a whole and that are considerable in terms of significance, duration and cost. A prior evaluation shall be conducted at the justified request of YLE or another legal or natural person or on the initiative of YLE's Administrative Council.

6. Since 2013, YLE's operations have been financed by a separate YLE tax. Before the introduction of the YLE tax, YLE's activities were financed with license fees. All Finns aged 18 or more as well as organizations engaged in business operations, vocational practice or agriculture in Finland are in principle subject to the YLE tax. In 2016, the net proceeds to YLE from the YLE tax amounted to MEUR 461.8.

Description of YLE's offering of text-based journalistic online content

7. In 2016, YLE published online a total of 117,483 text-based journalistic articles. YLE's text-based journalistic content is made available primarily through YLE's websites (yle.fi/uutiset and svenska.yle.fi) as well as through the YLE NewsWatch mobile application, which offers the mobile user a customized access to YLE's online text-based journalistic content. To illustrate the text-based journalistic online content provided by YLE, the Complainant has provided the Commission with an electronic copy of all the text-based journalistic content available on YLE's websites on a randomly chosen date (i.e. 16 June 2017).
8. YLE has significantly increased its investments in the online provision of text-based journalistic content especially after the implementation of the YLE tax in 2013. Assessed on the basis of the cost structure of YLE's private competitors, it is the Complainant's conservative estimate that in 2016 YLE's direct (incremental) costs for producing such content amounted to at least MEUR 35. This estimate is highly conservative as it does not include any of the (indirect) common fixed costs relating also to YLE's broadcasting activities.
9. The majority of YLE's text-based journalistic online content is entirely unrelated to YLE's broadcasting activities. YLE's text-based journalistic online content includes traditional newspaper-like reporting, lengthy analyses, opinions, columns by YLE's journalists or external persons and even magazine-type lengthy reports and analysis. Topics vary from politics, economy, culture, human interest issues (e.g. health and well-being), international affairs, local and regional issues etc. The provision of such content forms a significant service effectively independent from YLE's broadcasting activities.
10. When analysed quantitatively, more than half of the text-based journalistic articles published online by YLE do not have any link whatsoever to the content broadcast by YLE on TV, i.e. the topic mentioned in the online text was never mentioned in any of YLE's TV broadcasts. Furthermore, of the articles having some kind of link to YLE's broadcasts less than 20% of the actual content of the text-based articles made available by YLE online overlap with the text (spoken words) used by YLE in its TV broadcasting. Thus, only a small fraction of the content of YLE's online text-based articles reflects YLE's broadcasts.
11. Furthermore, the mere handling of a specific theme on a TV or radio program does not mean that the public service broadcaster would be entitled to provide online press- or magazine-like content relating to the same theme.
12. The text-based journalistic online content is further distributed through social media platforms (e.g. Facebook and Twitter) where YLE is also highly active. The social media distribution of publicly funded text-based journalistic online content further distorts the intense competition between the private Finnish media companies and the global social media giants.

The funding for YLE's text-based journalistic online content constitutes state aid pursuant to Article 107(1) TFEU

13. The funding for YLE's online provision of text-based journalistic content constitutes state aid within the meaning of Article 107(1) TFEU.
14. YLE's funding originates from the Finnish State budget, from which funds are transferred to a special State Television and Radio Fund (*fi. valtion televisio- ja radorahasto*). The funds are collected through a special YLE tax. Therefore, the funding should be considered as being attributable to the state as well as being granted through state resources within the meaning of Article 107(1) TFEU.
15. The funding provides YLE with a selective economic advantage as it has been granted in violation of the test laid down in the *Altmark*-judgment (both the second and the fourth *Altmark* criteria).
16. The aid distorts competition on the market for text-based journalistic online content. The funding for the production and publishing of text-based journalistic online content affects trade between Member States given e.g. the cross-border effects of advertisement.

The funding for YLE's text-based online content is not compatible with Article 106(2) TFEU

17. In order to benefit from the exemption set out in Article 106(2) TFEU, the public funding for YLE's online provision of text-based journalistic content would have to meet the following criteria:
 - a. The services in question have to constitute services of general economic interest and be clearly defined as such by the relevant Finnish legislation (*definition*).
 - b. YLE has to be explicitly entrusted by the relevant Finnish legislation with the provision of said services (*entrustment*).
 - c. Application of Article 107(1) TFEU must obstruct the performance of the particular tasks assigned to YLE and the exemption from said provision must not affect the development of trade to an extent that would be contrary to the interests of the Community (*proportionality*).
18. It is contended that YLE's online offering of text-based journalistic content cannot be considered a broadcasting activity, as it is no way necessary for or intrinsically linked (ancillary) to YLE's broadcasting activities.
19. Member States have a very wide margin of discretion in defining a given service as an SGEI when the service is provided within the field of broadcasting.
20. Outside the area of broadcasting (where the Amsterdam Protocol does not apply), the Member States must prove to the Commission that there is a need to supply the service in question as a public service. Such need shall be shown by a lack of private supply of such service on market conditions.¹ Thus, it is not acceptable to designate a service as an SGEI if it is already provided under conditions, such as price, objective quality characteristics, continuity and access to the service, by undertakings operating under normal market conditions.²

¹ Judgment in the Case T-454/13, *SNCM v Commission*, (2017), para 133.

² SGEI Communication, para 48.

21. Hence, YLE's online offering of text-based journalistic content should not be assessed under the Broadcasting Communication but under the normal SGEI regime under Article 106(2) TFEU, cf. the Commission's SGEI Communication from 2012.
22. It is important to note that there is a significant amount of text-based journalistic content published online by commercial operators on the Finnish market either for free or against a reasonable fee. Almost the entire Finnish population, regardless of age, place of residence or social class, already has access and makes use of the content provided by the commercial operators in the market (i.e. Finnish newspaper and magazine publishers).
23. As an example, it should be noted that Finnish newspapers' text-based journalistic content reaches weekly the highest share of the entire adult population in any Member State reviewed in a 2016 study by the Reuters Institute – and is in fact only exceeded by one country in the world reviewed in the study.
24. Therefore, it will in our view be impossible for the State to prove that there exists a lack of private supply that could justify YLE providing text-based journalistic content being qualified as an SGEI (and hence entitled to public funding). Consequently, defining the provision of such content as an SGEI should be regarded as constituting a manifest error.
25. Furthermore, it should be noted that the unclear definition of YLE's public service remit (cf. point 35 below) fails to comply with the criteria for the application of Article 106(2) as regards the clear definition of the services provided by YLE as SGEIs and their explicit entrustment to YLE.
26. In this regard it is notable, that in many EU Member States the governments and the public service broadcasters enter into an agreement or other binding legal instrument in force for a limited time period, in which the public service obligations of the broadcasting company are clearly defined and explicitly entrusted to the broadcasting company. However, this is not the case in Finland, where the (unclear) definition of YLE's public service remit is in force for an indefinite period without review.
27. Moreover, and in any event, the aid entails an excessive and disproportionate distortion of competition which fails to satisfy the proportionality test enshrined in Article 106(2).
28. Reference is made to point 56 of the 2012 SGEI Communication, which states that

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

- b. The text-based journalistic content published online by YLE competes directly with similar content made available by commercial operators, namely Finnish newspaper publishers.
 - c. YLE offers its online text-based journalistic content for free, which is – needless to say – much below the costs of its competitors, which depend on either advertising revenue and/or subscription fees to stay in the market.
 - d. It is clear that there is no need in the market for granting aid to YLE related to its online provision of text-based journalistic content, for which reason there is an obvious alternative to granting public service funding to YLE for such activity, i.e. granting no aid at all.
30. It is also useful to note that content available on YLE's websites is easily available on different social media platforms by links included in YLE's online articles. YLE is also itself actively producing and publishing content on different social media platforms. The publishing of YLE's content on various social media platforms has a negative impact on commercial operators' ability to compete with multinational operators of social media platforms on the market for advertising revenue.
31. As an overall consequence of YLE's online activities, the commercial operators' overall ability to profitably produce and publish text-based journalistic content online is reduced, which makes it harder for these operators to encounter the challenges posed by the general transition of the media market (i.e. declining subscription fees and advertising revenue from printed newspapers, as more and more readers access news and other journalistic content online).
32. Consequently, the funding for YLE's online provision of text-based journalistic content fails to meet the cumulative criteria for the application of Article 106(2) TFEU. Therefore, such funding cannot be considered compatible with the internal market.
33. Lastly, it is noteworthy that certain Member States have – in recognition of the problems depicted above – expressly forbidden their public service broadcasters to engage in the offering of newspaper-like online content if it is unrelated to the public service broadcasters' TV and radio programming. This is the case in e.g. Germany and Austria (cf. also Section 4.2.2.2 below).

YLE's regulation is in breach of the Broadcasting Communication

34. Should YLE's online provision of text-based journalistic content, however, be evaluated against the framework set out in the Broadcasting Communication, it would be noted that the current regulation of YLE's activities does not comply with the requirements set out in the Communication.
35. YLE's current public service remit as enshrined in the Act provides YLE with an unrestricted freedom to offer different new services online. The current remit is so unclear that YLE is in practice able to offer online services (such as text-based online journalistic content) whose value for satisfying the social, democratic and cultural needs of the Finnish society, as stipulated in the Amsterdam Protocol, is highly doubtful.
36. From the third parties' point of view, the unclear remit leads to significant uncertainty as regards the future behaviour of YLE on the markets for different online services, such as the online offering of text-based journalistic content. The uncertainty created by YLE's overly broad public service remit has a negative impact on the development of the Finnish media market as a whole.

37. The prior evaluation procedure included in the Act has been inconsistently applied by YLE's Administrative Council. Therefore, the prior evaluation procedure cannot be considered as a sufficient tool for specifying YLE's overly broad public service remit.
38. Finally, as regards the supervision of YLE's compliance with its public service remit, the body nominated as responsible for such monitoring (i.e. YLE's Administrative Council) cannot be regarded as being effectively independent from YLE's management. Instead, the Council itself forms a part of YLE's management. The supervision of YLE's activities does therefore not comply with the requirements set out in the Broadcasting Communication.

The funding for YLE's text-based journalistic online content constitutes new aid

39. YLE's overall public funding scheme was put in place before Finland's accession to the EU and can therefore be viewed as existing aid. The funding scheme has not been notified to the Commission by the Finnish State.
40. With respect to new online services, the Commission has in its decisional practice repeatedly stated that as long as new online services are closely linked to the broadcasting programme, the content is part of the public service remit and the budget is not increased substantially, their financing should be regarded as existing aid.
41. The text-based journalistic content made available by YLE online is, however, mostly unrelated to YLE's broadcasting programme. Consequently, the provision of such content constitutes a new service that should be considered distinct from YLE's broadcasting activities on TV and radio.
42. As such content was not being published at the time of Finland's accession to the EU in 1995, the public funding for the production and publishing of such content cannot be considered as forming part of the existing aid and therefore constitutes new aid.
43. Consequently, the Commission should order Finland to recover the incompatible and unlawful state aid granted to YLE for the production and publishing of online text-based journalistic content.
44. Should the Commission find, however, that the funding for YLE's online provision of text-based journalistic content constitutes existing aid, the Complainant urges the Commission to ensure that the aid is discontinued with immediate effect, cf. the procedure for appropriate measures laid down in Chapter VI (Articles 21 and 22) of the Procedural Regulation.

3. DESCRIPTION OF YLE AND ITS ACTIVITIES

3.1 YLE and its broadcasting activities³

YLE is a state-owned Finnish limited liability company responsible for acting as the public service broadcaster in Finland. YLE's activities are governed by the Act on Yleisradio Oy (fi. *Laki Yleisradio Oy:stä* 1380/1993, as amended). The Act has most recently been amended by a Government Bill approved by the Finnish Parliament on 14 June 2017.⁴ YLE falls within the administrative sector of the Finnish Ministry of Transport and Communications.

The State of Finland (the **State**) shall own and control the share capital of YLE to an extent which corresponds to at least 70 % of all the shares in YLE and of the votes generated by such shares.⁵ At the end of FY2016, the State owned 99 % of all the shares in YLE. YLE's administrative organs are composed of an Administrative Council, a Board of Directors and a Director General acting as YLE's Managing Director. The members of the Administrative Council are elected by the Finnish Parliament, in practice from among the members of the Parliament.⁶

YLE 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. Such and other content services related to public service may be provided in public communications networks nationally and regionally.⁷

YLE's public service programming shall in particular:

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

Currently YLE operates three national television channels: YLE TV1, YLE TV2 and YLE Teema & Fem. *YLE TV1* serves as the main news, current affairs and factual journalism channel of YLE. Documentaries, drama, entertainment, cinema, cultural and educational programs are also part of the broadcast. *YLE TV2* is the main channel for sports, children's and teenagers' programs as well as drama, entertainment and factual programs. *YLE Teema & Fem* is made up of two channels that were until April 2017 broadcast on separate channels: *YLE Teema*, a channel for culture, education and

³ For a more detailed description of YLE's administration, see [Appendix 1](#).

⁴ HE 13/2017 vp.

⁵ Section 2 of the Act.

⁶ Section 4 of the Act.

⁷ Section 7 of the Act.

science with a focus on theme broadcasts and *YLE Fem*, a Swedish-language full service channel broadcasting news, factual and children's programs as well as entertainment.

70 % of all Finnish television programs are produced by YLE. In 2015, YLE's programs and content reached 100 % of Finnish people yearly, with 72 % of them being reached daily and 91 % weekly.⁸ YLE's share of all daily television viewing was 43 % in 2015. YLE reached daily nearly three million Finns on television channels and YLE TV1 was the most popular television channel in Finland.⁹

YLE operates six FM radio channels and three digital radio services. YLE's radio channels include *YLE Radio 1*, *YLE Radio Suomi*, *YLEX*, *YLE Radio Vega*, *YLE X3M* and *Yle Puhe*. YLE produces 90 % of all Finnish radio programs. In 2015, YLE Radio Suomi achieved the highest daily reach of Finnish radio channels and YLE's share of overall daily radio listening was 50 %.¹⁰

YLE broadcasts TV and radio content online mainly through the YLE Areena on-demand media service, which was established in 2007. The service is accessible through the *areena.yle.fi* website as well as a mobile application. YLE Areena's content includes inter alia news broadcasts, sports broadcasts, culture programs, documentaries and series. All YLE's television channels can be streamed live and all YLE radio channels can be listened to live at YLE Areena. In 2016, YLE Areena had approximately one million video starts every day on average, mostly from mobile devices.¹¹

In recent years YLE has developed also its online radio services. Today each radio broadcast is available online through the YLE Areena service.¹² Every YLE radio channel is also featured by its own website, through which the broadcasts of each channel can be accessed and streamed. YLE's radio channels have also been brought to smartphones through mobile applications.

The scope of this complaint does not cover YLE's broadcasting activities described above, whether conducted on TV, radio or different online platforms. The Complainant acknowledges YLE's right to use the opportunities offered by digitisation and the diversification of distribution platforms and to provide audiovisual services over new distribution platforms in order to address the democratic, social and cultural needs of the Finnish society in accordance with the Amsterdam Protocol.

3.2 YLE's financing

Since 2013 YLE's operations have been financed by a separate YLE tax (*fi. YLE-vero*), which is governed by the Act on the YLE tax (*fi. Laki yleisradioverosta*, 484/2012). All Finns aged 18 or more as well as organizations engaged in business operations, vocational practice or agriculture in Finland are subject to the YLE tax. Before the implementation of the YLE tax, YLE's activities were financed with license fees.

The amount of the YLE tax paid by an individual citizen depends on his/her annual income. In 2017, the tax rate is 0.68 % of the individual's total earned income and capital income in a calendar year. The tax is not collected, if it would amount to less than EUR 70 for an individual citizen (i.e. with a yearly taxable income of less than EUR 10,294 (pensioners) or EUR 11,044 (employed persons)). The maximum amount of the tax in 2017 is EUR 143 (for persons earning yearly at least EUR 21,029).

⁸ YLE's customer relationships in 2015 (available at <https://drive.google.com/file/d/0B-v6fV6ewetZd0tOOVhQSW5xN1U/view>);

This is YLE 2016 (available at <https://drive.google.com/file/d/0B-v6fV6ewetZMF9LWFBVWldpWW8/view>).

⁹ This is YLE 2016 (available at <https://drive.google.com/file/d/0B-v6fV6ewetZMF9LWFBVWldpWW8/view>).

¹⁰ This is YLE 2016 (available at <https://drive.google.com/file/d/0B-v6fV6ewetZMF9LWFBVWldpWW8/view>).

¹¹ This is YLE 2016 (available at <https://drive.google.com/file/d/0B-v6fV6ewetZMF9LWFBVWldpWW8/view>).

¹² See article on YLE's website at http://yle.fi/uutiset/osasto/news/yle_radio_channels_now_available_on_smartphones/6586007.

For corporate entities, the tax rate depends on the taxable income of the entity in question. If the taxable income of the entity is less than EUR 50,000 per calendar year, no tax is collected. After this threshold, the tax rate is 0.35 % so that the maximum tax per year shall not exceed EUR 3,000 (i.e. after the entity's yearly taxable proceeds exceed EUR 867,143). The tax is deductible in the corporate taxation of limited liability companies. Public organizations (such as the Government and its institutions, communes, parishes and housing communities) are exempt from the tax.

The revenue produced by the YLE tax is transferred from the State budget to a separate Television and Radio Fund (*fi. valtion televisio- ja radorahasto*, the "**Fund**"), managed by the Finnish Communications Regulatory Authority. The Fund does not form part of the State budget.

According to the Act on the State Television and Radio Fund (*fi. Laki valtion televisio- ja radorahastosta*, 745/1998), the yearly appropriation from the budget to the Fund amounted to MEUR 500 in 2013, after which it would be subject to a yearly index increment. The appropriation is intended to cover YLE's costs for producing public service. YLE receives funding from the Fund based on an allocation scheme approved by the Finnish Government and based on YLE's own financing needs.

Even though the Act on the State Television and Radio Fund provides for a yearly index increment in YLE's funding, the parliamentary groups have decided that no increment shall be made during the years 2015 – 2018 due to challenges of the State's public finances.

In the following table, YLE's total yearly turnover and costs, as well as the turnover and costs allocated to public service offering on the internet and mobile devices, between 2012 – 2016 is presented.

Table 1: YLE's turnover, costs and result 2012 – 2016¹³

All activities (incl. commercial activities)			
Year	Turnover (incl. the YLE tax, program revenue and sale of services)	Costs	Change of costs from previous year
2016	470 941 266	476 139 947	1.6 %
2015	467 780 558	468 452 433	-2.4 %
2014	472 939 908	479 955 158	3.3 %
2013	465 871 014	464 431 849	2.5 %
2012	422 701 072	453 279 483	
Public service on the internet and mobile devices			
Year	Turnover (incl. the YLE tax, program revenue and sale of services)	Overall costs	Change of costs from previous year
2016	74 341 724	75 741 623	24.2 %
2015	60 674 212	60 993 276	15.5 %
2014	51 707 001	52 785 865	10.2 %
2013	47 872 414	47 892 267	5.1 %
2012	N/A	45 574 775	

The amount of turnover that YLE has allocated internally to the activities making up its public service offering online and through mobile devices has increased significantly from 2013 to 2016. The increase was especially substantial in 2016, when the turnover allocated by YLE to internet and

¹³ Data from YLE's annual statements to the Finnish Communications Regulatory Authority for the years 2012-2016. Available on YLE's website at <https://yle.fi/aihe/yleisradio/vuosikertomukset>.

mobile services increased from approximately MEUR 60.7 (2015) to MEUR 74.3 (2016) (a yearly increase of 22.5 %). The costs of producing internet and mobile services have also increased substantially, from MEUR 47.9 in 2013 to MEUR 75.7 in 2016 (an increase of 58.2 % when compared to the 2013 level). The overall increase in YLE's turnover from 2012 to 2016 (amounting to a total of MEUR 48.2) can to significant degree be explained by the increasing costs of producing YLE's internet and mobile content.

YLE does not report publicly the exact amount of public funding used to finance its online provision of text-based journalistic content. However, by using as a proxy the cost structure of YLE's private competitors offering online a substantially similar selection of text-based journalistic content, the Complainant has estimated YLE's costs for producing such content. *According to the Complainant's conservative estimate, YLE's direct (incremental) costs related to the online provision of text-based journalistic content in 2016 amounted to a total of at least MEUR 35.* This estimate is highly conservative as it does not include the common fixed costs that are shared with YLE's broadcasting activities, which benefit also YLE's online provision of text-based journalistic content.

3.3 YLE's non-broadcasting online activities

3.3.1 YLE's online offering of text-based journalistic content

YLE's main websites for offering text-based journalistic online content are *yle.fi* and its subpage *yle.fi/uutiset* (Finnish language websites) and *svenska.yle.fi* (Swedish language website). On the basis of information provided by YLE, YLE published online in 2016 a total of 117,483 text-based articles, of which 33,123 articles were written in Swedish.¹⁴

YLE's ambition to create a broad newspaper-like online service has been a part of an outspoken strategy of the company. This can be illustrated for example with the following quote from an interview with YLE's former editor-in-chief Atte Jääskeläinen¹⁵:

Online articles constitute another headache for YLE. The articles written have covered alternative medicine and included lengthy and incoherent reporting. Text-based online news are Jääskeläinen's creation. He argues that it couldn't succeed immediately. "I just had to endure the phase when stuff was written that the editor-in-chief was in practice ashamed to read", he says.

Since then, investments have been made in editing and training. However, mere editing is not enough according to Jääskeläinen, as there is a huge amount of online articles written. Jääskeläinen believes that transparency – somehow – creates quality. "When the person's name is published in connection with the article, quality will follow. The situation has improved. There is no non-sense being done anymore", Jääskeläinen says.

In a couple of years' time, the situation will according to him be different. "Then we can reach a level of high-quality writing."

YLE offers online a large amount of text-based journalistic articles featuring news, current affairs and sports in Finnish on *yle.fi* as well as its subpage *yle.fi/uutiset*. The online text-based journalistic

¹⁴ The report by YLE's Administrative Council to the Finnish parliament regarding YLE's activities in 2016, p. 31 (available online at <https://drive.google.com/file/d/0B-v6fV6ewetZU0xsUW1hOWhydZg/view>). Of these articles, a total of 107,346 articles (of which 29,275 in Swedish) were classified by YLE as news, actual affairs, regional, sports or special news related content. In addition, 10,137 articles (of which 3,848 in Swedish) were classified by YLE as other online journalistic content, such as content related to children, learning, culture and drama.

¹⁵ As published in the *Journalisti* magazine on 5 May 2017, available online at <https://www.journalisti.fi/artikkelit/2017/6/ylene-optimistinen/> (unofficial English translation).

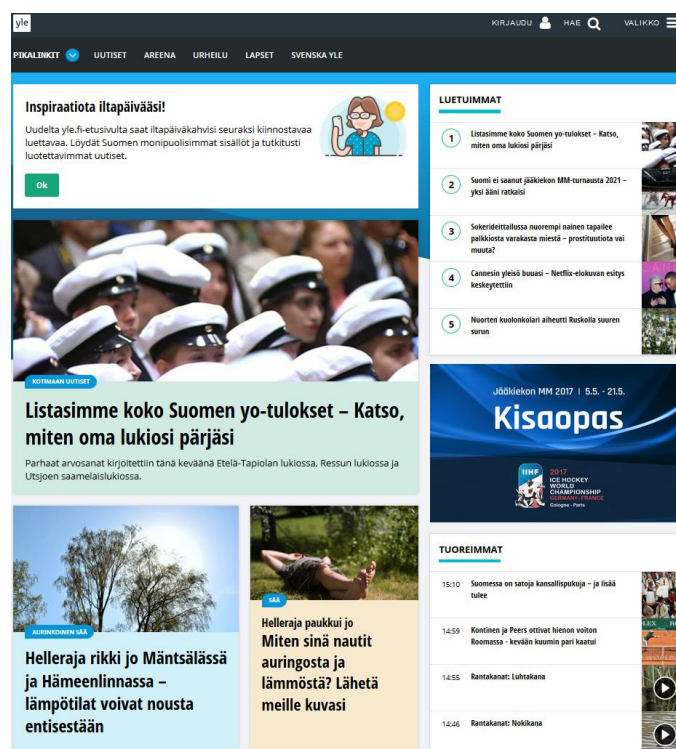
content offered on the websites is further divided into categories such as news, sports, domestic, foreign, politics, economics, culture etc. In essence, YLE is currently providing through its online services a full offering of different kinds of text-based journalistic content, including for example:

- general news, including domestic, local and international news,
- economic news,
- sports news,
- magazine-type lengthier articles and analysis on different subjects (lifestyle, health, nature, science etc.),
- columns and blogs,
- entertainment and culture.

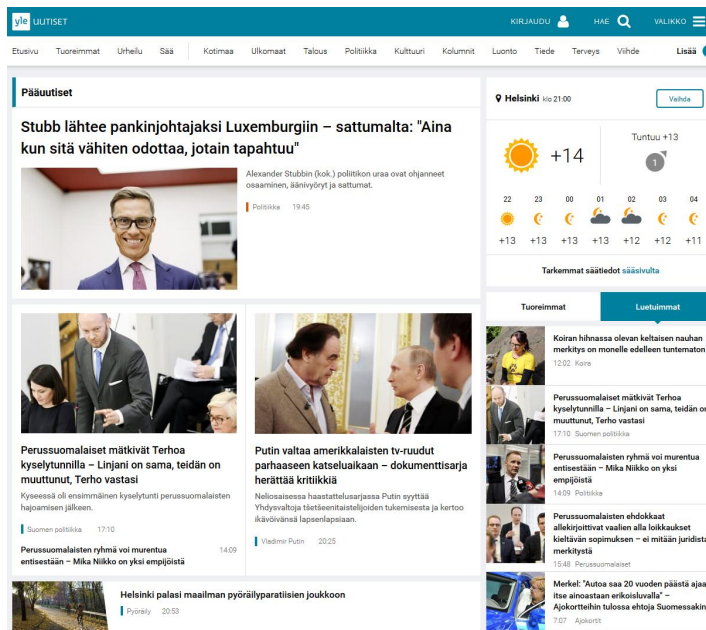
To illustrate YLE's online activities, we have provided the Commission with an example of the text-based journalistic online content available on YLE's website on a randomly chosen date, i.e. 16 June 2017 (Appendix 2). Please see also Appendix 3 for illustrative examples for each of the different types of content mentioned above available on YLE's website on 16 June 2017.

However, with respect to each of the categories described above, there exists on the Finnish market a substantial offering of such content already provided by commercial operators. Furthermore, as described below in Section 4.2.2.3, such content provided by commercial operators is generally accessible to all the different groups in the society regardless of their age or social class.

Screenshot of YLE's main Finnish language website (yle.fi)



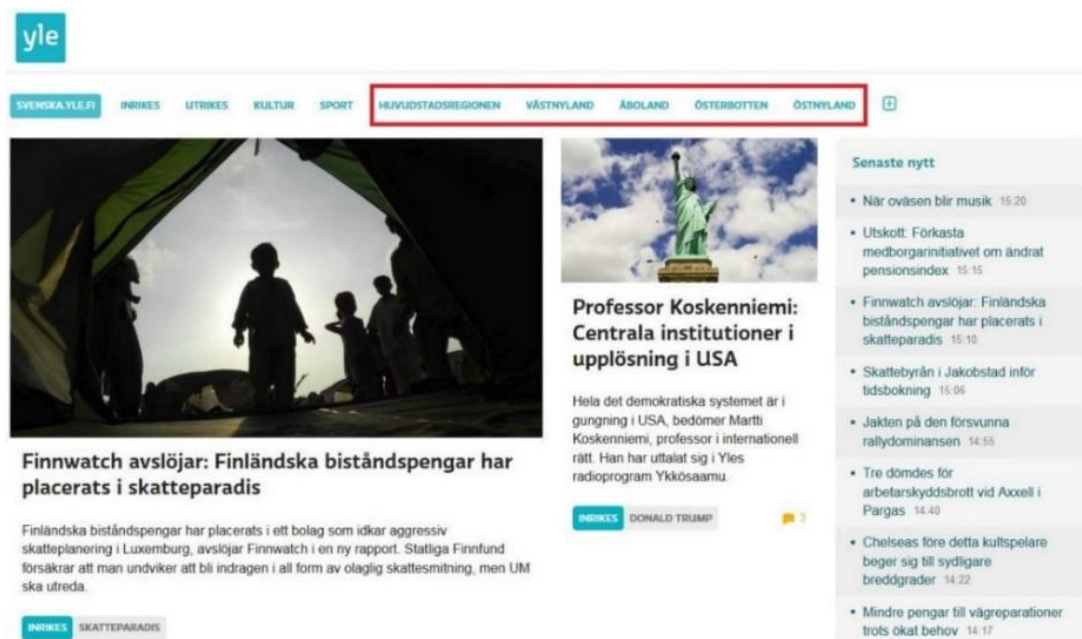
Screenshot of YLE's main subpage for text-based journalistic content (yle.fi/uutiset)



As demonstrated by the above screenshots, the YLE's websites in question mostly contain text-based journalistic content, instead of audiovisual content. Please find more examples in [Appendix 3](#).

In addition to YLE's Finnish language website, the Swedish language website svenska.yle.fi offers a large selection of online news, current affairs, culture and sports addressed to the Swedish speaking minority in Finland. Moreover, the website offers separate sites for all of Finland's Swedish speaking regions containing local news. The focus on local news is significant on svenska.yle.fi.

Screenshot showing YLE's regional news offering on the front page of svenska.yle.fi (emphasis added)



YLE's online offering of text-based sports-related content is not restricted to reporting the results of different events. In addition, YLE publishes a significant amount of lengthy articles and analysis on different sports-related subjects on its website. A few illustrative screenshots of such articles are included below.


Nashvillen viisi vahvuutta Stanley Cupin loppuotteluihin – levänyt Rinne keihäänkärkänä

Pelika Rome on halvin kassalasia, mikäli Nashville haluaa kasapata maanantaina alkavista Stanley Cupin loppuottelujen seurustelunsa antamienlaan vobon. Lussamme Nashvillein vuvuodist alkavan loppuottelupäivän.

1 **HLA** 28.03.2017 14:17:17

Tommi Oksanen, **to**
toimittaja @HelsinginSanomat

1 **Twitter** **Facebook**



5

Nashville Predators, KHL, AJP

Vuorotto

Pittsburghissa on alkanut loppuottelujärjestely toteutua, mutta Nashville on lauantai iltaan, 27:ltä Chicago. Si. Louisa on suunnitellut jarrutettua kappaleita ottaa alottaa, mutta jona lisenssi on valmistunut Nashville nappaa vobon. Chicagoissa on vobon valmistunut, Nashville on joutunut ammattimiehen koulutuksen pahuutta laulemaan pois-tiivis energia, ja kun koulutust on alkanut seura, suunnitelmien on lausa vobon laulemaan olosta potereista.

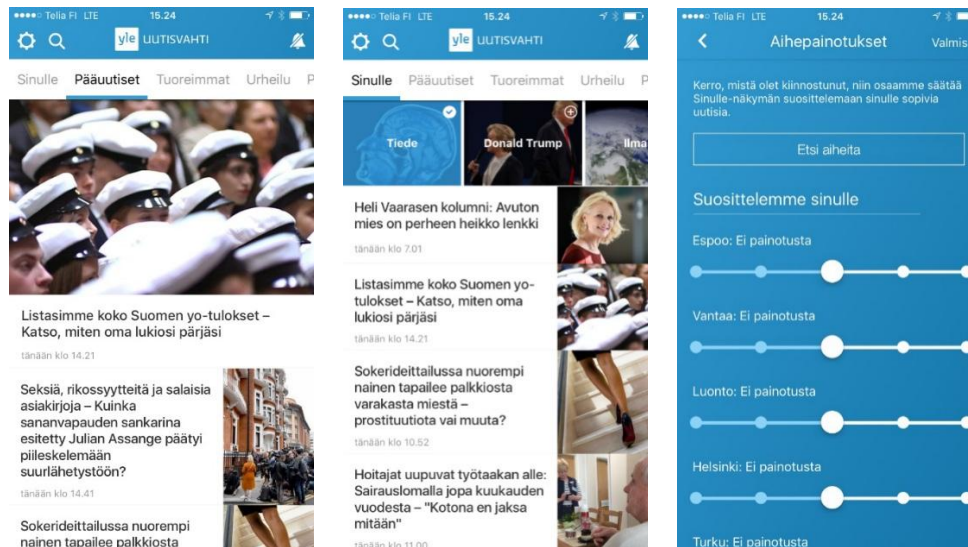
On vobon tihvi Nashvillein illoissa Pittsburghin jarrutelmien laulemista, mutta se on joutunut toteutua lausa vobon lausa se jarrutettua laulemista. Pittsburghin. Predators näkee lausa vobon laulemista. Nashville on muuttanut laulemista vobon lausa se jarrutettua laulemista. Pittsburghin laulemista.

4

In addition to its abovementioned websites, YLE offers a mobile application (*YLE NewsWatch*), which enables its users to customize the text-based news feed made available by YLE in accordance with the user's personal tastes and interests.¹⁶ Following the launch of *YLE NewsWatch* in 2014, the application was downloaded over 190 000 times during a period of six months.¹⁷ Since then, the number of the application's users has significantly increased. *YLE NewsWatch* is for example the first application offered by Apple AppStore when typing the Finnish language keyword "uutiset" (engl. news).

¹⁷ See online article dealing with the matter at <http://mobiliili.fi/2014/11/08/paras-mobiilipalvelu-2014-henkilokohtaista-utustarjontaa-ylen-uutisvahdilta/>.

Screenshots of YLE NewsWatch



As demonstrated by the above screenshots, YLE NewsWatch contains hardly any audiovisual content.

For the purposes of this complaint, it is essential to note that YLE's significant online provision of text-based journalistic content described above constitutes an independent service that cannot be considered part of YLE's broadcasting activities. This is further described in Section 4.2.2.2 below.

3.3.2 YLE's offering of content on social media platforms

YLE is also highly active in publishing and producing content for different social media platforms, namely *Facebook*, *Instagram*, *YouTube* and *Twitter*. Many of YLE's individual channels or websites, such as YLE TV1, YLE TV2, YLE Teema, YLE Areena and YLE Uutiset have their own accounts on these social media platforms. Moreover, some of YLE's most popular TV programs have their own accounts.

By way of an example, YLE currently operates a total of 58 separate Facebook pages on which it publishes links to its articles, videos and photos. YLE's five most popular Facebook pages (measured in the number of "likes") are YLE News', YLE Areena's, YLE Sport's, YLE X's and YLE Elävä Arkisto's Facebook channels. YLE's most popular Facebook pages post content on the respective page approximately every half an hour from early morning to evening on weekdays (however, less regularly on weekends).

YLE can be considered to have a social media presence that is unrivalled by any of the commercial media actors in Finland. YLE's outspoken aim in distributing content on different social media platforms is to reach segments of the audience that are otherwise considered challenging to reach by YLE. As stated by YLE's Chief Digital Officer on YLE's website, "after creating a relationship with these challenging target groups on the social media, it is possible to redirect them to our other services, such as YLE Areena or the yle.fi website".¹⁸

¹⁸ See article by YLE's Chief Digital Officer Mikko Rusama on YLE's website at <http://yle.fi/aihe/artikkeli/2017/05/17/mikko-rusama-ylene-merkitys-punnitaan-verkkopalveluissa>.

4. LEGAL ASSESSMENT

4.1 The public funding for YLE's online provision of text-based journalistic content constitutes state aid within the meaning of Article 107(1) TFEU

Article 107(1) TFEU contains the general description of state aid that is as a rule considered incompatible with the internal market. In order to be regarded as state aid incompatible with the internal market, the measure in question has to meet the following four cumulative criteria: 1) the measure has to entail a selective economic advantage, 2) the measure has to be granted by a Member State or through state resources, 3) the measure has to distort competition and 4) the measure has to affect trade between Member States.

4.1.1. State resources

YLE's funding originates from the Finnish State budget, from which funds are transferred to a special State Television and Radio Fund (*fi. valtion televisio- ja radiorahasto*). The funds transferred to said Fund are used to finance YLE's activities, including the online provision of text-based journalistic content. The funds are collected through a special YLE tax. *Therefore, it is evident that the funding for YLE's online provision of text-based journalistic content should be considered as being attributable to the state as well as being granted through state resources within the meaning of Article 107(1) TFEU.*

4.1.2. Selective advantage

Whether compensation paid to public service broadcasters can be regarded as constituting an advantage to its recipient is assessed in the light of the *Altmark* criteria. As YLE's activities are funded by a tax that is set to a certain level for several years regardless of the actual scope of YLE's activities, the parameters on the basis of which the yearly compensation paid to YLE is calculated are not established in advance in an objective and transparent manner (*2nd Altmark criterion*). Furthermore, the funding for YLE's provision of text-based journalistic content has not been determined on the basis of an analysis of the costs that a typical well-run adequately equipped undertaking would incur in fulfilling the public service obligations entrusted to YLE (*4th Altmark criterion*).

Pursuant to applicable national legislation, the public funding for YLE's online provision of text-based journalistic content has been granted exclusively to YLE. *Therefore, it is evident that such public funding should be regarded as being de jure selective.*

Therefore, the funding for YLE's provision of text-based journalistic content should be regarded as conferring a selective economic advantage to YLE within the meaning of Article 107(1) TFEU.

4.1.3. Distortion of competition and effect on trade

YLE's annual public funding provides a financial advantage which strengthens YLE's position towards private market operators who need to finance their activities through commercial revenues. As regards the online offering of text-based journalistic content, YLE competes directly with private operators (i.e. newspaper publishers) offering similar online content. It is obvious that the public funding for the offering of such content by YLE has an impact on the business model of private operators either through the competition between the services offered by private operators and similar services offered by YLE or through the competition for users which ultimately determines the advertising revenues of private operators. *Therefore, it can be concluded that the public funding for YLE's online provision of text-based journalistic content distorts competition between YLE and the private market operators.*

Many of the private competitors affected by the public funding for YLE's online provision of text-based journalistic content are active in intra-Union trade and their ownership structures often extend over several Member States. Furthermore, text-based journalistic content can as a general rule be provided online also by competitors located in other Member States. *Therefore, the funding for YLE's provision of text-based journalistic content affects trade between Member States.*

4.2 The public funding for YLE's online provision of text-based journalistic content is not compatible with the internal market under Article 106(2) TFEU

As regards the compatibility of the state aid granted to YLE, we expect the State to invoke Article 106(2) TFEU as this is the general legal framework when state aid to public service broadcasters is at stake.

We consider it unlikely that the State will invoke Article 107(2) or Article 107(3) TFEU in the present case, but are happy to provide comments to such argumentation if it should be presented to the Commission.

4.2.1 Relevant regulatory framework

4.2.1.1 TFEU 106(2)

Article 106 TFEU contains provisions relating to the treatment of public undertakings and undertakings entrusted with the operation of services of general economic interest (**SGEIs**). Article 106(2) TFEU states that undertakings entrusted with the operation of SGEIs or having the character of revenue-producing monopoly shall be subject to the rules contained in the TFEU, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. Furthermore, the development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

As Article 106(2) TFEU constitutes a derogation, the European Court of Justice has consistently held that the provision in question must be interpreted restrictively. The Court has clarified that in order for a measure to benefit from such a derogation, it is necessary that all the following conditions 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*)¹⁹;
- (ii) the undertaking in question must be explicitly entrusted by the Member State with the provision of that service (*entrustment*)²⁰;
- (iii) the application of the competition rules of the TFEU (in this case, the ban on state aid) must obstruct the performance of the particular tasks assigned to the undertaking and the exemption from such rules must not affect the development of trade to an extent that would be contrary to the interests of the Community (*proportionality test*)²¹.

4.2.1.2 SGEI Communication

The Commission's Communication on the application of the EU State aid rules to compensation granted for the provision of SGEIs (the **SGEI Communication**) clarifies, *inter alia*, the important notion

¹⁹ Judgment in the Case 172/80 *Zuechner*; (1981) 2021.

²⁰ Judgment in the Case C-242/95 *GT-Link*; (1997) 4449.

²¹ Judgment in the Case C-159/94 *EDF and GDF*; (1997) I-5815.

of “services of general economic interest” and the Member States’ autonomy in defining the scope of such services.²²

In the Communication, the Commission has noted that the concept of service of general economic interest is an evolving notion that depends, among other things, on the needs of citizens, technological and market developments and social and political preferences in the Member State concerned. In the absence of specific EU rules defining the scope for the existence of an SGEI, Member States have a wide margin of discretion in defining a given service as an SGEI and in granting compensation to the service provider. The Commission’s competence in this respect is limited to checking whether the Member State has made a manifest error when defining the service as an SGEI and to assessing any state aid involved in the compensation.²³

As noted by the Commission in the SGEI Communication, the first *Altmark* criterion requires the definition of an SGEI task. This requirement coincides with that of Article 106(2) TFEU. It transpires from Article 106(2) TFEU that undertakings entrusted with the operation of SGEIs are undertakings entrusted with ‘a particular task’. Generally speaking, the entrustment of a ‘particular public service task’ implies the supply of services which, if it were considering its own commercial interest, an undertaking would not assume or would not assume to the same extent or under the same conditions. Applying a general interest criterion, Member States may attach specific obligations to such services.²⁴

The Commission thus considers that it would not be appropriate to attach specific public service obligations to an activity *which is already provided or can be provided satisfactorily and under conditions, such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by a Member State, by undertakings operating under normal market conditions*. As for the question of whether a service can be provided by the market, the Commission’s assessment is limited to checking whether the Member State has made a manifest error.²⁵

As stated by the Commission in the SGEI Communication, Member States have traditionally possessed a wide margin of discretion when it comes to defining a given service as an SGEI. However, as implied by the SGEI Communication and as evidenced by the recent jurisprudence of the General Court, Member States’ autonomy in this respect is not without limits.

In this respect, the General Court’s recent judgment in the matter *SNCM v Commission* is especially noteworthy. In the said judgment, the Court noted that Member States’ power to define a given service as an SGEI is not without limits and should not be exercised in order to limit the application of EU competition rules to a given sector.²⁶ In principle, the need for a given public service may according to the Court be shown by lack of private initiative.²⁷

With respect to the need to show a lack of private initiative, the Court noted the following (emphasis added):

[...] pour qu’un service de cabotage maritime puisse être qualifié de SIEG, il faut qu’il réponde à un besoin réel de service public, démontré par l’insuffisance des services réguliers de transport dans une situation de libre concurrence, et que le périmètre du

²² Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest Text with EEA relevance, OJ C 8, 11.1.2012, p. 4–14.

²³ SGEI Communication, paras 45–46.

²⁴ SGEI Communication, para 47.

²⁵ SGEI Communication, para 48.

²⁶ Judgment in the Case T-454/13, *SNCM v Commission*, (2017), para 112.

²⁷ *Ibid.*, para 125.

SIEG soit nécessaire et proportionné à ce besoin. Or, c'est incontestablement à l'État membre concerné, et non à la Commission, qu'il incombe d'effectuer cette démonstration, et ce en avançant des éléments suffisamment convaincants. À cet égard, il doit être relevé que, contrairement à ce qu'a soutenu la SNCM lors de l'audience (voir point 106 ci-dessus), l'État membre ne saurait se contenter d'invoquer l'existence d'un « intérêt général au sens très large ». L'absence de preuve, fournie par l'État membre, que les critères susmentionnés sont satisfaits ou la méconnaissance de ceux-ci est susceptible de constituer une erreur manifeste d'appréciation que la Commission est tenue de prendre en considération.²⁸

In its judgment, the Court also dismissed the claimant's claim that the three-step test employed by the Commission to check whether the requirements for the 1st *Altmark* criterion (i.e. definition of the SGEI task) were met in the matter in question, would have been unfounded. In this respect, the Court noted the following (emphasis added):

*[...] Ainsi, tout d'abord, s'il n'existe pas de demande des usagers pour tout ou partie des services entrant dans le périmètre du service public, tel que défini par les autorités nationales, ce service public ou son périmètre ne sauraient clairement être considérés comme nécessaires et proportionnés par rapport à un besoin réel de service public. Ensuite, il ne saurait non plus y avoir un tel besoin si la demande des usagers est déjà susceptible d'être satisfaite par les opérateurs du marché en l'absence d'obligation en ce sens fixée par les pouvoirs publics. En d'autres termes, comme cela a déjà été relevé au point 125 ci-dessus, en l'absence de carence de l'initiative privée, il ne saurait y avoir de besoin réel de service public. Enfin, s'il existe une demande des usagers et si cette demande n'est pas susceptible d'être satisfaite par le simple jeu des forces du marché, encore faut-il que les autorités nationales privilégient l'approche qui porte le moins atteinte aux libertés essentielles au bon fonctionnement du marché intérieur. [...]*²⁹

It follows from the General Court's judgment discussed above that Member States' autonomy to define a given service as a service of general economic interest is limited to situations where the Member State can show a real need for the public service obligation in question. Such a need can be shown by a demand for the services in question that cannot be satisfied with the existing private supply of such services. Furthermore, the definition of the public service obligation should be proportional to the observed need to produce such public service. It is also important to observe that, in accordance with the abovementioned case-law, *the Member State has the burden of proof* and must therefore show that there is a market failure which justifies the imposition of a public service obligation.³⁰

4.2.1.3 Amsterdam Protocol and the Broadcasting Communication

The Treaty of Amsterdam of 1997³¹ introduced the Protocol on the system of public broadcasting in the Member States (the **Amsterdam Protocol**), whereby the Member States secured the special treatment of public service broadcasting when it comes to state aid control. The Amsterdam Protocol grants the Member States significant autonomy in deciding on the funding of their respective public service broadcasters and the definition of the public service remit. However, this autonomy is limited by the fact that such funding shall not affect trading conditions and competition to an extent contrary to the common interest. *Furthermore, it is essential to note that the exemption set out in the Amsterdam*

²⁸ Ibid., para 133.

²⁹ Ibid., para 134.

³⁰ See also Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04, *TV2 a.o. v Commission*, paragraph 183.

³¹ OJ C 340, 10.11.1997.

Protocol applies only to public service broadcasters' broadcasting activities and does not cover activities on markets that are unrelated to public service broadcasting.

The Broadcasting Communication clarifies the principles followed by the Commission in the application of Article 107 TFEU and Article 106(2) TFEU to the public funding of *audiovisual services* in the broadcasting sector.³² The Commission has furthermore clarified that, for the purpose of the Communication, the notion 'audiovisual service(s)' refers to the *linear and/or non-linear distribution of audio and/or audiovisual content and of other neighbouring services such as online text-based information services*. According to the Commission, this notion of 'audiovisual service(s)' must be distinguished from the narrower concept of 'audiovisual media service(s)', as defined in Article 1(a) of the Audiovisual Media Services Directive.³³

To the extent that a given service provided by a public service broadcaster does not constitute an audiovisual service within the meaning of the Broadcasting Communication, the public funding for the provision of such a service needs to be assessed on the basis of the general legal framework for assessing state aid pursuant to Article 107 TFEU. To the extent such funding constitutes compensation for the provision of an SGEI, the funding would also need to be assessed on the basis of the general legal framework regarding the application of Article 106(2) TFEU.

4.2.2 Assessment of the public funding for YLE's online provision of text-based journalistic content under Article 106(2) TFEU

4.2.2.1 General

The Complainant does not contend that YLE's general broadcasting activities would not constitute SGEIs.

The objective of this complaint is the part of YLE's activities that in our view cannot be considered "broadcasting activities", i.e. the YLE's online activities in the field of text-based journalistic content (the provision of such content through the *yle.fi/uutiset* website and the *YLE NewsWatch* application).

The provision of such content cannot qualify as an SGEI, as shall be further explained in Section 4.4.2.3 below. Moreover, the provision of such content by YLE has not been clearly defined as an SGEI entrusted to YLE (see further Section 4.4.2.4 below).

Furthermore, it is necessary to take into consideration the potential distortive effects on competition caused by YLE's provision of such content, even if it were to be qualified as an SGEI – quod non (see further Section 4.4.2.5 below).

4.2.2.2 YLE's online provision of text-based journalistic content cannot be qualified as "broadcasting" within the meaning of the Amsterdam Protocol and must therefore be assessed as any other SGEI.

As shall be further explained in this section, the Complainant contends that YLE's online provision of text-based journalistic content cannot be qualified as "broadcasting" within the meaning of the

³² Broadcasting Communication, para 8.

³³ In article 1(a) of the Audiovisual Media Services Directive, the notion of 'audiovisual media service' is defined as a service as defined by Articles 56 and 57 TFEU which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC. Such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph.

Amsterdam Protocol and must therefore be assessed as a “normal” SGEI in the light of Article 106(2) and the Commission’s SGEI Communication from 2012.

As stated in point 47 of the Broadcasting Communication, within the field of broadcasting “a qualitative definition entrusting a given broadcaster with the obligation to provide a wide range of programming and a balanced and varied broadcasting offer is generally considered, in view of the interpretative provisions of the Amsterdam Protocol, legitimate under Article 106(2).”

This dictum relies inter alia on the ruling of the General Court in the *TV2* judgment, where it was held that an SGEI may cover the broadcasting of so-called “full-spectrum programming” – regardless whether the content (or parts thereof) is also offered by the competing market players without state aid compensation.³⁴ In *TV2*, the General Court held that when it comes to public service broadcasting, there is no need to calculate the “supplementary costs that the broadcaster would normally not have incurred absent the public service obligation”, as the state is entitled to finance all the costs of the public service broadcaster.³⁵

As is clear both from the said case-law and from the Broadcasting Communication, Member States are given greater latitude within the field of broadcasting than within other fields. Both the case-law and the Broadcasting Communication base this conclusion on a number of legal documents from the EU institutions emphasizing the particular characteristics of public service broadcasting, as further explained by the Commission in points 9 *et seq.* and point 38 of the Broadcasting Communication (“*In the specific case of public broadcasting the above approach has to be adapted in the light of the interpretative provisions of the Amsterdam Protocol ...*”). Besides the Amsterdam Protocol, both the Commission and the Union Courts refer to the 1999 Council Resolution concerning public service broadcasting,³⁶ which emphasizes the particular nature of the broadcasting sector.

Conversely, outside the field of broadcasting (where the Amsterdam Protocol does not apply), the Member State in question must prove to the Commission that there is a need to supply the service in question as a public service. Such need shall be shown by a lack of private supply of such service on market conditions.³⁷ Thus, it is not acceptable to designate a service as an SGEI if it is already provided under conditions, such as price, objective quality characteristics, continuity and access to the service, by undertakings operating under normal market conditions.³⁸

In the present case, the critical question is therefore whether YLE’s online offering of text-based content can be considered a broadcasting activity. It is contended that this is not the case.

The exact definition of “broadcasting activities” is not provided in the Amsterdam Protocol or in the 1999 Council Resolution, which refer merely to the particular nature of the broadcasting sector. However, as is clear from the Broadcasting Communication, which makes excessive reference to the notion of audiovisual services,³⁹ broadcasting and audiovisual services are closely linked.

Under the Audiovisual Media Services Directive⁴⁰, “audiovisual services” refer to moving images with or without sound (both linear and non-linear) but not including audio transmission or radio services.

³⁴ Joined Cases T-309/04, T-317/04, 329/04 and T336/04, *TV2 and others v Commission*, paragraph 103 *et seq.*

³⁵ *Ibid.*, paragraph 110.

³⁶ See e.g. point 12 of the Broadcasting Communication.

³⁷ Judgment in the Case T-454/13, *SNCM v Commission*, (2017), para 133.

³⁸ SGEI Communication, para 48.

³⁹ See e.g. points 5 and 8 of the Broadcasting Communication.

⁴⁰ Directive 2010/13 of 10 March 2010, OJ 2010 L 95/1.

Conversely, the Broadcasting Communication builds upon a broader notion which encompasses broadcasting of both television and radio programs, i.e. both “audio and audiovisual” content.⁴¹

At the same time, footnote 8 to the Broadcasting Communication states that the notion “audiovisual services” refers to the linear and/or non-linear distribution of audio and/or audiovisual content “and “of other neighbouring services such as online text-based information services””. It is not further explained in the Broadcasting Communication what is meant by “neighbouring services such as online text-based information services”, but the expression “neighbouring” suggests that the text-based information services must be closely linked to the audiovisual services.

In the historical context of the Broadcasting Communication, the notion of “text-based information services” should mainly be understood as referring to teletext services.

It is argued that the Audiovisual Media Services Directive can be interpreted in the same manner, as it excludes from its scope “stand alone text-based services” (cf. recital 23 to its preamble) and “electronic versions of newspapers and magazines” (cf. recital 28 to its preamble). Conversely, text-based services which are not “stand-alone” services (but intrinsically linked to the audiovisual services) would seem to fall within the Directive.

It is also important to note that the Broadcasting Communication contains no further mention of text-based information services. In fact, in its chapter 6.7. (“*Diversification of public broadcasting services*”), the Broadcasting Communication refers e.g. to the rapidly changing business models of the public service broadcasters, including the use of pay-services, like access to archives for a fee, special interest TV channels on a pay-per-view basis, access to mobile services for a lump sum payment, deferred access to TV programmes for a fee, online content downloads.⁴² Mention is also made of the increasing digitalization (see e.g. point 81), the diversification of distribution platforms, including mobile devices (see e.g. points 81 and 85), the introduction of pay elements (points 83), the use of non-linear programming, etc.

But at no point does the Broadcasting Communication mention “text-based information services” or provide any examples thereof. Nor is it obvious that any of the examples listed in chapter 6.7. of the Communication relates to such services. To the Complainant, this confirms that the notion of “text-based information services” must be interpreted narrowly – in the same way as “broadcasting activities” must be interpreted narrowly.

It is recalled that broadcasting activities belong to a market which is clearly separate from the market for publication of written journalistic content (both online and on print).

With respect to newspaper publishing, the Commission has in its decisional practice traditionally considered that written press should be differentiated from other media products, including television and radio. In its decision from 2010 concerning *News Corp/BskyB*, the Commission held that its market investigation was inconclusive as to the substitutability of print newspapers and online news services and as to the substitutability of print newspapers and paid-for online news services.⁴³ Taking into account the rising number of consumers who read their newspapers online (either via computer or different mobile devices) in Finland, it seems clear that at least on the Finnish market, the provision of online news belongs to the same product market as the market for printed news.

⁴¹ See footnote 8 of Broadcasting Communication. Radio broadcasting is also mentioned numerous times in e.g. the Italian, Danish and Swedish versions of the Communication.

⁴² See e.g. para 82 of the Broadcasting Communication.

⁴³ Case No COMP/M.5932 – *News Corp / BskyB*, para 211.

However, for purposes of the current case, the essential point to note is that the provision of text-based journalistic content (whether published in print or online) forms from a consumer perspective a service that is not substitutable with free-to-air TV and radio services. Thus, a broad definition of a market for journalistic content, including both text-based and audiovisual content distributed either via television, radio or online channels, cannot be justified from the point of view of consumer demand and does not find support in relevant case law.⁴⁴

Moreover, it is recalled that, as an exception to the general Treaty rules, Article 106(2) TFEU should be interpreted strictly. Thus, the notion of “broadcasting activities” must be interpreted strictly, as they are subject to an even more lenient regime than what follows from Article 106(2) TFEU. Indeed, if the Commission were to endorse an overly broad definition of “broadcasting activities”, it would give the Member States an excessive – almost unlimited – margin of appreciation to define SGEIs in areas where this is neither necessary nor required by the particular features of the broadcasting sector.

Also, it is the Member States that must prove that the conditions for applying Article 106(2) TFEU are fulfilled.⁴⁵

It is precisely for this purpose that certain Member States have expressly forbidden their public service broadcasters to engage in the offering of newspaper-like online content.

In Germany, for example, the German Interstate Broadcasting Agreement (*Staatsvertrag für Rundfunk und Telemedien*) expressly prohibits public service broadcasters’ press-like offers that are unrelated to the public service broadcasters’ TV and radio programming.⁴⁶

Staatsvertrag für Rundfunk und Telemedien, Section 11d is worded as follows:

“Sendungen und sendungsbezogenen Telemedien nach Ablauf der Fristen nach Nummer 1 1. Halbsatz und Nummer 2 sowie von nichtsendungsbezogenen Telemedien nach Maßgabe eines nach § 11 f durchgeführten Verfahrens; in den Telemedienkonzepten ist angebotsabhängig eine Befristung für die Verweildauervorzunehmen; nichtsendungsbezogene presseähnliche Angebote sind nicht zulässig [...]”

Reference is also made to e.g. the Austrian Broadcasting Act, which provides that the Austrian public broadcaster may carry out “the organisation of broadcasting programmes” and “the performance of online and teletext services related to those activities”:

Federal Act on the Austrian Broadcasting Corporation

“Section 2(1)

The business objective of the Austrian Broadcasting Corporation, unless otherwise specified in this Federal Act, comprises the following:

1. the organisation of broadcasting programmes,
2. the performance of online and teletext services related to activities under subparagraph 1 and the operation of technical installations required for the activities under this sub-paragraph and sub-paragraph 1,
3. all reasonable business transactions and measures required for the performance of activities under subparagraphs 1 and 2 or for the marketing of these activities.

⁴⁴ The Danish Competition Council has recently endorsed a significantly narrower definition of the relevant product market, identifying, among others, the markets for daily national paid-for printed newspapers and daily national paid-for online newspapers as constituting separate product markets, cf. the press release from the Danish Competition Council dated 24 January 2017 at <http://en.kfst.dk/Indhold-KFST/English/News/20172401-JP-Politiken-withdraws-merger-with-Boersen?tc=C4B4A4263E6147FCB14D4C1268C2E74B>.

⁴⁵ See e.g. Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04, *TV2 and others v Commission*, paragraph 183.

⁴⁶ See *Staatsvertrag für Rundfunk und Telemedien*, § 11d, paragraph 2, subparagraph 3.

[...]

Section 3(5)

The service provision mandate also includes the organisation of online and teletext services associated with broadcasting programmes under paragraph 1 and that serve the purpose of fulfilling the programme mandate (Section 4). [...]

Based on the above, the Complainant contends that the relevant test should be whether a given text-based service is either directly related to and necessary for or intrinsically linked (i.e. “ancillary”) to the broadcasting activities.

The notion of ancillarity is well-known under competition law and implies that the restriction in question is not the primary object of the agreement, but is “directly related to and necessary for” the proper functioning of the objectives envisaged by agreement.⁴⁷

More importantly, the notion of ancillarity is also well-known under state aid law, where it is also considered if the said activity is “intrinsically linked to” the main activity.

Thus, in its Notice on the Notion of State Aid, the Commission considers that the mixed (i.e. both economic and non-economic) use of infrastructure may fall outside the State aid rules in its entirety, provided that the economic use “remains purely ancillary, that is to say an activity which is directly related to and necessary for the operation of the infrastructure or intrinsically linked to its main non-economic use”.⁴⁸

According to the Commission, this should be considered to be the case when the economic activities consume the same inputs as the primary non-economic activities, for example material, equipment, labour or fixed capital. Moreover, “[a]ncillary economic activities must remain limited in scope, as regards the capacity of the infrastructure”. Examples of such ancillary economic activities may include a research organisation occasionally renting out its equipment and laboratories to industrial partners.⁴⁹

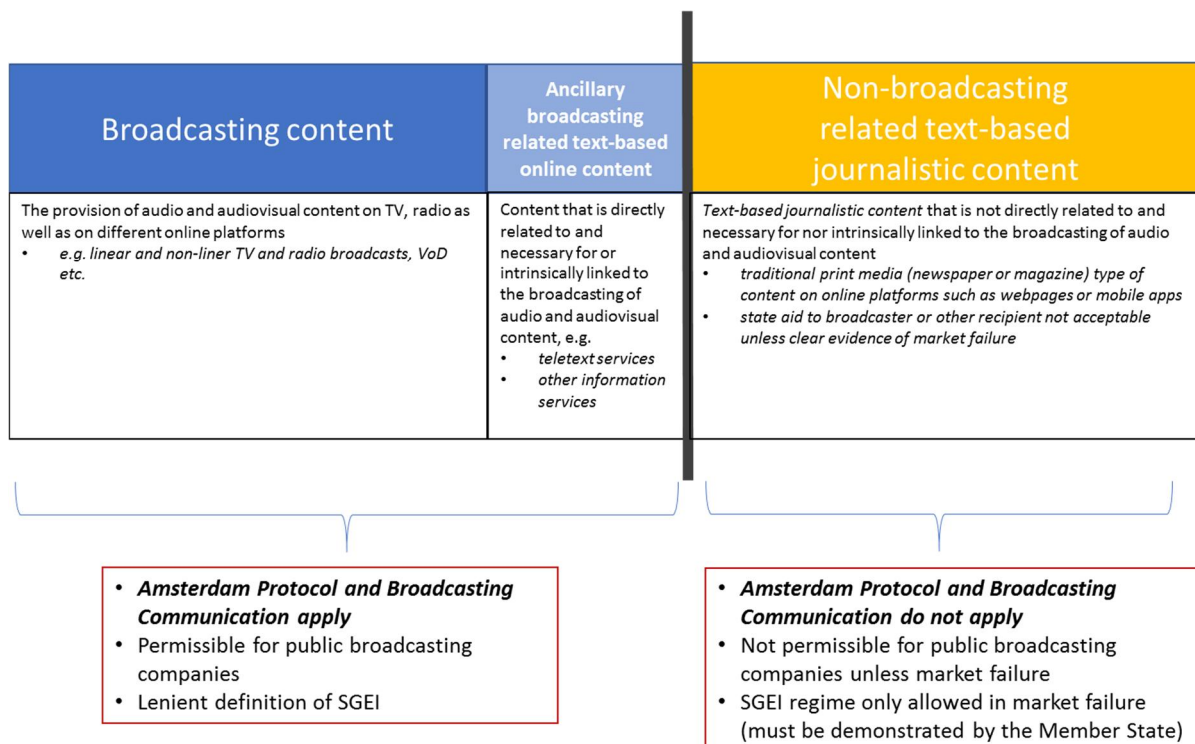
Conversely, if the activities do not remain ancillary, also secondary economic activities can be subject to the State aid rules, even if the activity is limited in scope compared to the main activity. This is clear from e.g. Case T-347/09, *Germany v Commission*, where the selling of wood and tourism activities of nature conservation organizations was considered clearly severable from (not intrinsically linked to) the organization’s non-economic activities.

⁴⁷ See e.g. Commission Notice on restrictions directly related and necessary to concentrations (OJ C 56, 5.3.2005, p. 24). See e.g. points 12-13 (“For restrictions to be considered ‘directly related to the implementation of the concentration’, they must be closely linked to the concentration itself.” [Moreover], they must be ‘necessary to the implementation of the concentration’, which means that, in the absence of those agreements, the concentration could not be implemented or could only be implemented under considerably more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably greater difficulty.”)

⁴⁸ Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU (OJ 2016 C 262, p. 1), points 207.

⁴⁹ Ibid, idem. The Commission also considers that public financing provided to customary amenities (such as restaurants, shops or paid parking) of infrastructures that are almost exclusively used for a non-economic activity normally has no effect on trade between Member States since those customary amenities are unlikely to attract customers from other Member States and their financing is unlikely to have a more than marginal effect on cross-border investment or establishment.

The distinction between (i) broadcasting activities, (ii) services ancillary to broadcasting activities and (iii) non-broadcasting activities can be illustrated with the following graph:



It is also important to note that if a non-economic activity becomes too important, the activity in its entirety becomes economic – not just the “exceeding” part.

Even though YLE might carry out some text-based activities online which may by themselves be considered “ancillary” to its broadcasting activities, the non-broadcasting activities are simply too massive (too important), which means that none of YLE’s online text-based activities can be considered ancillary.

It is clear from the facts of the case that YLE’s text-based online activities are not directly related to and necessary for its main activities as broadcaster (i.e. its audio and audiovisual services). Nor are they intrinsically linked to the latter. It is for the State to prove that (the totality of) YLE’s online text-based services are ancillary to its broadcasting activities. It is contended that such a proof will be impossible to deliver.

To give the Commission an idea of the scope of YLE’s text-based activities online, the Complainant has with the assistance of Copenhagen Economics conducted an in-depth analysis of the text-based journalistic online content provided by YLE.⁵⁰ The results of the analysis can be summarized as follows:

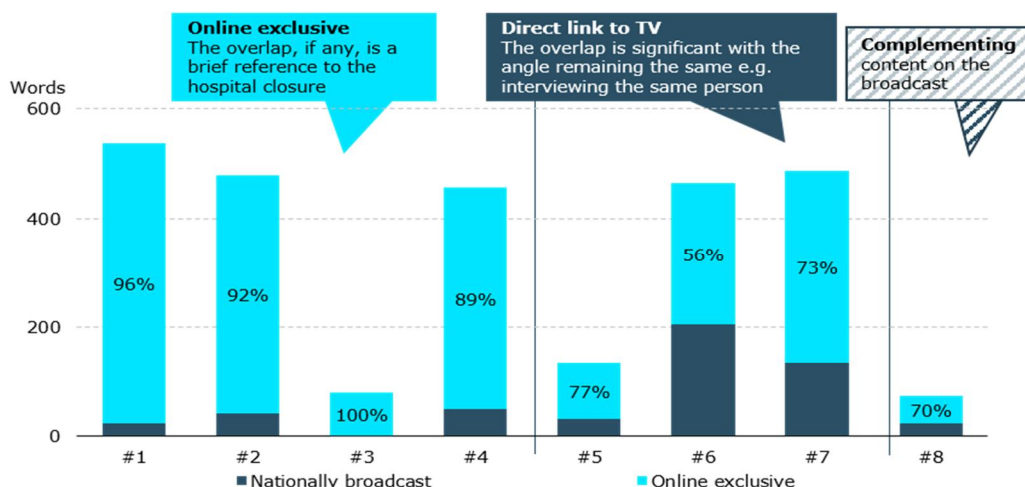
1. The analysis included a general quantitative analysis of YLE’s text-based journalistic online content. In the general quantitative analysis, all the text-based articles published by YLE online on its Finnish language website (yle.fi/uutiset) during three randomly chosen days were each assigned a topic. The topics were then compared to the topics featured in YLE’s TV broadcasting during the day in question. In the general quantitative analysis, it was observed that for a majority

⁵⁰ The detailed methodology of the conducted study is attached hereto as [Appendix 4](#).

(51 %) of the text-based articles, the topic of the article was not featured in YLE's TV broadcasting during the same day. Hence, they were online exclusive.

2. A similar quantitative analysis was also conducted with respect to the text-based sports-related content offered on YLE's Finnish language website for sports (yle.fi/urheilu) during the course of a single day. *Out of a total of 42 text-based sports-related articles published online by YLE during the course of a randomly chosen day, only 5 TV broadcasts made by YLE on the same day featured the same sports topic, e.g. sports event. The share of online exclusive material was thus 88 %.*
3. Moreover, an analysis dealing merely with the similarity of topics between online text text-based articles and TV broadcasts says nothing about the extent and depth of the online text.
4. Thus, Copenhagen Economics has also conducted a qualitative analysis of the text-based journalistic content having also links to YLE broadcasting. The aim of the analysis was to find out how much (in terms of word count) of the content of the text-based articles in question were actually featured in YLE's TV broadcasting (in terms of spoken words).
5. A random news event was chosen for that purpose, *in casu* the construction problems of the Kättilöopisto maternity hospital in Helsinki.
6. In total eight text-based articles on the closure of the Kättilöopisto maternity ward were published on YLE's Finnish language website during the examination period, with an average of 339 words in each article. Of these eight articles, four could not be linked to the material broadcast by YLE on TV. *Out of the remaining four articles, three were considered linked to material broadcast by YLE on TV and one as being complementary to such material.*
7. *However, it is crucial to note that on the average 78 % of all the online text-based content (measured as the number of words included in the text-based online articles) published by YLE regarding the news event in question was not featured in YLE's TV broadcasting dealing with the same news event.*

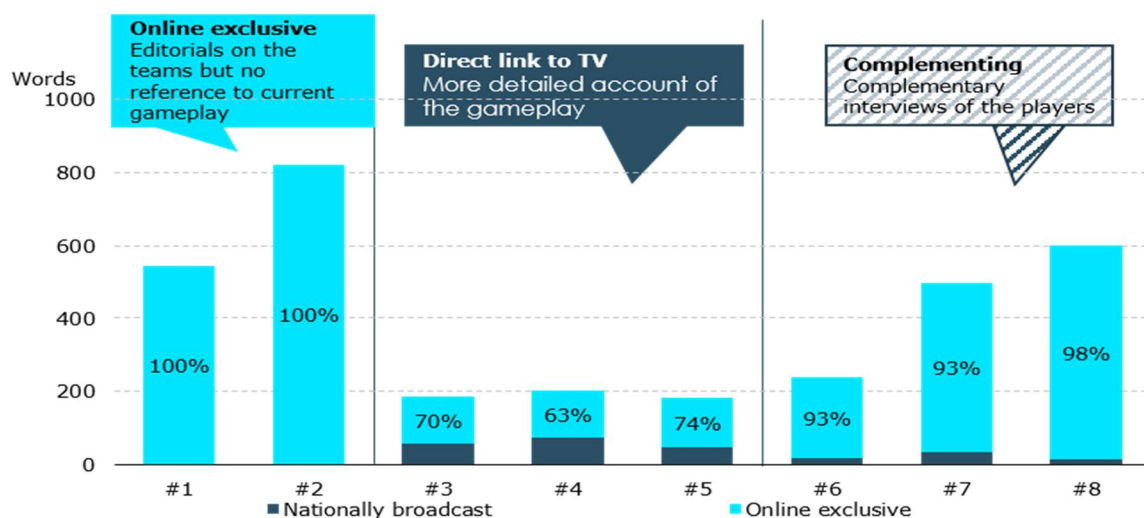
Figure 1: Share of online exclusive content of all the online articles regarding a single major news event (closure of the Kättilöopisto maternity ward)



8. A similar assessment was also conducted with respect to a single sports-related topic, the NHL Playoffs. Eight text-based articles on the topic were published on YLE's Finnish language sports

website during the course of a three-day period, with an average of 409 words each. Two articles could not be matched to any content broadcast by YLE on TV. However, of all the text-based content of the articles only 7% was featured in YLE's TV broadcasts. Hence, the share of the online exclusive content was 93%.

Figure 2: Share of online exclusive content of all the online articles regarding a single major sports event (the NHL Playoffs)



Considering the results of the analyses described above, it is evident that the text-based journalistic online content provided by YLE cannot be considered as being ancillary to YLE's broadcasting activities. On the contrary, YLE is in practice offering online a substantial amount of text-based articles, which are in essence newspaper-like.

Furthermore, the mere handling of a specific theme on a TV or radio program does not mean that the public service broadcaster would be entitled to provide online press- or magazine-like content relating to the same theme.

The provision of such text-based journalistic online content by YLE is neither related nor necessary for YLE's broadcasting activities. Furthermore, it is not intrinsically linked to such activities. Therefore, the provision of such content cannot be considered as being ancillary to YLE's broadcasting activities. Consequently, it is clear that the provision of such content by YLE should be considered as a non-broadcasting activity.

Reference is also made to Section 4.4 below, where it is explained why YLE's online offering of text-based journalistic content is severable from its other activities and therefore must be viewed as new aid.

4.2.2.3 There is no need for an SGEI on the Finnish market for online text-based journalistic content

With respect to YLE's traditional broadcasting activities (i.e. the provision of audio and audiovisual content to end-users), they clearly fall within the scope of application of the Broadcasting Communication and therefore Member States have a wide degree of discretion, in accordance with the Amsterdam Protocol and the Broadcasting Communication, in defining the services in question as SGEIs.

However, with regard to YLE's activities as provider of online text-based journalistic content, it was concluded in the previous section that they do not constitute broadcasting activities. Hence, they should not be assessed under the lenient regime provided for under the Broadcasting Communication, but instead under the normal SGEI rules flowing from Article 106(2) TFEU.

It is recalled that under Article 106(2) TFEU, it must be proven that there is a need to supply the service in question as a public service. Such need shall be shown by a lack of private supply of such service on market conditions.⁵¹ *Thus, it is not acceptable to designate a service as an SGEI if it is already provided under conditions, such as price, objective quality characteristics, continuity and access to the service, by undertakings operating under normal market conditions.*⁵²

*It is the Member State which carries this burden of proof.*⁵³ Thus, in the present case, it is not for the Complainant or the European Commission to prove that there is no market failure. Rather, it is for the State to prove that such a market failure does exist. It is submitted that such evidence cannot be provided by the State in the present case.

In this context, it is essential to note that there exists a significant supply of online text-based journalistic content in terms of both local, regional and national newspapers as well as magazines published by commercial operators in Finland.

According to a recent study published by the Finnish Prime Minister's Office, there are currently some 200 printed newspapers published in Finland. Of these one quarter can be considered dailies, published between 4 and 7 times a week.⁵⁴ If the dailies' overall circulation is compared to the amount of the total population, Finland ranks as the country with the 3rd highest daily newspaper circulation figure per capita in the world. Almost all of these newspapers also operate a website (in some cases also a mobile application), through which they offer consumers a substantial amount of online text-based journalistic content either for free or against a reasonable subscription fee.

With respect to the general availability of online text-based journalistic content produced by commercial operators on the Finnish market, it should be noted that several Finnish dailies are financed through advertising revenue and therefore do not require the consumer to pay a subscription fee in order to get a full access to the daily's online content. This can be illustrated inter alia with the following examples:

- Both of Finland's most popular tabloids, *Ilta-Sanomat* and *Ilta-lehti*, do not have subscription fees and a majority of their content can be accessed by consumers free of charge.
- *Hufvudstadsbladet*, Finland's largest daily for the Swedish speaking language minority, is financed by advertising revenue and offers its content to the consumers free of charge.
- The commercial TV channel *MTV3* publishes online a significant amount of text-based journalistic content that can be accessed by the consumers free of charge.

With respect to Finnish newspapers that do charge a subscription fee for (full) access to their online services, the subscription fee can in general be considered to be modest and not constituting an obstacle for the general public for accessing text-based journalistic content. This can be illustrated with the following examples:

⁵¹ Judgment in the Case T-454/13, *SNCM v Commission*, (2017), para 133.

⁵² SGEI Communication, para 48.

⁵³ Judgment in the Case T-454/13, *SNCM v Commission*, (2017), para 133.

⁵⁴ *Current state and future outlook of the Finnish media market*, Prime Minister's Office Finland, 24.11.2016, p. 71.

- Finland's largest daily newspaper *Helsingin Sanomat* currently offers a Finnish household access to all its online services for a monthly price of EUR 11.33 - less than 0.3 EUR per day.⁵⁵ By paying the subscription price in question, the consumer can access all the online content offered by *Helsingin Sanomat*, including its archive, a mobile application as well as the online version of the printed newspaper.
- *Aamulehti*, a regional daily newspaper published in Finland in the Tampere region, offers consumers' a 3-month online subscription for the price of EUR 29, less than EUR 10 per month.⁵⁶
- *Turun Sanomat*, a regional daily newspaper published in Finland in the Turku region, offers its consumers access to Turun Sanomat's online journalistic content for the monthly price of EUR 7,90.⁵⁷

Furthermore, most of the newspapers that fund a part of their operations with subscription fees do in fact offer consumers the possibility to access each day / week a limited amount of articles completely free of charge.

*The significant private supply of text-based journalistic content (both in print and online form) is evidenced also by the fact that, when compared to most other western countries, Finnish newspapers are actually read by an exceptionally high share of the entire Finnish adult population on a weekly basis. This is evidenced by the results of the latest (2016) study by the Reuters Institute.*⁵⁸

- In 2016, 73 % of the entire Finnish adult population had accessed news via printed newspapers during the last week. Furthermore, 85 % of the population had accessed news via online newspapers during the last week.
- In 2016, 94 % of the entire Finnish adult population had accessed news either via printed newspapers or online newspapers during the last week.
- Finnish newspapers' content reaches weekly the highest share of the entire adult population in any Member State reviewed in the Reuters Institute's study – and is in fact only exceeded by one country in the world reviewed in the study (i.e. Turkey).

The results described above clearly show that an overwhelming majority of Finnish consumers already has access to text-based journalistic content provided by the newspaper publishers active on the Finnish market. This observation applies to Finnish consumers regardless of their age, as shown by the results of the Reuters Institute study in 2015⁵⁹:

- In 2015, the share of the Finnish adult population that had accessed news either via printed newspapers or online newspapers during the last week varied between 92 – 94 % across different age groups.
- Even of the Finnish population aged 18-24 years, 92 % had accessed news either via an online newspaper or printed newspaper during the last week. In the age group in question, 82 % had accessed news via an online newspaper and 70 % through a printed newspaper.

⁵⁵ See Helsingin Sanomat's website at http://www.hs.fi/tilaa/?ref=nosto_hslukuokeusnavi.

⁵⁶ See Aamulehti's website at <https://www.aamulehti.fi/tilaa/>.

⁵⁷ See Turun Sanomat's website at <https://tilaa.ts.fi/>.

⁵⁸ *Uutismedia verkossa 2016*. Reuters Institute Digital News Report – Suomen maaraortti, p. 9.

⁵⁹ See relevant statistics on the website of the Finnish Newspapers Association, available at <https://www.sanomalehdet.fi/sanomalehtitieto/median-k%C3%A4ytt%C3%B6>.

Consequently, it would appear that nearly the entire Finnish adult population regardless of age or social class already has access to text-based journalistic content offered by Finnish private newspapers on market terms.

The same applies also to the offering of text-based journalistic content dealing with the matters of a given municipality or region in Finland. With the exception of certain national newspapers, most Finnish newspapers focus their news coverage on the matters of a given region or city/municipality. As an example, there are currently approximately 150 local newspapers being published in Finland. As stated already above, nearly all of these newspapers also provide text-based online content either for free or against a moderate subscription fee. In addition, there are approximately 55 municipal newspapers published in Finland that are distributed to each Finnish household free of charge.

The provision of text-based journalistic content as an SGEI by YLE cannot therefore be considered necessary in order to provide the general public access to local and regional text-based journalistic content, as a substantial amount of such content is already made available by commercial operators on the Finnish market.

In the light of the above, it can be concluded that the text-based journalistic content already provided by commercial operators active in Finland reaches almost the entire Finnish population regardless of age or social class. The same observation holds with respect to the provision of local and regional text-based journalistic content. Text-based journalistic content produced by commercial operators is within the reach of the entire Finnish adult population either for free or against a reasonable fee.

Based on the above considerations, we fail to see how the State – or YLE for that matter – can prove to the Commission that a lack of private supply of text-based journalistic content can be observed on the Finnish market for such content. *Therefore, the provision of such content by YLE cannot be deemed an SGEI and therefore cannot be declared compatible with the internal market under Article 106(2) TFEU.*

4.2.2.4 The online provision of text-based journalistic has not been clearly defined as an SGEI nor entrusted to YLE

For the reasons discussed above in Section 4.2.2.3, the provision of text-based online content by YLE cannot be deemed to constitute an SGEI. However, this is not the only element preventing the State from successfully invoking Article 106(2) TFEU with respect to the provision of text-based journalistic content by YLE.

As noted already above, in order for a measure to benefit from the derogation included in Article 106(2) TFEU, it is necessary that the service in question must be an SGEI and clearly defined as such by the Member State. The clear definition of the service as an SGEI implies that the tasks to be fulfilled by the undertaking to which the SGEI is entrusted need to be determined in detail.

Furthermore, the undertaking in question must be explicitly entrusted by the Member State with the provision of such service.⁶⁰

It should be noted that the online provision of text-based journalistic content has not been clearly defined as an SGEI nor explicitly entrusted to YLE by the applicable Finnish legislation (i.e. the Act). In this regard it is notable, that in many EU Member States the governments and the public service broadcasters enter into an agreement or other binding legal instrument in force for a limited time period, in which the public service obligations of the broadcasting company are clearly defined and

⁶⁰ See judgment in the Case 172/80 *Zuechner*.

explicitly entrusted to the broadcasting company. However, this is not the case in Finland, where the (unclear) definition of YLE's public service remit is in force for an indefinite period without review.

In Section 7 of the Act, YLE is entrusted with the provision of a versatile and comprehensive television and radio programming with the related additional and extra services for all citizens under equal conditions. Such and other content services related to public service may be provided in public communications networks nationally and regionally. Furthermore, the Section includes a seven-point list of qualitative attributes that should be taken into account by YLE in its programming. However, the list of qualitative attributes describing the public service remit in the Act is according to its wording not exhaustive and applies only to programming (i.e. not online services).

Considering the above, it is evident that the State has not clearly defined YLE's public service remit as encompassing the online provision of text-based journalistic content as an SGEI nor has the State explicitly entrusted YLE with the provision of such services, as required under Article 106(2) TFEU.

Instead, YLE's public service remit merely implies that YLE may offer such services (in addition to other "content services"), provided that they are related to public service. As a consequence of the unclear definition of the SGEI, national authorities are in practice unable to monitor whether the services defined as SGEIs are even actually supplied by YLE.

Furthermore, from the private market operators' point of view, there is no predictability as regards the YLE's future behaviour on the market as a result of the unclear definition of the tasks entrusted to it. Without predictability, investments into new services become highly uncertain and in many cases impossible.

4.2.2.5 YLE's online provision of text-based journalistic content produces disproportionate distortive effects on competition

In assessing whether YLE's significant online provision of text-based journalistic content can be considered appropriate within the legal framework of Article 106(2) TFEU, it is also necessary to take into account *the significant distortive effects on competition produced by the offering of such content as an SGEI by YLE.*

In point 56 of the 2012 SGEI Communication, the Commission states that

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

All of those conditions are satisfied in the present case:

1. YLE was appointed as SGEI provider by the State without a competitive selection procedure in a non-reserved market.

2. The text-based journalistic content published online by YLE *competes directly* with similar content made available by commercial operators, namely Finnish newspaper publishers.
3. YLE offers its online text-based journalistic content for free, which is – needless to say – much below the costs of its competitors, which depend on either advertising revenue and/or subscription fees to stay in the market.
4. It is clear that that there is no need in the market for granting aid to YLE related to its online provision of text-based journalistic content, for which reason there is an obvious alternative to granting public service funding to YLE for such activity, i.e. granting no aid at all.

The disproportionate distortions of competition caused by YLE's substantial online offering of text-based journalistic content are clearly evident from the results of an online survey conducted by the Complainant and targeted at the CEOs/commercial managers of the most important Finnish newspapers:

- 11/14 of the respondents considered YLE as their newspaper's primary competitor in online news services. All the respondents named YLE as one of their three most important competitors with respect to such services.
- 13/14 of the respondents considered that YLE's online news offering had either significantly or somewhat reduced the number of visitors on their newspaper's website.
- 12/14 of respondents considered that YLE's offering of online news had significantly or somewhat reduced their subscribers' willingness to pay for their respective newspaper's online news offering.
- 12/14 respondents considered that YLE's online news offering had led to decreasing advertising revenues for their newspapers, mainly because of reduced numbers of visitors on the respective newspapers' websites.
- All the respondents argued that the fact that YLE offered its services free of charge constituted a significant competitive advantage to YLE.
- 13/14 of the respondents also stated YLE's superior resources (e.g. in terms of the fixed public funding enjoyed by YLE and the editorial resources made possible by such funding) as additional competitive advantages enjoyed by YLE in comparison to its commercial rivals.
- All of the respondents considered that YLE's investments in online services had increased either significantly or somewhat after the adoption of the YLE tax in 2013
- 7/14 of the respondents indicated that YLE's actions had reduced their willingness to make investments in new online services or to develop existing services.

Considering the results of the survey targeted at market participants, briefly summarized above, it seems evident that YLE's substantial online offering of text-based journalistic content affects the development of trade and competition to an extent contrary to the interests of the Community.

The distortions of competition arising from YLE's activities should furthermore be assessed against the general transition of the media market that is taking place in Finland as well as globally, as more and more readers access their newspapers via online channels. This transition is evidenced by the fact that printed newspapers reach less readers than before.

For example, in 2012 printed newspapers reached 2.5 million readers, whereas in 2014 the figure had dropped to 2.2 million readers (a decrease of 7 %).⁶¹ The change in consumers' behaviour is evidenced also by the recent Reuters Institute's study, which shows that for 46 % of Finns, online services already constitute the primary channel for accessing news, making these the overall primary news channel for Finns.⁶²

This change in readers' behaviour has stressed the newspaper publishers' need to invent new business models especially when it comes to the online publishing of text-based journalistic content. To remain on the market, newspaper publishers need to be able to successfully migrate their existing readers of printed newspapers to their online services in order to generate either subscription fees or advertising revenue from these new services. Furthermore, private newspapers are also facing increasing competition for advertising revenue from new actors on the market for such revenue, such as *Facebook* and *Google*.

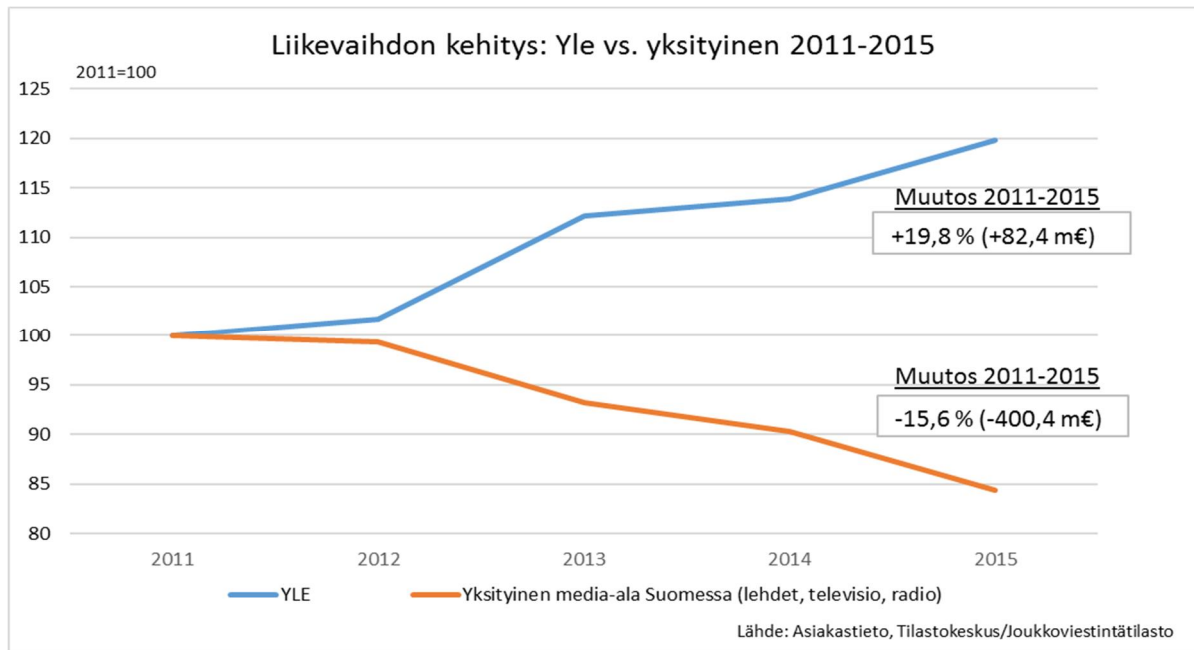
The general transformation of the market therefore poses significant challenges to private newspaper publishers' business models. For purposes of this complaint, it is however crucial to note that *a substantial online offering of text-based journalistic content by a public service broadcaster directly competing with the content produced by commercial operators will inevitably significantly reduce the private newspaper publishers' ability to attract consumers to their online services*. This is the case especially with respect to YLE, which offers online a vast amount of text-based journalistic content that is unrelated to YLE's broadcasting activities. In the long run, such behaviour by YLE is highly likely to lead to a reduction of media pluralism in Finland.

A comparison of the private media's and YLE's financial resources is revealing in this respect. The following graph illustrates the development of YLE's and the private media's total turnover from 2011 onwards (indexed to the 2011 level). The blue line illustrates the development of the annual turnover of YLE, whereas the red line illustrates the annual turnover of the entire media industry in Finland (including newspapers, radio and television). As illustrated by the graph, whereas the annual turnover of the private media industry declined by some MEUR 400 between the years 2011 and 2015, the annual turnover of YLE actually grew at the same time by more than MEUR 80.

⁶¹ *Current state and future outlook of the Finnish media market*, Prime Minister's Office Finland, 24.11.2016, p. 71.

⁶² *Utismedia verkossa 2016*. Reuters Institute Digital News Report – Suomen maaraaportti, p. 3-5.

Figure 3: The development of turnover for YLE and the private media between 2011-2015



The actual harmful effects of YLE's provision of a substantial amount of text-based journalistic online content from the point of view of Finnish private newspapers can be summarized as follows:

1. As a result of YLE's substantial online offering of text-based journalistic content, less traffic is directed to the private newspapers' online services. As a result of reduced traffic on their online services, private newspapers encounter difficulties in generating advertisement revenues from such services.
2. Private newspapers will in the future have significant difficulties to remain on the market, as private newspapers are not able to charge appropriate subscription fees for their online services. The ability to generate subscription fees is becoming increasingly crucial given that sales from printed newspapers are declining. It is important to note, that online subscription fees are already extremely low in Finland.
3. As a result of its significant and stable publicly funded resources, YLE is able to invest heavily both in terms of technology and human resources in the development of its online services. However, due to declining advertising revenues and subscription fees commercial operators do not have similar resources at their disposal.
4. Furthermore, YLE's significant investments in the online provision of text-based journalistic content reduces the private newspapers' incentives to undertake new investments in innovative new services in this field, as such investments may prove to be unprofitable.
5. YLE is also itself actively producing and publishing content on different social media platforms. The publishing of YLE's content on various social media platforms has a negative impact on commercial operators' ability to compete with multinational operators of social media platforms on the market for advertising revenue.
6. Consequently, YLE's substantial offering of text-based journalistic online content will in the long run affect not only the quantity but also the quality of such content available on the Finnish market.

Based on all the relevant factors discussed above, it can be concluded that the substantial online provision of text-based journalistic content as an SGEI by YLE leads to significant distortions of competition on the market for such content in Finland. The substantial provision of such content by YLE decreases the commercial market operators' ability to compete profitably on a market which is characterized by rapidly decreasing subscription fees from printed newspapers as well as increasing competition for advertising revenue caused by new, multinational companies such as Facebook and Google.

4.3 The current regulation of YLE's activities does not comply with the requirements set out in the Broadcasting Communication

4.3.1 General

The online provision of text-based journalistic content by YLE does not fall within the scope of application of the Broadcasting Communication, as the provision of such content by YLE cannot be considered as being ancillary in nature to the broadcasting activities carried out by YLE on television or radio. Instead, the online provision of text-based journalistic content by YLE constitutes an independent service that is in essence identical to the services already provided on the market by Finnish newspaper publishers. Consequently, whether the public compensation for the production of such content can be considered compatible with the internal market pursuant to Article 106(2) TFEU should be primarily assessed in accordance with the general SGEI framework.

Should the Commission, however, consider that YLE's online provision of text-based journalistic content falls within the scope of application of the Broadcasting Communication, it is essential to note that the current national regulation of YLE's activities does not comply with the requirements set out in the Broadcasting Communication. This is mainly due to the following reasons:

1. YLE's public service remit is overly broad and not specified by a proper prior evaluation procedure (Section 4.3.2)
2. The supervision of YLE's activities is not effectively independent (Section 4.3.3)

4.3.2 YLE's public service remit is overly broad and not specified by a proper prior evaluation procedure

The Commission has noted that the definition of the public service mandate falls as a general rule within the competence of the Member States. However, the Commission has noted that the definition of the public service mandate by the Member States should be as precise as possible. *It should leave no doubt as to whether a certain activity performed by the entrusted operator is intended by the Member State to be included in the public service remit or not.* Without a clear and precise definition of the obligations imposed upon the public service broadcaster, the Commission would not be able to carry out its tasks under Article 106(2) TFEU and, therefore, could not grant any exemption under that provision. Furthermore, the Commission has pointed out that *the clear identification of the activities covered by the public service remit is also important for non-public service operators, so that they can plan their activities.* Moreover, the terms of the public service remit should be sufficiently precise, so that Member States' authorities can effectively monitor compliance.⁶³

However, the Commission has noted that given the specific nature of the broadcasting sector, and the need to safeguard the editorial independence of the public service broadcasters, a qualitative definition entrusting a given broadcaster with the obligation to provide a wide range of programming

⁶³ Broadcasting Communication, paras 45-46.

and a balanced and varied broadcasting offer is generally considered, in view of the interpretative provisions of the Amsterdam Protocol, legitimate under Article 106(2) TFEU.⁶⁴

As regards the definition of the public service in the broadcasting sector, the role of the Commission is limited *to checking for manifest errors*. The definition of the public service remit would be in manifest error if it included activities that could not reasonably be considered to meet — in the wording of the Amsterdam Protocol — the democratic, social and cultural needs of each society. A manifest error could occur where state aid is used to finance activities *which do not bring added value in terms of serving the social, democratic and cultural needs of society*.⁶⁵

In Section 7 of the Act, YLE is entrusted with the provision of a versatile and comprehensive television and radio programming with the related additional and extra services for all citizens under equal conditions. Such and other content services related to public service may be provided in public communications networks nationally and regionally. Furthermore, the Section includes a seven-point list of qualitative attributes that should be taken into account by YLE in its programming.

When analyzing YLE's public service remit in light of the above considerations, it should be noted that the current formulation of the public service remit provides YLE in practice an unlimited freedom to offer not only (i) television and radio services with the related additional and extra services but also (ii) other content services. Such services can be provided on all public communications networks nationally and regionally. Furthermore, the list of qualitative attributes describing the public service remit in the Act is according to its wording not exhaustive and applies only to programming (i.e. not online services).

Consequently, YLE's public service remit cannot even remotely be considered "clear and precise" within the meaning of the Broadcasting Communication and the Commission's decisional practice. *YLE's current broadly formulated public service remit provides YLE an unlimited freedom to engage for example in online press-like activities, the provision of which the Commission has in its previous decisional practice found problematic from the point of view of satisfying the social, democratic and cultural needs of society*.⁶⁶ Furthermore, and as discussed at length already above, there exists no lack of private supply for such services on the Finnish market that could justify their provision as an SGEI by YLE.

Furthermore, it is also important to draw attention to the impact on predictability that such a vague definition of YLE's public service remit has from the third parties' point of view, the importance of which is outlined by the Commission in its RTBF decision:

*En accordant une telle latitude à la RTBF pour offrir des services de nouveaux médias assez vaguement définis, et compte tenu du manque de prévisibilité pour les parties tierces, d'autres opérateurs du marché risquent d'être dissuadés de développer et d'offrir de tels services de nouveaux médias. Une mission de service public clairement définie est donc indispensable pour trouver un équilibre entre la prestation de services d'intérêt économique général et une égalité de traitement entre les opérateurs publics et privés, en veillant ainsi à ce que le financement d'activités des nouveaux médias n'aille pas à l'encontre de l'intérêt communautaire.*⁶⁷

⁶⁴ Judgment in the Case T-442/03, *SIC v Commission*, (2008), paragraph 201, Judgement in joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 *TV2/Denmark v Commission* (2008) at 122 to 124.

⁶⁵ Broadcasting Communication, para 48.

⁶⁶ See e.g. case E2/2008 (*State funding for Austrian public service broadcaster ORF*), para 144.

⁶⁷ Case SA.32635 (*Financement de la RTBF Belgique*), para 186.

As stated by the Commission in its RTBF decision, such latitude granted to a public service broadcaster may also have a negative effect on media pluralism:

*Comme généralement pour le services de nouveaux médias, cette définition laisse une grande latitude à la RTBF quant au contenu de ses services en ligne, alors qu'une prévisibilité et définition claire et précise du mandat concernant les services en ligne (et en particulier ses services écrits en ligne) sont nécessaires pour permettre aux parties tierces, tels que les éditeurs de journaux, de mettre en place ou d'adapter un modèle économique viable sur internet et d'éviter qu'un développement incontrôlé de l'offre de nouveaux services en ligne par le radiodiffuseur public avec des fonds publics puisse menacer la viabilité de ces éditeurs et dès lors constituer un risque pour le pluralisme des médias. Une définition plus claire du mandat de la RTBF en ce qui concerne les services (écrits) en ligne est donc nécessaire.*⁶⁸

From the third parties' perspective, the current broad public service remit of YLE, as set out in the Act, leads to significant uncertainty as regards the future behaviour of YLE on the markets for different online services, such as the online offering of text-based journalistic content similar to the content already offered by private operators. This uncertainty has an impact on, *inter alia*, the private operators' willingness to undertake investments in new online services. *Consequently, the uncertainty created by YLE's overly broad public service remit has a negative impact on the development of the Finnish media market as a whole.*

In its decisional practice, the Commission has noted that it considers that the public service remit can be further specified in the framework of a prior evaluation process. Such a process could ensure a clearly defined public service remit to strike a balance between the provision of services in the general economic interest and a level playing field between public and private operators, thus ensuring that the financing of in particular new media activities does not run counter to the interest of the Union.⁶⁹

To this end, the Commission has in the Broadcasting Communication required Member States to implement a prior evaluation procedure on whether significant new audiovisual services envisaged by public service broadcasters meet the requirements of the Amsterdam Protocol, i.e. whether they serve the democratic, social and cultural needs of the society. The Commission has stated that Member States shall be free to determine, taking into account the characteristics and the evolution of the broadcasting market, as well as the range of services already offered by the public service broadcaster, what shall qualify as a 'significant new service'.⁷⁰

However, it should be noted that the Commission has in its recent RTBF decision argued that exemptions from the prior evaluation procedure need to be determined based on objective and precise criteria. If the exemptions are not based on such criteria, they may lead to excessive exclusions from the applicability of the prior evaluation procedure.⁷¹

Finland has introduced a prior evaluation procedure in the applicable legislation (Section 6a of the Act). The evaluation procedure has to date been carried out four times, most recently in 2017 with respect to the reform of YLE's online local news offering and the personalization of YLE's content. *None of the prior evaluation procedures so far conducted have led to the dismissal or curtailment of a given service proposed by YLE.*

⁶⁸ Ibid., para 194.

⁶⁹ See e.g case E5/2005 (*Yearly financing of Dutch public broadcasters*), para 153.

⁷⁰ Broadcasting Communication, para 87.

⁷¹ Commission decision SA.32635, issued on 7 May 2014, para 219.

As YLE's online provision of text-based journalistic content does not constitute a broadcasting activity within the meaning of the Broadcasting Communication and therefore does not fall within the scope of the said Communication, whether or not a prior evaluation procedure has been carried out with respect to such services is irrelevant for their assessment under Article 106(2) TFEU.

However, should the Commission nevertheless consider that these services do in fact fall under the scope of application of the Broadcasting Communication, it should be noted that YLE has never carried out a prior evaluation procedure with respect to its significant online provision of text-based journalistic content. This is the case even though there can be no question as to the significance of the service in question and even though it constitutes a service that is clearly distinct from YLE's traditional broadcasting activities, instead of being ancillary to the services in question. The same applies also to the *YLE NewsWatch* application, with respect to which no prior evaluation procedure has ever been carried out.

It can therefore be concluded, that the prior evaluation procedure as enshrined in the Act and put into practice by YLE's Administrative Council cannot be considered as a sufficient tool for specifying YLE's overly broad public service remit.

4.3.3 The supervision of YLE's activities is not effectively independent

According to the Broadcasting Communication, the public service remit should be entrusted to one or more undertakings by means of an official act. Furthermore, the Commission requires that an appropriate authority or appointed body monitors the application of the formal agreement between the state and the entrusted undertaking. Such supervision needs to be carried out by a body effectively independent from the management of the public service broadcaster, which has the powers and the necessary capacity and resources to carry out supervision regularly, and which leads to the imposition of appropriate remedies insofar as it is necessary to ensure respect of the public service obligations.⁷²

In the Act, YLE's Administrative Council is nominated as the body responsible for monitoring YLE's activities as regards their compliance with the public service remit. YLE's Administrative Council is an organ of a limited liability existing under Finnish law, the general duties of which are set out in the Finnish Companies Act (624/2006, as amended; the **Companies Act**).

According to Section 1(3) of the Act, the Companies Act is applied to YLE as well, with the exceptions provided for in the Act. According to Chapter 6 Section 1 of the Companies Act, a company may have an administrative council. If a company has an administrative council, it is deemed to form a part of the management of the company. Furthermore, according to Chapter 1 Section 8 of the Companies Act, the management of a company is under the legal obligation to act in due care and to promote the interests of the company. This legal obligation applies to YLE's Administrative Council as well.

Therefore, YLE's Administrative Council cannot be regarded as being "effectively independent" from YLE's management, as the Council itself should in fact be considered to form a part of YLE's management. Under the Act (as currently in force), the Administrative Council is, for example, responsible for deciding on issues concerning the considerable restriction or expansion of the activities or significant changes in the organization of YLE and deciding on YLE's economical and operational guidelines. Furthermore, after the most recent amendment to the Act, YLE's Administrative Council will in the future decide on YLE's strategy⁷³.

⁷² Broadcasting Communication, para 54.

⁷³ HE 13/2017 vp.

It is also noteworthy that in the Government Bill proposing the adoption of the original Act in 1993 the Administrative Council was entrusted with specifying and indeed also broadening the scope of activities that should be considered to fall within YLE's public service remit.⁷⁴ In this respect the Administrative Council would seem to perform a double role, as it is at the same time entrusted with defining YLE's public service remit as well as supervising that YLE complies with said remit.

This double role played by YLE's Administrative Council is acknowledged also by YLE itself. In this respect, reference can for example be made to a recent statement by YLE's Publishing Director Ismo Silvo. In his statement, Mr. Silvo argued that "*the Administrative Council nominated by the Parliament has both the roles of acting as the party ordering the public service and evaluating and supervising its implementation – all in one hands*" (English translation).⁷⁵ However, it is highly questionable whether the Administrative Council is, as a result of this double role, able to appropriately perform the task of supervising YLE's compliance with its public service remit.

Furthermore, it can be argued that the supervision of YLE complying with its public service remit is rendered *de facto* impossible by YLE's overly broad and unclear public service remit. The difficulty of effectively supervising YLE's compliance with the public service remit has been noted also by the Finnish Parliament's Transport and Communication's Committee, which has in its report on YLE's annual report to the Finnish Parliament for 2014 stated the following (English translation):

*It has been brought to the Committee's attention that, to an extent because of the broad definition of the public service remit, it is difficult to assess on the basis of YLE's annual report how YLE has performed the public service task entrusted to it.*⁷⁶

Taking into account the broad definition of YLE's public service remit discussed already above in Section 4.3.2, the concern expressed by the Committee is indeed valid. This concern applies especially to the content published online by YLE, to which the qualitative attributes set out in Section 7 the Act do not apply to, as per the wording of the provision in question. YLE's current public service remit does in fact not contain any concrete attributes, against which the actual online services produced by YLE could be evaluated.

It can therefore be concluded that the current supervision of YLE by its Administrative Council does not comply with the requirements set out in Article 106(2) TFEU and the Broadcasting Communication.

4.4 The public funding for YLE's online provision of text-based journalistic content constitutes new aid

Pursuant to Article 1(b)(i) of the Procedural Regulation, existing aid means aid which existed prior to the entry into force of the TFEU in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the TFEU in the respective Member States. In the case of Finland, state aid measures introduced before the entry into force of the EEA Agreement on 1 January 1994 are regarded as existing aid.⁷⁷

Consequently, YLE's public funding scheme, as in place at the time of Finland's accession to the EU, has been considered by the Commission to constitute existing aid and therefore has not been notified to the Commission. YLE's funding scheme was significantly revised in 2012, when the license fee based system was replaced with a tax based system. It is the Complainant's understanding that YLE's

⁷⁴ HE 124/1993 vp.

⁷⁵ See the article on YLE's website, available at <http://yle.fi/aihe/artikkeli/2017/05/11/ismo-silvo-yle-politiikka-ja-poliitikot>.

⁷⁶ See the committee report on the Parliament's website, available at https://www.eduskunta.fi/FI/vaski/Mietinto/Documents/LiVM_5+2015.pdf.

⁷⁷ Broadcasting Communication, paras 25-27.

investments to its online services have increased significantly at least after 2012, i.e. after the revision of YLE funding scheme.

According to settled case law, not every alteration to an existing aid scheme should be regarded as changing an existing aid into a new aid. As stated by the Court of First Instance, “*it is only where the alteration affects the actual substance of the original scheme that the latter is transformed into a new aid scheme. There can be no question of such a substantive alteration where the new element is clearly severable from the initial scheme*”.⁷⁸

In light of the above considerations, in its decision-making practice the Commission has generally examined (a) whether the original financing regime for public service broadcasters is existing aid; (b) whether subsequent modifications affect the actual substance of the original measure (i.e. the nature of the advantage or the source of financing, the purpose of the aid, the beneficiaries or the scope of activities of the beneficiaries) or whether these modifications are rather of a purely formal or administrative nature; and (c) in case subsequent modifications are substantial, whether they are severable from the original measure, in which case they can be assessed separately, or whether they are not severable from the original measure so that the original measure is as a whole transformed into a new aid.⁷⁹

With respect to new online services, the Commission has in its decisional practice repeatedly argued that as long as new online services are closely linked to the broadcasting programme, the content is part of the public service remit and the budget is not increased substantially, their financing should be regarded as existing aid.⁸⁰ In this respect, reference can be made for example to the Commission’s decision regarding the Austrian public broadcaster ORF, in which the Commission considered the funding for ORF’s online services not to consist a fundamental modification to the existing public service remit on the following grounds (emphasis added):

*The provision of online services (and teletext) connected with the programmes, which according to the ORF Law serve to achieve the programme remit and are connected with the broadcasting programme, has a close connection in any event, according to the wording, with ORF’s traditional programme remit and appears restricted to supporting functions. In line with its case practice, the Commission therefore takes the view that the online services of ORF do not modify the existing public service remit to a fundamental extent within the meaning of the Gibraltar Jurisprudence.*⁸¹

As noted earlier, YLE’s public service remit is very broad and effectively qualitative in scope. However, as has been noted above, a clear majority of the text-based journalistic content offered online by YLE is unrelated to YLE’s broadcasting programme and in fact constitutes a new service that should be considered distinct from YLE’s broadcasting activities as conducted on TV and radio networks. As such content was not being published at the time of Finland’s accession to the EU in 1995, the public funding for the production and publishing of such content cannot be considered as forming part of the existing aid that falls outside the scope of the need to notify the aid to the European Commission.

As YLE’s online provision of text-based journalistic content does not constitute a broadcasting activity and is not ancillary to such activities, the public funding for the provision of such content should be considered severable from YLE’s general funding scheme, i.e. the public funding for YLE’s broadcasting activities and services ancillary to such activities.

⁷⁸ Joined Cases T-195/01 and T-207/01, (2002) ECR II-2309.

⁷⁹ Broadcasting Communication, para 31.

⁸⁰ See Werner & Verouden (eds., 2017) p. 729 and case law referred to therein.

⁸¹ Case E2/2008, *Financing of the Austrian public service broadcaster ORF*, decision issued on 28.10.2009, para 130.

Therefore, the public funding for YLE's online provision of text-based journalistic content should be considered as new aid within the meaning of the Procedural Regulation and subject to the obligation to notify said aid to the Commission. However, the State has not notified said aid to the Commission before implementing it.

4.5 The incompatible and unlawful state aid for YLE's text-based online content should be recovered

According to Article 16(1) of the Procedural Regulation, where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary.

The funding for YLE's online provision of text-based journalistic content should be considered as new aid that should have been notified to the Commission before its introduction. Finland has not notified said aid to the Commission before implementing it, and it is therefore unlawful aid (see Section 4.4).

Furthermore, such funding cannot be considered compatible with the internal market pursuant to Article 106(2) TFEU (see Section 4.2.2).

Consequently, the Complainant considers that the State should be ordered by the Commission to recover the incompatible and unlawful state aid granted by the State to YLE for the production and publishing of online text-based journalistic content.

YLE does not report publicly the share of its turnover that is used for the production and publishing of text-based journalistic content. However, by using as a proxy the cost structure of YLE's private competitors offering online a substantially similar selection of text-based journalistic content, the Complainant has estimated YLE's costs for producing such content. *According to the Complainant's conservative estimate, YLE's direct (incremental) costs related to the online provision of text-based journalistic content in 2016 amounted to a total of at least MEUR 35.* This estimate is highly conservative as it does not include the fixed common costs that are shared with YLE's broadcasting activities which are also beneficial to YLE's online provision of text-based journalistic content.

The Complainant considers that the recovery should encompass the public funding for YLE's online provision of text-based journalistic content from at least 2013 onwards, which marked the introduction of YLE's current funding scheme (the YLE tax) as well as the start of significant yearly increases in the turnover allocated by YLE for its online and mobile services and thereby also to the online provision of text-based journalistic content. On the basis of the information provided by the Finnish Authorities, it is for the Commission to provide a methodology for assessing the exact amount of state aid to be recovered.

Should the Commission not agree with the Complainant's understanding as regards the nature of the funding for YLE's provision of text-based journalistic content as new aid, the Complainant strongly urges the Commission to issue a recommendation for appropriate measures in accordance with Chapter VI (Articles 21 and 22) of the Procedural Regulation to ensure that the aid is discontinued with immediate effect.

4.6 Conclusion

YLE's online provision of the text-based journalistic does not constitute a *broadcasting activity* within the meaning of the Communication from the Commission on the application of State aid rules to public service broadcasting (the Broadcasting Communication). The public funding for YLE's online provision of text-based journalistic content should therefore be assessed in accordance with the general EU

legal framework for assessing services of general economic interest. As there is no market failure, the provision of text-based journalistic online content by YLE as a service of general economic interest cannot be considered appropriate.

YLE's provision of text-based journalistic content produces disproportionate distortive effects on competition on the Finnish media market. There are no grounds to distort in Finland or elsewhere in the European Union the long-standing balance between (print or online) newspapers (or other media) and the public broadcasting activities. On the contrary, without rapid intervention by the European Commission, the media pluralism and freedom is at great risk in Finland.

APPENDICES

- Appendix 1: Description of YLE's administration
- Appendix 2: An electronic copy of YLE's text-based journalistic content available online on 16 June 2017 (TO BE PROVIDED TO THE COMMISSION SEPARATELY ON A USB DRIVE)
- Appendix 3: Examples from YLE's text-based journalistic online content available on 16 June 2017 (TO BE PROVIDED TO THE COMMISSION SEPARATELY ON A USB DRIVE)
- Appendix 4: A quantitative assessment of YLE online