

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

NO. 573

12 APRIL 2019



**NOTICE TO PUBLISH THE DRAFT FINDINGS DOCUMENT ON
"INQUIRY INTO SUBSCRIPTION TELEVISION BROADCASTING
SERVICES"**

1. On 11 July 2016 the Authority published a notice of its intention to conduct an inquiry into the state of competition in subscription television broadcasting services in terms of section 4B of the ICASA Act¹ ("**the Inquiry**"). The Inquiry commenced in earnest on 13 July 2016, with a preliminary information gathering exercise on a voluntary basis through the publication of a questionnaire for interested stakeholders to complete.
2. Following the responses to the Questionnaire and internal research, the Authority published a Discussion Document on 25 August 2017, inviting stakeholders to respond thereto. Public hearings were held on 7 to 11 May 2018, following the receipt of written comments in response to the Discussion Document.

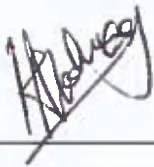
¹ The Initial Notice was corrected by an erratum published under GN 552 in *Government Gazette* 40256 of 7 September 2016.

3. The Authority requested supplementary information from some stakeholders during the hearings and such information was submitted at various times during the course of 2018.
4. The final supplementary information was received in November 2018 and the Authority then set out to develop this Draft Findings Document.
5. This Draft Findings Document is published in terms of section 4B of the ICASA Act, read with section 67(4) of the ECA, pursuant to an inquiry conducted by the Authority into the state of competition in subscription television broadcasting services in South Africa. The publication of this Draft Findings Document, follows a period of public consultations through clarification questions from stakeholders and responses to the Questionnaire, including written responses to the Discussion Document and public hearings. The Findings Document expresses the Authority's view and position on the issues raised, before a Final Findings Document is published.
6. During the course of the Inquiry, the Authority received various requests in terms of section 4D of the ICASA Act for treatment of specific information submitted by certain stakeholders as confidential.
7. The Authority considered the motivations advanced in support of such confidentiality requests and made determinations of confidential status in relation to those pieces of information.
8. Accordingly, where this Draft Findings Document refers to or relies upon such confidential information, the Authority has redacted or not disclosed the details of such information herein.
9. A copy of the Draft Finding Document will be made available on the Authority's website at <http://www.icasa.org.za> and in the Authority's

Library at No. 350 Witch-Hazel Avenue, Eco Point Office Park, Centurion between 09h00 and 16h00 Monday to Friday.

10. Written representations must be submitted to the Authority by no later than 16h00, 45 working days from date of publication and marked for attention: Ms Violet Molete.

11. Delivery Address: Block B, 350 Witch-Hazel Avenue Eco Point Office Park Centurion or email at vmolete@icasa.org.za or subscriptioninquiry@icasa.org.za Telephonic inquiries should be directed to 012 568 3715.



Dr. Keabetswe Modimoeng

Acting Chairperson

Date: 2 April 2019



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DRAFT FINDINGS DOCUMENT:

**Inquiry into Subscription Television Broadcasting
Services**

April 2019

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Abbreviations

Authority	The Independent Communications Authority of South Africa
BT	British Telecommunications
CPE	Customer Premises Equipment
DEOD	Digital Entertainment on Demand
DSAT	Digital Satellite
DTH	Direct to Home satellite service
DTT	Digital Terrestrial Transmission
DVB-H	Digital Video Broadcasting- Handheld
EC	European Commission
ECA	Electronic Communications Act, 36 of 2005
EPG	Electronic Programme Guide
EU	European Union
FSPTW	First Subscription Pay TV Window
IBA	Independent Broadcasting Authority
ICASA	Independent Communication Authority of South Africa
ICASA Act	Independent Communication Authority of South Africa Act, 13 of 2000
ICT	Information and Communication Technology
IPTV	Internet Protocol Television
ITA	Invitation to Apply
NAB	National Association of Broadcasters
NCC	National Consumer Commission
ODM	On Digital Media

OECD	Organization for Economic Cooperation and Development
Ofcom	Office of Communications
OTT	Over The Top
OVHD	Open View HD
PSL	Premier Soccer League
Questionnaire	The questionnaire distributed by the Authority and among interested parties and stakeholders on or about 13 July 2016
SABC	South African Broadcasting Corporation SOC Limited
SACF	South African Communications Forum
SEM	Socio-Economic Measure (a market segmentation tool)
SMP	Significant Market Power
SSNIP	Small but Significant Non-Transitory Increase in Price
TNT	Television Numerique Terrestre
UEFA	Union of European Football Associations
USAASA	Universal Service and Access Agency

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1. EXECUTIVE SUMMARY

1.1 Introduction

- 1.1.1 On 11 July 2016 the Independent Communications Authority of South Africa ("the Authority") published a notice of its intention to conduct an inquiry into the state of competition in subscription television broadcasting services ("the Inquiry") in terms of section 4B¹ of the Independent Communication Authority of South Africa Act, 13 of 2000 ("the ICASA Act"). The Inquiry commenced in earnest on 13 July 2016, with a preliminary information gathering exercise on a voluntary basis through the publication of a questionnaire for interested stakeholders to complete.
- 1.1.2 This Draft Findings Document is published in terms of section 4B of the ICASA Act, read with section 67(4) of the Electronic Communications Act, 36 of 2005 ("the ECA"), pursuant to an inquiry conducted by the Authority into the state of competition in subscription television broadcasting services in South Africa. The publication of this Draft Findings Document, follows a period of public consultations through clarification questions from stakeholders and responses to the Questionnaire, including written responses to the Discussion Document and public hearings. The Draft Findings Document expresses the Authority's view and position on the issues raised, before a Final Findings Document is published.
- 1.1.3 Should it be necessary or warranted, flowing from the Final Findings Document, to publish draft regulations, a separate process with its own public consultation schedule will be followed in terms of sections 4(4) to 4(6) read with 67 of the ECA. All interested and affected stakeholders will have an opportunity to participate fully in this process.
- 1.1.4 Following the responses to the Questionnaire and internal research, the Authority published a Discussion Document on 25 August 2017, inviting stakeholders to respond thereto. Public hearings were held on 7 to 11 May 2018, following the receipt of written comments in response to the Discussion

¹ The Initial Notice was corrected by an erratum published under GN 552 in *Government Gazette* 40256 of 7 September 2016.

Document. The Authority requested supplementary information from some stakeholders during the hearings and such information was submitted at various times during the course of 2018.

1.1.5 The last piece of information was received in November 2018 and the Authority then set out to develop this Draft Findings Document.

1.1.6 In furtherance of the above undertaking, the Authority commissioned an independent consumer survey in order to understand consumer behaviour with respect to television broadcasting and video-on-demand services, the results of which survey have been considered in defining the relevant markets.

1.1.7 During the course of the Inquiry, the Authority received various requests in terms of section 4D of the ICASA Act for treatment of specific information submitted by certain stakeholders as confidential.

1.1.8 The Authority considered the motivations advanced in support of such confidentiality requests and made determinations of confidential status in relation to those pieces of information.

1.1.9 Accordingly, where this Draft Findings Document refers to or relies upon such confidential information, the Authority has redacted or not disclosed the details of such information herein.

1.2 Recent and future developments that have an impact on broadcasting services

1.2.1 The Authority considered the advent of Overt the Top ("OTT") service providers, inclusive of various types of video-on-demand services and their impact on television broadcasting services.

1.2.2 The Authority found that OTTs are expanding in terms of the number of new entrants and the scale of operations, especially international video-on-demand service providers. It is important to recognize that there are a number of OTT service providers who have exited the market in the past 4 years or so, owing to sustainability challenges. What is undeniable though is that the entry of OTTs is changing the manner in which viewers consume content. Whilst the

majority of consumers still rely on the television set to watch content, there is a growing number of younger consumers who prefer to view online content, using mobile phones, tablets and laptops.

1.2.3 Despite this phenomenon, the Authority found that the impact of OTTs is still muted, given the relatively limited level of internet access, the high cost of data and low average internet speeds. The lack of access to local content and sports content also limits the rapid growth of OTTs in South Africa. As a result, OTTs are seen as an out of market constraint² on subscription television services.

1.2.4 Another development that is likely to impact on broadcasting services is the imminent full migration to digital broadcasting. There have been delays in the digital migration agenda. This has implications for competition in the sector, in the sense that incumbents are shielded from competition as the entry of new players gets delayed. The current policy of non-encryption means that digital terrestrial television services will have a minimal impact on satellite-based subscription television services.

1.3 Market definition

1.3.1 The Authority used the theoretical framework contained in the Guidelines on the Conduct of Market Enquiries as a basis for its market definition analysis. As will be set out in more detail below, most stakeholders agreed with the Authority's theoretical framework for market definition. Primary to the market definition theoretical framework is the use of the Small but Significant Non-Transitory Increase in Price ("SSNIP") test.

1.3.2 The Authority also considered, among other things, chains of substitution and the two-sided nature of broadcasting services. Where the Authority holds a different view to a stakeholder, the Authority has explained its position supported by relevant evidence subject to any confidentiality constraints in terms of section 4D of the ICASA Act.

² An out of market constraint is a product or service that does not belong in the relevant market but may be considered in a competition assessment.

- 1.3.3 In defining the relevant markets, over and above the use of the Small but Significant Non-Transitory Increase in Price ("SSNIP") test, the Authority took the following information and/or documents into account:
- Stakeholder responses to the Discussion Document and the Questionnaire that preceded it;
 - International and domestic case precedent, where relevant;
 - Research reports and articles;
 - Product characteristics;
 - Pricing behaviour and business models; and
 - The results of the consumer survey.
- 1.3.4 Central to market definition in the broadcasting and video-on-demand sectors is whether all types of content are substitutable. MultiChoice argues that the concept of premium content is obsolete and that given market developments there is no longer a distinction between premium content and other content.
- 1.3.5 Other stakeholders agree with the Authority that differences can be observed across different types of content. The Authority finds that viewers still attach particular value to different types of content. The Authority also finds that the windowing model in terms of which movies are released has the effect of reducing the value attached to movies that are released later in the window. By the same token, the Authority finds that certain live sporting events attract a lot of viewers. Therefore, the Authority makes a distinction between premium and non-premium content.
- 1.3.6 Market definition at the retail level is first assessed from the viewer's perspective and then from a supply-side perspective. Since the Authority's focal product for purposes of this inquiry is subscription television, this is the product on which the SSNIP test is applied. The Authority first considered substitution between subscription television services and free-to-air television services and found that there is asymmetric substitution from analogue-based free-to-air television services to basic-tier subscription television services but not the other way around.

- 1.3.7 This phenomenon is compounded by the Must Carry Regulations in terms of which subscription television viewers have access to free-to-air television services. The Authority is in the process of reviewing the Must Carry Regulations. On this basis, basic-tier subscription television services would belong in a different market to analogue-based free-to-air television services.
- 1.3.8 However, when consideration is given to satellite based free-to-air services, the Authority found that there is substitution in either direction. As a result, the Authority delineated a market comprising satellite-based free-to-air television services and basic tier subscription television services.
- 1.3.9 The Authority then considered substitution between subscription television services and OTT services. Owing to limited internet access, and relatively high data costs, differences in the windowing model and the limited availability of live sports content, the Authority found that OTTs and subscription television services belong in separate markets.
- 1.3.10 In the end the Authority defined the following relevant markets at the retail level:
- a market for the retail distribution of analogue based free-to-air television services in South Africa;
 - a market for the retail distribution of basic-tier subscription television services and satellite-based free-to-air television services in South Africa;
 - a market for the retail distribution of premium subscription television services in South Africa; and
 - a market for the retail distribution of video-on-demand services in South Africa.
 - The Authority did not deem it necessary to define a wholesale market for channel acquisition since the segmentation of the relevant markets for premium and basic tier channels is a function of content aggregation higher up the value chain.
 - The Authority then analysed the wholesale market for content acquisition. The Authority's analysis starts off by asking what a television broadcaster

or video-on-demand service provider would do if the price of a particular set of content increases by a margin of 5%-10%.

1.3.11 The Authority maintains its position that not all content is substitutable, and that there is not a single market for content. The Authority finds that there is a difference between premium and non-premium content. However, the Authority agrees that premium content is a fluid concept that is dependent on the circumstances prevailing at a particular point in time in a market and is specific to a geographical area, given the culture and preferences of the population at a specific point in time.

1.3.12 Therefore, rather than defining the concept, the Authority opted to identify what it considers to be premium content on the basis of the characteristics of premium content.

1.3.13 For purposes of this inquiry the Authority considers the following to be premium content: (a) Hollywood premium FSPTW movies and series; (b) major live soccer matches including Bafana Bafana, FIFA World Cup, PSL, EPL, UEFA, La Liga, Bundesliga, Ligue 1 and Serie A live soccer matches; (c) live rugby matches, including Rugby Championships, Super Rugby, World Rugby Sevens Series and the Currie Cup Premier Division and the Super 14; and (d) live cricket matches, including the IPL, T20 and test matches involving the Proteas. The Authority is satisfied that over the market review period of three years, the identified premium content will remain unchanged.

1.3.14 Therefore, taking into account (a) the SSNIP test, (b) characteristics of premium and non-premium content (c) responses to the Discussion Document; (d) internal research; and (e) case precedent, the Authority defined upstream markets (1) for the supply and acquisition of premium content for distribution in South Africa and (2) for the supply and acquisition of non-premium content for distribution in South Africa.

1.4 Assessing the effectiveness of competition

1.4.1 In assessing the effectiveness of competition section 67(4A) of the ECA is instructive in terms of what factors the Authority must consider. It states that the Authority must consider among other things (a) the non-transitory (structural, legal, and regulatory) entry barriers to the applicable markets or market segments and (b) the dynamic character and functioning of the markets or market segments, including (i) an assessment of relative market shares of the various licensees or providers of exempt services in the markets or market segments, and (ii) a forward looking assessment of the relative market power of the licensees in the markets or market segments.

1.4.2 The Authority used the guidance of section 67(4A) of the ECA and subjected each identified relevant market to an assessment. The Authority found ineffective competition in the following markets:

1.4.2.1 the market for the retail distribution of basic-tier subscription television services and satellite-based free-to-air television services in South Africa;

1.4.2.2 the market for the retail distribution of premium subscription television services in South Africa; and

1.4.2.3 the market for the wholesale acquisition of premium content for distribution in South Africa.

1.5 Identifying licensees with significant market power

1.5.1 Once an assessment of competition is done and where there is ineffective competition, the Authority is enjoined to identify players with significant market power upon whom licence terms and conditions may be imposed to remedy the ineffectiveness of competition.

1.5.2 In all the identified markets where there is ineffective competition the Authority found that MultiChoice possesses significant market power on the basis of high market shares and the nature of its vertical integration which the Authority considers to harm competition.

1.6 Imposition of licence terms and conditions

1.6.1 The Authority considers the following licence terms and conditions as appropriate to deal with the ineffective competition in the relevant markets:

1.6.1.1 Reducing contract duration and prohibiting automatic renewal of contracts – the Authority finds that competition becomes ineffective when a licensee with significant market power enters into exclusive contracts with a duration of five or more years. The Authority proposes to limit the duration of exclusive contracts entered into by a licensee with significant market power to three years.

1.6.1.2 The Authority further found instances where long term exclusive contracts were renewed without the rights owner going back to the market. In order to deal with this challenge, the Authority proposes to prohibit the automatic renewal of contracts entered into by a licensee with significant market power.

1.6.1.3 Rights splitting – this involves splitting content rights into packages and selling them to more than one distributor – The Authority finds that the current practice of allowing a ‘winner-takes-all’ outcome only serves to limit entry into the market.

1.6.1.4 Unbundling – Similar to rights splitting, unbundling allows rights to be held by more than a single distributor. The focus of unbundling is on the modes of distribution, that is, allowing rights to be held simultaneously by subscription, free-to-air or OTT service providers. Currently, MultiChoice holds the rights to all distribution platforms, thus limiting entry by other distributors. The Authority finds this to result in ineffective competition in the identified markets.

1.6.1.5 Wholesale must-offer – wholesale must-offer allows or obliges a licensee with significant market power that wins rights to offer them to downstream distributors on terms and conditions imposed by the Authority. The details of a wholesale-must-offer condition will be contained in Regulations, should the Authority choose to go ahead with the remedy.

Limiting access to the number of Hollywood movie studios – The Authority finds that FSPTW Hollywood movies are premium content. Therefore, in order

to stimulate competition, it is necessary that players have access to such movies. As a result, a licensee with significant market power should have access to or only be able to enter into agreements with half of the movie studios at a time. This frees up the other half to competitors.

- 1.6.1.6 Set-top box interoperability – The Authority finds that switching from one service provider to another can be limited by the lack of set-top box interoperability. However, should the Authority go ahead with this remedy, it will embark on a separate and standalone consultation and public participation process.

1.7 Conclusion

- 1.7.1 The Authority publishes this Draft Findings Document to solicit comments and responses from stakeholders. Thereafter a Final Findings Document will be published. If necessary in terms of the conclusions reached in the Final Findings Document, the Authority will then embark upon a regulation making process in terms of section 67(4) of the ECA.

2. INTRODUCTION

2.1 Legal framework within which this inquiry is conducted

2.1.1 The Independent Communications of South Africa ("the Authority") is an independent regulatory body, which has been established in terms of the ICASA Act. Section 4 of the ICASA Act sets out the functions of the Authority.

2.1.2 Section 4(1) of the ICASA Act provides that the Authority must exercise the powers and perform the duties conferred and imposed upon it by the ICASA Act and the underlying statutes, including the ECA and the Broadcasting Act. In terms of section 4(3)(m) of the ICASA Act, the Authority –

"may undertake inquiries on any matter within its jurisdiction."

2.1.3 To give effect to this function, section 4B of the ICASA Act sets out the scope of inquiries that may be conducted by the Authority and the process to be followed by the Authority in conducting such inquiries.

2.1.4 In terms of section 4B (1) of the ICASA Act –

"The Authority may conduct an inquiry into any matter with regard to –

(a) the achievement of the objects of this Act or the underlying statutes;

(b) ...

(c) ...

(d) ...

(e) the exercise and performance of its powers, functions and duties in terms of this Act or the underlying statutes."

2.1.5 The underlying statutes referred to in the ICASA Act include both the Broadcasting Act and the ECA.

2.1.6 The object of the Broadcasting Act is to establish and develop a broadcasting policy in South Africa in the public interest and for that purpose to, amongst other things, ensure fair competition in the broadcasting sector (section 2(h) of the Broadcasting Act).

2.1.7 The primary object of the ECA is to provide for the regulation of electronic communications in South Africa in the public interest and for that purpose to, amongst other things, (1) promote competition within the ICT sector (in terms of section 2(f) of the ECA), and (2) promote an environment of open, fair and non-discriminatory access to broadcasting services, electronic communication networks and to electronic communications services (in terms of section 2(g) of the ECA).

2.1.8 Competition matters relating to broadcasting and electronic communications are regulated under Chapter 10 of the ECA. In terms of section 67(4) of the ECA, the Authority must –

"...following an inquiry, prescribe regulations defining the relevant markets and market segments and impose appropriate and sufficient pro-competitive licence conditions on licensees where there is ineffective competition, and if any licensee has significant market power in such markets or market segments."

2.1.9 The regulations must, among other things, (1) define relevant wholesale and retail markets or market segments, (2) determine whether there is effective competition in those relevant markets and market segments, (3) determine which, if any, licensees have significant market power in those markets and market segments where there is ineffective competition, (4) impose appropriate pro-competitive licence conditions on those licensees having significant market power to remedy the market failure, (5) set out a schedule in terms of which the Authority will undertake periodic reviews of the markets and market segments; and (6) provide for monitoring and investigation of anti-competitive behaviour in the relevant market and market segments.

2.1.10 In terms of section 67(4A) of the ECA, when determining whether there is effective competition in markets and market segments, the Authority must consider, among other things, (1) the non-transitory (structural, legal and regulatory) entry barriers to the applicable markets or market segments, and (2) the dynamic character and functioning of the markets or market segments, including an assessment of relative market share of the various licensees or providers of exempt services in the markets or market segments, and a forward

looking assessment of the relative market power of the licensees in the markets or market segments.

2.1.11 Further, section 67(5) of the ECA provides that a licensee has significant market power in a market or segment if that licensee is dominant, has control of an essential facility, or has a vertical relationship that the Authority determines could harm competition.

2.1.12 Section 67(4B) of the ECA provides that, subject to section 4D of the ICASA Act, licensees are required to provide to the Authority any information specified by the Authority so that the Authority may carry out its duties in terms of section 67 of the ECA.

2.1.13 Against this background, this inquiry into the state of competition in subscription television broadcasting services is convened in line with the purpose and functions of the Authority set out in the Constitution, the ICASA Act, the ECA and the Broadcasting Act, together with the underlying regulations where applicable.

2.1.14 On 11 July 2016 the Authority gave notice of its intention to conduct an inquiry into the state of competition in subscription television broadcasting services in terms of section 4B of the ICASA Act³.

2.1.15 It commenced an inquiry with preliminary information gathering on a voluntary basis with the publication on 13 July 2016 of a questionnaire for interested stakeholders to complete ("the Questionnaire").

2.1.16 The Discussion Document was published as part of a consultation process with all interested stakeholders in order to obtain their views on the Authority's preliminary views and analysis, and to receive any information that would assist the Authority in making findings.

2.1.17 In the event that the Authority's findings determine that there is ineffective competition, and if any licensee has significant market power in such markets or market segments, the ECA obliges the Authority to impose appropriate and sufficient procompetitive licence conditions on licensees where there is ineffective

³ The Initial Notice was corrected by an erratum Published under GN 552 in *Government Gazette* 40256 of 7 September 2016.

competition and to make regulations in terms of section 67(4(a) to (f) of the ECA, on the following aspects, among others, relevant to subscription broadcasting services –

- 2.1.17.1 define relevant wholesale and retail markets or market segments;
 - 2.1.17.2 determine whether there is effective competition in those relevant markets and market segments;
 - 2.1.17.3 determine which, if any, licensees have significant market power in those markets and market segments where there is ineffective competition;
 - 2.1.17.4 impose appropriate procompetitive licence conditions on those licensees having significant market power to remedy the market failure;
 - 2.1.17.5 set out a schedule in terms of which the Authority will undertake periodic review of the markets and market segments, taking into account subsection (9) and the determination in respect of the effectiveness of competition and application of procompetitive measures in those markets; and
 - 2.1.17.6 provide for monitoring and investigation of anticompetitive behaviour in the relevant market and market segments.
- 2.1.18 The publication of this Draft Findings Document, follows a period of public consultations through clarification questions from stakeholders and responses to the Questionnaire, including written responses to the Discussion Document and public hearings. The Draft Findings Document expresses the Authority's preliminary view and position on the issues raised, before a Final Findings Document is published.
- 2.1.19 Should it be necessary or warranted, flowing from the Final Findings Document, to publish draft regulations, a separate process with its own public consultation schedule will be followed in terms of sections 4(4) to 4(6) of the ECA, and all interested and affected stakeholders will have an opportunity to participate fully in this process.
- 2.1.20 After taking all submissions on the draft regulations into account, the Authority may then publish final regulations under section 67(4) read with section 4 of the

ECA, in which, among other things, (i) the relevant markets or market segments are defined, (ii) the Authority makes a determination as to effective competition in those relevant markets or market segments, (iii) the Authority makes a determination as to which licensees, if any, have significant market power in those markets and market segments where there is ineffective competition, (iv) appropriate pro-competitive licence conditions are imposed on those licensees having significant market power, to remedy the market failure, (v) a schedule is set out in terms of which the Authority will undertake periodic reviews of the markets and market segments, and (vi) provision is made for monitoring and investigation of anti-competitive behaviour in the relevant markets and market segments.

2.1.21 It is important to note that the above list is not immutable and may be modified depending on the contents of the Final Findings Document.

2.2 Process

2.2.1 In terms of its mandate to promote competition in the Information and Communication Technology ("ICT ") sector and to ensure fair competition in the broadcasting sector⁴, the Authority has been collecting evidence and carrying out analysis to understand the operation of subscription television broadcasting services in South Africa. Much of this has been achieved through engaging with stakeholders, and by conducting market and desktop research.

2.2.2 On 11 July 2016, the Authority published a notice in the *Government Gazette* giving notice of its intention to conduct an inquiry into subscription television broadcasting services in terms of section 4B of the ICASA Act (the "Notice").

2.2.3 In the Notice, the Authority noted that despite having issued five subscription broadcasting service licences in 2007 and a further two subscription broadcasting service licences in 2015, only three licensees⁵ are operational. One of the licensees⁶ faced sustainability challenges and had to go through a business rescue

⁴ Section 2(1)(f) of the ECA.

⁵ Multichoice, StarSat and Deukom

⁶ StarSat

process. The remaining subscription broadcasting service licensees who were issued with licences in 2015 and 2007, respectively, have not yet started operations. As such, the Authority noted in the Notice that, due to its commitment and mandate to ensure that markets are effectively competitive, it was commencing an inquiry into subscription television broadcasting services.

2.2.4 The Notice outlined the process to be followed by the Authority during the course of the inquiry:

First, an information gathering stage would be conducted in accordance with "section 4C of the ICASA Act" (which, as discussed below, was an erratum later corrected by the Authority), which would consist of a questionnaire and one-on-one engagements with relevant stakeholders, where necessary. Stakeholders were given 10 business days to review the questionnaire and send any clarification questions to the Authority. This deadline was indicated to be 22 July 2016. The Authority noted that it would respond to all stakeholder questions and publish responses in the form of a Frequently Asked Questions ("FAQs") document on the Authority's website. The submission deadline for responses to the questionnaire was 12 August 2016.

2.2.4.1 Second, the information gathered during the information gathering stage would be used to develop a Discussion Document that would be published in terms of section 4B of the ICASA Act for public comment for a period of 45 days. The Authority noted that it might also hold public hearings.

2.2.4.2 Third, following public consultation on the Discussion Document, the Authority would publish a Findings Document.

2.2.4.3 Fourth, depending on the outcome of the Findings Document, the Authority may publish regulations in terms of section 67(4) of the ECA.

2.2.5 This approach accords with the process outlined in the 'Guideline for Conducting Market Reviews' (the "Guideline") published by the Authority on 8 March 2010. The Guideline was published in the context of the Authority's powers under section 67 prior to the amendment of this section by the Electronic Communications Amendment Act 1 of 2014, which came into effect in 2014. In the Authority's view,

the amendments to section 67 did not materially change the Authority's power or the process to be followed in terms of section 67 and, as such, the Guideline can still be used to guide the process as the amendments to section 67 in 2014 have not necessitated a change to the Authority's approach. The Authority notes that the Guideline is merely a guide not legislation and is therefore not binding on the Authority, but the Authority has decided to follow this approach, as it is the process that has been communicated to stakeholders.

2.2.6 The purpose of the Guideline is to provide clarity to stakeholders and licensees regarding the conduct of market reviews⁷, including the public consultation process, the relevant powers of the Authority when gathering information, and the types of information which may be requested by the Authority.

2.2.7 In terms of the Guideline, the Authority will inform licensees of the Authority's intention to conduct an inquiry into a specific market and release a request for information to licensees.

2.2.8 In this regard, the Guideline notes that the Authority may use questionnaires and one-on-one meetings with licensees to gather market information and make up-to-date evidence-based decisions. The Authority will then release a discussion paper on market definition, effectiveness of competition, declaration of significant market power and relevant remedies, conduct public hearings on the discussion paper, release a findings document accompanied with draft regulations under section 67(4) of the ECA, conduct public hearings on the draft regulations, and then release the final regulations for implementation (if required).

2.2.9 On 13 July 2016, and in line with this process, the Questionnaire was duly published on the Authority's website. The Questionnaire solicited information from subscription, free-to-air and community television broadcasters, as well as from video-on-demand, streaming and over-the-top ("OTT") service providers. A guideline for completing the Questionnaire was also published by the Authority on its website on 13 July 2016.

⁷ Market reviews in this context refer to market inquiries and not a market review in terms of section 67(4)(e) of the ECA.

2.2.10 The Questionnaire was divided into various sections targeted at different stakeholders such as content rights holders, channel operators, subscription television broadcasters, free-to-air television broadcasters, broadcasting associations and OTT service providers, purely for ease of responding. However, stakeholders were advised to respond to any other matter not falling within their relevant "group", and to submit any comments regarding the subject matter. Similarly, interested parties not falling within any of the identified groups were also able to respond to the Questionnaire.

2.2.11 A number of stakeholders raised clarification questions which were submitted to the Authority by 27 July 2016. This included clarification submissions from Vodacom (Pty) Limited ("Vodacom"), Siyaya Free to Air (Pty) Limited ("Siyaya") (which submitted responses on 22 July 2016 and on 27 July 2016), MultiChoice South Africa (Pty) Ltd ("MultiChoice"), and e.tv (Pty) Limited ("e.tv").

2.2.12 On 7 September 2016, the Authority issued an Erratum Notice as well as a list of responses to Frequently Asked Questions, in response to the clarification questions raised by various stakeholders.

2.2.13 The extended submission deadline for responses to the Questionnaire was 15 September 2016, which effectively provided for a period of at least 45 days for interested persons to submit responses to the Questionnaire from the date of publication of the 11 July Notice.

2.2.14 The following stakeholders submitted responses to the Questionnaire by the closing date:

- The South African Broadcasting Corporation SOC Limited (SABC)
- e.tv
- Siyaya
- Multichoice
- Telkom SA SOC Limited ("Telkom")
- The National Association of Broadcasters ("NAB")
- The South African Communications Forum ("SACF")

2.2.15 After analysing the responses to the questionnaire, the Authority identified a need to set up meetings with some stakeholders in order to obtain further clarity and information. Letters of invitation were then sent to the relevant stakeholders with a list of questions to facilitate the one-on-one meetings. The information received through these meetings was used to supplement responses to the questionnaire and consequently to assist in framing this discussion document.

2.2.16 One-on-one meetings were conducted with the SABC, Telkom and e.tv.

2.2.17 Following the information gathering process including stakeholders' responses to the Questionnaire, the information obtained during the voluntary one-on-one meetings held with certain stakeholders, and the Authority's own market and desktop research, the Authority developed a Discussion Document and published it on 25 August 2017, inviting written responses from stakeholders.

2.2.18 The Discussion Document set out the Authority's preliminary understanding, analysis and views of subscription television broadcasting services in South Africa, including in respect of its proposed theoretical approach to the definition of markets and market segments, the effectiveness of competition in the relevant markets, the determination of licensees with significant market power, and possible appropriate pro-competitive licence conditions that may be imposed. It also provided an explanatory and contextual discussion to the relevant issues as determined by the Authority in respect of subscription television broadcasting services in South Africa.

2.2.19 The Discussion Document sought stakeholders' views on this initial analysis, and on the implications for the subscription television broadcasting services in South Africa.

2.2.20 A total of nineteen (19) written submissions were received by the closing date of 4 December 2017. The following stakeholders submitted written responses to the Discussion Document:

- Competition Commission;
- SABC;
- e.tv;

- Deukom;
- Capricorn Community Concepts;
- Cape Town TV;
- Cell C;
- Vodacom;
- MTN;
- Liquid Telecom;
- Telkom;
- Econet Media (Kwesé);
- MultiChoice;
- PSL;
- Cricket SA;
- SA Rugby;
- SOS/ Media Monitoring Africa;
- Act-SA; and
- Mr. H. Whoolf.

2.2.21 Following the above submissions, the Authority published a notice of public hearings on 27 March 2018. In terms of the notice, public hearings were scheduled for 7 to 11 May 2018. Due to withdrawal notices received from various entities, the timetables for presentations were amended and published on 3 May 2018. The dates of 7 to 11 May 2018 remained unchanged.

2.2.22 The following eleven (11) stakeholders made oral presentations at the public hearings:

- Mr. H. Whoolf;
- ACT-SA;
- SABC;
- Cape Town TV
- MMA and SOS;
- Cell C;
- Econet Media/Kwesé;
- e.tv;
- MultiChoice;

- SA Rugby;
- PSL; and
- Cricket SA.

2.2.23 The purpose of the public hearings was to afford those stakeholders who made written submissions an opportunity to present their views orally, to clarify and respond to questions posed by the panel constituted by the Authority ('the panel') as well as provide additional information as requested by the Authority.

2.2.24 After the public hearings the Authority also commissioned an independent consumer survey to gauge consumer behaviour with regards to television broadcasting and audio-visual viewership patterns and test for substitutability between services.

2.2.25 The results of the consumer survey will form part of the analysis on market definition.

2.2.26 The analysis in this Draft Findings Document takes into account the following sources of information:

- written submissions in response to the information gathering Questionnaire
- written submissions in response to the Discussion Document;
- oral presentations made during the public hearings;
- additional information as requested by the Authority during the public hearings;
- further research; and
- the results of the consumer survey commissioned by the Authority.

2.3 Clarification

2.3.1 On or about 14 December 2018, the Authority published in Government Gazette 42115 notice of its intention to amend the existing 2010 Sports Broadcasting Services regulations⁸.

⁸ As published in Government Gazette 33079 of 7 April 2010.

2.3.2 The amendment contemplated is in terms of the powers conferred upon the Authority by the provisions of the ECA (in particular, sections 4 and 60) read with section 4(3)(j) of ICASA Act.

2.3.3 The above provisions prescribe that the Authority is required, save for the instances set out in section 4(7) of the ECA, to publish in the Government Gazette notice of its intention to amend or issue regulations and to invite representations in that respect.

2.3.4 In this instance, the Authority prescribed a deadline of 4 February 2019 for provision of comments.

2.3.5 Section 4(6) further provides that the Authority may call public hearings in relation to a draft regulation.

2.3.6 The above process is wholly distinct to the Inquiry and has no bearing on the preliminary findings reached herein.

2.4 Confidentiality

2.4.1 Paragraph 1.5 of the Notice provided for confidentiality requests in terms of section 4D of the ICASA Act in respect of the stakeholders' submissions pursuant to the Inquiry.

2.4.2 The Authority received requests for confidentiality from various stakeholders, in respect of certain information contained in their responses to the Discussion Document.

2.4.3 In this regard, section 4D of the ICASA Act provides that, when a person submits information to the Authority, that person may request that the information be treated as confidential information. The request for confidentiality should be accompanied by a written statement explaining why the specific information should be treated as confidential. The Authority is then required to, within 14 days of receiving the information, make a determination as to whether or not confidentiality will be granted and provide reasons to the person concerned in relation to its determination. Where the Authority determines that a request for

confidentiality cannot be acceded to, the person who submitted the information must be given an opportunity to withdraw it.

2.4.4 The Authority considered all requests for confidentiality that were made in respect of information provided in response to the Discussion Document as well as the additional information submitted after the public hearings at the request of the panel.

2.4.5 Where information that has been determined as confidential by the Authority in terms of section 4D is used in the Draft Findings Document, it will be redacted to protect its confidentiality.

2.5 Concurrent jurisdiction

2.5.1 The Authority is responsible for the regulation of the electronic communications, broadcasting and postal service sectors in South Africa in the public interest. The Authority's role includes, among other things, the issuing of licences, monitoring compliance with the licence conditions, developing and implementing regulations, undertaking enquiries on matters within its jurisdiction, investigating complaints in the sector and managing radio frequency spectrum.

2.5.2 The Competition Commission (the "Commission") regulates competition in the South African economy in general and is responsible for *inter alia*, investigating, controlling and evaluating restrictive practices, abuses of dominance, mergers and granting or refusing exemptions in terms of Chapter 2 of the Competition Act 89 of 1998 ("Competition Act").

2.5.3 Areas of overlap in responsibilities between the Authority and the Commission are managed through specific sections in the Competition Act, the ECA and the ICASA Act.

2.5.4 The Commission and the Authority also signed a memorandum of agreement, effective from 16 September 2002, defining their respective areas of jurisdiction and regulating interaction between them ("Memorandum of Agreement"). For example, the Memorandum of Agreement provides that the Commission will deal with mergers and acquisitions as well as complaints concerning restrictive

practices and the abuse of dominance, whilst ICASA will deal with contraventions of electronic communications services and broadcasting services licence conditions and legislation.

2.5.5 As discussed above, competition matters are regulated under Chapter 10 of the ECA. In terms of section 67(4) of the ECA, the Authority must, following an inquiry, prescribe regulations defining the relevant markets and market segments and impose appropriate and sufficient pro-competitive licence conditions on licensees where there is ineffective competition, and if any licensee has significant market power in such markets or market segments.

2.5.6 The regulations must, among other things, (1) define relevant wholesale and retail markets or market segments, (2) determine whether there is effective competition in those relevant markets and market segments, (3) determine which, if any, licensees have significant market power in those markets and market segments where there is ineffective competition, (4) impose appropriate pro-competitive licence conditions on those licensees having significant market power to remedy the market failure, (5) set out a schedule in terms of which the Authority will undertake periodic review of the markets and market segments; and (6) provide for monitoring and investigation of anti-competitive behaviour in the relevant market and market segments.

2.5.7 Section 67(9) of the ECA provides that, subject to the provisions of the ECA, the Competition Act applies to competition matters in the electronic communications industry. Further, section 67(11) of the ECA provides that the Authority may ask for and receive from the Commission, assistance or advice on relevant proceedings of the Authority, including proceedings under Chapter 10. (Similarly, in terms of section 67(12) of the ECA, the Commission may ask for and receive from the Authority, assistance or advice on relevant proceedings of the Commission.)

2.5.8 Section 4B of the ICASA Act provides further clarity on concurrent jurisdiction by providing that –

"(8) Before the exercise and performance of any of its powers and duties in terms of this section, the Authority must –

(a) consider whether or not, in terms of any concurrent jurisdiction agreement concluded between the Authority and any other authority or institution, it would be appropriate to refer an inquiry to such authority or institution; or

(b) subject to section 67 of the Electronic Communications Act and the terms and conditions of any concurrent jurisdiction agreement concluded between the Authority and the Competition Commission, bear in mind that the Competition Commission has primary authority to detect and investigate past or current commissions of alleged prohibited practices within any industry or sector and to review mergers within any industry or sector in terms of the Competition Act.

(9) Subject to the terms and conditions of the concurrent jurisdiction agreement or unless otherwise agreed to by the Authority and the other authority or institution in question, the Authority may not take any action where a matter has already been brought to the attention of and is being dealt with by that other authority or institution."

2.5.9 The Authority has considered the above sections and is aware that the Commission has not referred the various complaints into allegations of abuse of dominance by Multichoice, on the basis that the conduct complained of did not raise significant competition concerns. This notwithstanding, the Commission points to signs of potential market failure in the subscription television market, including –

- highly concentrated nature of the subscription television market;
- high barriers to effectively enter the market and inability of other existing firms to expand in the market;
- lack of credible alternative buyers for premium sports rights other than the incumbent;
- overly long and exclusive contracts between the incumbent and some content suppliers; and
- lack of credible alternatives to which individual consumers can turn to should they wish to switch away from the incumbent⁹.

⁹ Competition Commission. Media statement. Commission decides not to prosecute MultiChoice and Supersport. 5 February 2019
<http://www.compcom.co.za/wp-content/uploads/2019/01/COMMISSION-DECIDES-NOT-TO-PROSECUTE-MULTICHOICE-003.pdf>

2.5.10 The Authority reiterates that this Inquiry is a distinct process from the investigation into specific conduct undertaken by the Commission. Moreover, this Inquiry does not allege any wrong doing by any market participant but is a process, aimed at assessing and dealing with impediments to fair and effective competition, if any, in the relevant markets on an *ex ante* basis.

2.5.11 The Commission submitted a written response to the Discussion Document, which has been taken into account in compiling this draft Findings Document. The Authority will consult with the Commission as and when necessary during the course of this Inquiry in the spirit of the Memorandum of Agreement between the two institutions.

2.5.12 The Authority also signed a Memorandum of Agreement¹⁰ with the National Consumer Commission ("NCC") to coordinate the exercise of jurisdiction on consumer protection matters in the electronic communications and broadcasting sectors. The Authority will also consult with the NCC as and when necessary during the course of the Inquiry.

2.6 Consumer Survey

2.6.1 In September 2018 the Authority commissioned a consumer survey¹¹ with specific research objectives, including:

- To assist the Authority to understand consumer behaviour to perform a systematic assessment of the retail market of television subscription broadcasting services;
- To establish baseline television and video-on-demand viewing patterns among South Africans;
- To identify the key factors that influence these patterns;
- To assess the key content sought from television viewing;
- To identify the barriers to switching to alternative television broadcasting products or services;

¹⁰ http://www.gov.za/sites/www.gov.za/files/38982_gon596.pdf

¹¹ <https://www.icasa.org.za/legislation-and-regulations/tv-viewing-attitudes-habits-and-practices>

- To measure households' ability and willingness to switch television broadcasting products or services upon payment of a fee; and
- To determine the cross-price demand elasticities between alternative television broadcasting products / services, including free-to-air television and OTT services

2.6.2 The survey was conducted among 1 002 participants, comprising Free to Air (FTA) viewers, subscription television subscribers, and Over the Top (OTT) subscribers and viewers in order to understand the prevailing usage and attitudes amongst viewers.

2.6.3 The project adopted a phased approach during which several expert interviews were conducted followed by a series of consumer focus groups. The results of these phases were presented separately.

2.6.4 Some of the relevant findings uncovered by the consumer survey are set out below:

- The level of TV subscription services rises with income and full time employment
- Movies are the most watched content, followed by drama series, news and sport
- Movies are the most popular content amongst all subscriber groups, except FTA viewers, who watch news most frequently
- The incidence of watching movies generally increases with household income whereas incidence of watching news decreases with household income;
- Sport is strongest amongst upper income households
- Movies, sport and drama series are mentioned most frequently when personal preference is addressed;
- Preference for locally produced programming declines with the increase in the price of subscription TV package
- Soccer from all sources is the most preferred category amongst the sport audience;
- There is a male bias in the soccer viewing audience;

- Interest in cricket and rugby is strongest amongst Coloureds, Asians and Whites, and also amongst females;
- The majority of OTT viewers both stream and download content for later viewing
- The higher incidence of downloading programmes to watch later relative to location is possibly linked to bandwidth availability;
- Cellular data is the most frequently used bandwidth source, followed by an ADSL line;
- The incidence of watching free content on YouTube is high;
- Watching free content on YouTube occurs equally across all age groups and household income levels;
- More movie options and updated drama series are the most desired content;
- Overall, it appears that movies, sport and drama series drive audience size;
- FTA viewers would like more movies and more local sport programming, all other consumer groups would like more movies and more drama series;
- The desire for more movies, drama series and sitcoms increases as household income increases;
- The lowest and highest income households have a desire for more sport;
- The importance of live sport programming increases in line with the increasing cost of the TV subscription service;
- Concern regarding the subscription cost, or indifference to the offering, are the main reasons why FTA viewers have not purchased a TV subscription service;
- Cost is the main reason why Basic DStv subscribers do not upgrade to Compact or Compact Plus;
- Familiarity and value perception are the main reasons for choosing Mid-Range DStv packages over the Basic packages; and
- Budget constraints and value perspectives are the reasons why DStv Mid-range subscribers do not upgrade to DStv Premium.

2.6.5 In performing its functions in terms of section 67(4) of the ECA to examine competition issues, the Authority must have regard also to the regulatory objectives in section 2 of the ECA.

2.6.6 In the present context these regulatory objectives include:

- promoting competition within the ICT sector;
- ensure the provision of a variety of quality electronic communications services at reasonable prices;
- promote the interests of consumers with regard to the price, quality and the variety of electronic communications services;
- promote the development of public, commercial and community broadcasting services which are responsive to the needs of the public;
- ensure that broadcasting services, viewed collectively promote and provide public interest programming such as news, actuality programmes, programmes on political issues of public interest, and programmes on matters of international, national, regional and local significance; and cater for a broad range of services and specifically for the programming needs of children, women, the youth and the disabled.

3. THE SCOPE AND PURPOSE OF THE INQUIRY

3.1 Overview

3.1.1 The Authority is conducting an inquiry into subscription television broadcasting services because it has reason to believe that there are features of this sector that may result in ineffective competition. The Authority further believes that conducting this Inquiry will assist in understanding how it may promote competition in the context of subscription television broadcasting services, in furtherance of the purposes of the ECA.

3.1.2 In the Notice (as read with the Erratum Notice) the Authority set out a preliminary outline of the purpose of the inquiry into subscription television broadcasting services for the purposes of the Authority's initial information-gathering stage, as follows:

"1.1...

1.2 The Authority has noted that despite having issued five (5) licences in 2007 and a further two (2) licences in 2015 in the subscription television broadcasting services market, three (3) licensees have commenced operations. The Authority has also noted that one (1) of these licensees faced sustainability challenges while the others have not yet launched services.

1.3 The Authority has the responsibility to ensure that all communications and broadcasting services are open, competitive and sustainable. The purpose of this inquiry is to establish the factors that have contributed to new subscription broadcasting service licensees not being able to successfully launch their services and/or attract a fair number of new subscribers.

1.4 It is important for the Authority to understand the challenges faced by these licensees so that it can address the regulatory impediments, and create an enabling environment for the introduction of competition, if any."

3.1.3 The Authority noted that, in terms of section 4B (2) of the ICASA Act, a notice of the Authority's intention to conduct an inquiry must indicate the purpose of the inquiry. While section 4B (2) of the ICASA Act does not specify the detail required to be given by the Authority regarding the purpose of the inquiry, the Authority appreciated that sufficient information must be provided so as to

enable interested stakeholders to contribute meaningfully to the process and, in particular, to assess what information is required by the Authority.

- 3.1.4 The Authority is satisfied that all stakeholders have been provided an opportunity to comment and participate meaningfully in the inquiry.

3.2 Scope and purpose of the inquiry

- 3.2.1 This Inquiry sought to examine the subscription television broadcasting sector, which encompasses a number of interrelated services, including free-to-air and OTT services.

- 3.2.2 Due to the interrelated aspects of the various services that comprise the value chain of subscription television broadcasting services, it is generally accepted that competition in one level or segment is capable of influencing or affecting competition in another level or segment in relatively minor to major ways. This implies that the nature and dynamics of competition and associated matters can only be properly understood by evaluating the dynamics within and relationships between the various services that comprise the value chain of subscription television broadcasting services in South Africa. The achievement of the inquiry's objectives thus required the Authority to consider a range of markets along the value chain of subscription television broadcasting services, including at the upstream level, the wholesale level, the downstream level, and the technical services level. As set out above, the Authority has noted that despite having issued five subscription television broadcasting services licences in 2007 and a further two subscription television broadcasting services licences in 2015, only three subscription television broadcasting service licensees remain operational. The Authority has accordingly identified a need for an inquiry into whether there are any competition concerns in the subscription television broadcasting sector which have contributed to new subscription television broadcasting service licensees not being able to successfully launch their services and/or attract a fair number of new subscribers or which impact more generally on competition in the broadcasting sector, including the ability of other broadcasters to compete and expand.

- 3.2.3 The inquiry into subscription television broadcasting services evaluated the challenges and factors that may have contributed to new subscription television broadcasting service licensees not being able to successfully launch their services and/or to attract a critical mass of new subscribers, and has identified competitive dynamics at play. Through this analysis, the Inquiry aims to identify all factors that prevent, distort or restrict effective competition, including any evidence of market failure, regulatory failure or competition concerns. This Inquiry provides a factual basis upon which the Authority can make evidence-based recommendations that serve to address any regulatory impediments and promote competition in respect of subscription television broadcasting services in South Africa.
- 3.2.4 The Draft Findings Document results from an extensive public consultation process. It contains the Authority's views and findings on various aspects canvassed with stakeholders through various stages of public consultations.
- 3.2.5 As discussed, the Authority is responsible for ensuring fair competition in broadcasting services, and for promoting competition in the ICT sector. Against this background, the purpose of the inquiry was to (1) establish the factors and understand the challenges that have contributed to new subscription television broadcasting service licensees not being able to successfully launch their services and/or attract a fair number of new subscribers; (2) assess the regulatory impediments (if any) faced by new subscription television broadcasting service licensees; (3) assess the state of competition in the context of subscription television broadcasting services; and (4) investigate possible interventions in the context of subscription television broadcasting services.
- 3.2.6 For the purposes of section 67(4) of the ECA, this Inquiry further enabled the Authority to:
- define/identify particular markets or market segments (and conduct an analysis of the interrelationship between various markets or market segments in subscription television broadcasting services, including

examining relevant contractual relationships and interactions between participants within subscription television broadcasting services);

- determine whether there is effective competition in those particular markets or market segments (taking section 67(4A) of the ECA into consideration);
- assess whether any licensees have significant market power in those particular markets or market segments (taking section 67(5) of the ECA into consideration); and
- consider and develop a position as to whether pro-competitive licence conditions should be imposed on those licensees having significant market power to remedy the market failure, if any.

3.2.7 In performing its functions in terms of section 67(4) of the ECA to examine competition issues, the Authority must have regard also to the regulatory objectives in section 2 of the ECA.

3.2.8 In the present context these regulatory objectives include:

- promoting competition within the ICT sector;
- ensure the provision of a variety of quality electronic communications services at reasonable prices;
- promote the interests of consumers with regard to the price, quality and the variety of electronic communications services;
- promote the development of public, commercial and community broadcasting services which are responsive to the needs of the public;
- ensure that broadcasting services, viewed collectively promote and provide public interest programming such as news, actuality programmes, programmes on political issues of public interest, and programmes on matters of international, national, regional and local significance; and cater for a broad range of services and specifically for the programming needs of children, women, the youth and the disabled.

4. RECENT AND FUTURE DEVELOPMENTS THAT HAVE OR MAY HAVE AN IMPACT ON BROADCASTING SERVICES

4.1 Overview

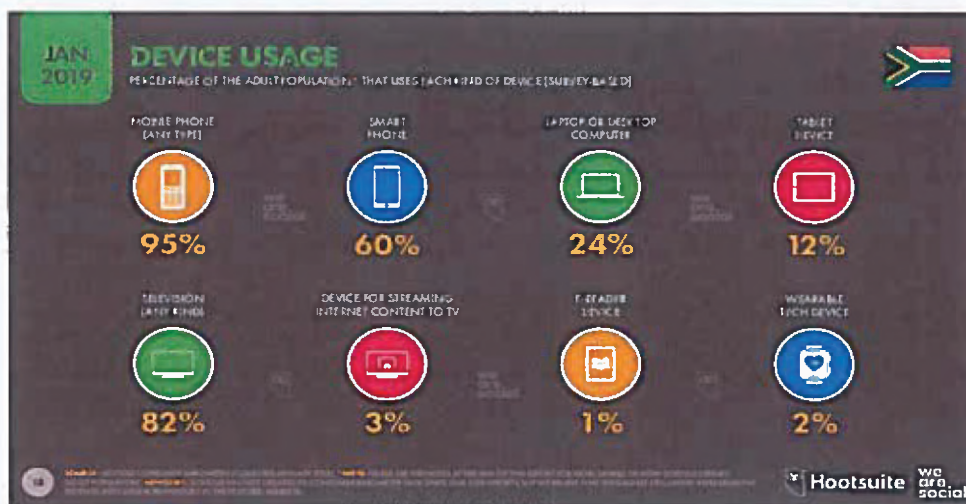
- 4.1.1 Section 4 of the Discussion Document provided an overview of the broader television broadcasting sector in South Africa, in order to contextualize the discussion on subscription television broadcasting services. It dealt with the policy, legislative and regulatory framework governing the television broadcasting services sector in general, as well as in respect of subscription television broadcasting services in particular. It also provided an overview of the television broadcasting services sector dynamics and the structure of the television broadcasting services sector.
- 4.1.2 The policy, legislative and regulatory framework as outlined in the Discussion Document largely remains unchanged.
- 4.1.3 Moreover, there were no questions posed in this section of the Discussion Document, although the Authority received comments from stakeholders. The Authority does not deem it necessary to repeat these issues. What is important for purposes of this Draft Findings Document is consideration of the recent and future developments that have a bearing on television broadcasting services.
- 4.1.4 The Discussion Document identified the advent of over-the-top services and digital migration as two critical developments that are likely to impact on television broadcasting services in South Africa. These are considered below against the background of recent developments and the evidence presented during the public hearings.

4.2 Over-the-Top Services

4.2.1 South Africa has 30.81 million internet users and a 54%¹² mobile broadband penetration level with an average internet speed of 6.38 Mbps¹³. The global average broadband penetration rate is 57%¹⁴. Certain audio-visual content can be accessed through mobile and fixed broadband internet. Over-the-top ("OTT") content as well as Internet Protocol Television (IPTV) have been growing in recent years. A number of OTT providers have launched in South Africa recently, including Showmax (part of Multichoice), Netflix, DEOD, Vodacom VideoPlay, Google Play, Amazon Prime, Kwesé Play, Telkom LIT, Cell C's Black and iflix.

4.2.2 Figure 1 below shows that about 95% of the adult population use a mobile phone and 82% make use of a television set. A very small percentage (3%) use a device for streaming internet content onto a television set¹⁵.

Figure 1 Percentage of adult population that use each kind of device



Source: We are social

12 Please note that in terms of the Icasa 2018 State of ICT Report this rate is at 57.8%. <https://www.icasa.org.za/uploads/files/State-of-ICT-Sector-Report-March-2018.pdf>

13 Statistics South Africa. General Household Survey, 2017. June 2018. Available at <http://www.statssa.gov.za/publications/P0318/P03182017.pdf>

14 International Telecommunications Union. The state of broadband 2018: Broadband catalyzing sustainable development. September 2018. Available at https://www.itu.int/dms_pub/itu-s/opb/pol/S-PDL-BROADBAND.19-2018-PDF-E.pdf

15 We Are Social Digital 2019 – South Africa. <https://datareportal.com/reports/digital-2019-south-africa>

- 4.2.3 OTT proliferation in South Africa is leveraging growth on internet penetration, especially mobile broadband.
- 4.2.4 In the Discussion Document, the Authority had concluded that given the low penetration levels of good quality broadband services coupled with relatively high data costs there was a slow take up of OTT services. Consequently, the Authority expected the impact of OTT services to remain small but noticeable in the foreseeable future.
- 4.2.5 This conclusion was also informed by the fact that at the time of developing the Discussion Document, a number of local OTT services had been launched but faced sustainability challenges and a number of them have since been discontinued. These include:
- Vidi by media group Times Media Limited;
 - FrontRow by mobile network operator MTN;
 - Node by technology conglomerate Altech; and
 - OnTapTV by PCCW Global, the international wing of Hong Kong based telecommunications operator KHT.
- 4.2.6 Stakeholders commented on the impact and implications of OTT growth on television broadcasting services in general. We set out below summaries of their comments.
- 4.2.7 With respect to the rapid disruption brought about by technological innovation in electronic communications e.tv agrees with MultiChoice that there are changes that will bring about segmentation which will impact on business models in the future. Customers will be able to choose which content they want; advertising income will become more fragmented while content will be a key determinant of success. Viewers will migrate to the best content of their own choice and viewer loyalty will decrease.
- 4.2.8 However, e.tv states that although the OTT challenge may be formidable in name and in the future, its impact is currently not felt in the industry. e.tv does not consider OTTs to be a huge challenge in South Africa. Moreover,

other local platforms that had been launched in the recent past had failed. e.tv concludes by stating that

whilst OTT service providers may be viewed as monsters, they are on the horizon and the 'gorilla' in the room affecting competition in television broadcasting is actually MultiChoice¹⁶.

4.2.9 According to Cell C, OTT players are not a substitute at this time and are unlikely to constitute a substantial competitive threat to subscription television for the majority of viewers in the near term.

4.2.10 Cape Town TV submits that whereas much has been made in some submissions of the impact of OTT platforms on subscription TV as a disruptive technology in the broadcasting space, television audience viewing patterns indicate that a higher percentage of viewers watch live TV while the minority of them watches it online. These observations suggest that the claim that OTT service providers are a major threat to subscription TV is overstated.

4.2.11 According to Econet Media, data indicates that South Africa does not have sufficient internet penetration, internet speeds are too slow and data is too expensive for consumers to be able to afford and easily switch from subscription-TV to OTT services. Econet media expects this situation to remain this way in the short to medium term.

4.2.12 Econet Media further indicates that about 98% of South Africans watch television in their own homes. A much larger proportion of households have a television set than internet access at home, a computer or fixed telephone. Compared to other countries with OTT content, SA has a much lower proportion of households with internet access at home, therefore only fewer households are able to watch OTT content at home. For those South African households with internet access, the speed is slow. A comparison data shows that SA 's internet is much slower than in other countries and the global average.

¹⁶ Page 35 of the transcripts of the e.tv (E-Media) presentation on 10 May 2018.

- 4.2.13 Furthermore, according to Econet Media, for both fixed-broadband and mobile-broadband South Africa prices are higher than other countries when expressed as a proportion of gross national product per capita.
- 4.2.14 Econet Media recognizes that the distinction between television broadcasting and OTT services is becoming blurred through convergence. As such, regulation must be forward looking and must use past trends to inform the forward looking regulation, re-evaluating the market at regular and set intervals. Therefore, ICASA should re-evaluate subscription television broadcasting regulation at regular intervals to assess whether the market failure has been addressed.
- 4.2.15 According to MultiChoice, there were only 4 national broadcasters in the past, mainly the SABC, DStv, Mnet and e.tv. These are regarded as the traditional TV services. However, broadcasting services have grown rapidly. Currently there are many audio-visual platforms, devices and service providers such as:
- Netflix
 - Black
 - Kwesé
 - OpenView
 - YouTube
 - Apple TV
 - Showmax
 - StarSat
- 4.2.16 MultiChoice is of the view that the audio-visual landscape is under intense pressure. New players have entered the market; broadband services are increasing; there is widespread adoption of services and consumer viewing habits are changing. All these factors have brought a dramatic change in the market.
- 4.2.17 MultiChoice further submits that statistics show an upward trend in data consumption. The rate of customers consuming data increased by 14% between 30 June 2016 and 31 December 2017. This is due to more customers preferring the use of data over voice. Data is now the biggest revenue

generator in South Africa. The data revenue has immensely grown while voice revenue has decreased on average compared to the previous periods.

4.2.18 According to MultiChoice, the average price per MB of data has also decreased and continues to do so. There is a 24.2% decline in effective data prices for the year 2018 and a 43.9% data traffic growth.

4.2.19 Data for smart phone subscriptions, as at 30 September 2017 shows the rapid adoption of connected devices and broadband subscriptions are also doubling.

4.2.20 Audio-visual services are increasingly viewed on other devices, not TV sets. Other devices such as smartphones, tablets, laptops and desktops are particularly prevalent amongst younger people while the age group between 35 and 59 use TV sets to watch content.

4.2.21 MultiChoice points to the global collapse of television viewership, in particular among younger people. The rate of change occurs far more quickly in South Africa and is characterized by:

- Cord-shaving (Consumers downgrade to lower-priced Pay TV services, and combine with other audio-visual services (OTT, FTA)).
- Cord-cutting (Consumers terminate traditional Pay TV services altogether, in favour of other electronic audio-visual services).
- Cord-Nevers (Individuals who have never subscribed to traditional Pay TV services, rather choosing OTT).

4.2.22 OTT services, according to MultiChoice, have several advantages including the advantage of being able to leverage existing broadband infrastructure and the public internet. They are able to offer consumers triple and quadruple play (telco OTTs) and are subject to little or no regulatory oversight. Creating a TV network is now easy as creating an app.

4.2.23 The visible impact of OTTs is the competition with local broadcasters whereas the hidden impact is that "national goals are undermined". The hidden impact includes:

- no local content quotas

- no tax, profits flow offshore
- no local job creation or skills development
- no license fees

4.2.24 Having outlined the above, MultiChoice contends that the Discussion Document does not pay sufficient attention to this hidden impact.

4.2.25 MultiChoice further contends that there is plethora of short-form audio-visual content available which are often viewed through social media platforms such as:

- WhatsApp
- Facebook
- Twitter
- Snapchat

4.2.26 Given the above, MultiChoice submits that access to content is not a problem. There is a wide range of content which is neither scarce nor costly. Audio-visual service providers need to be able to select content which will appeal to their target markets and astutely package and promote their content.

4.2.27 Mr Whoolf¹⁷ also lamented the high costs of data, especially for a pensioner like him, and indicated that he is *"going to make it my mission to find out the closest places to me that will be convenient for me so as to not have to buy data every month. It's absurdly expensive"*.¹⁸

4.3 The Authority's findings

Over-the-top services

4.3.1 The Authority recognizes the growth of OTT services in the last four years or so and the impact they are likely to have on television broadcasting viewership patterns in South Africa. It is imperative that this impact be analysed. Therefore, the Draft Findings Document will analyse the competition impact of

¹⁷ A private consumer who made a written submission and presented at the public hearings

¹⁸ Public hearing transcript, p14-15

OTTs in the context of both market definition and the assessment of the effectiveness of competition in the relevant markets.

- 4.3.2 Figure 2 below depicts examples of various OTT services that are found in the electronic communications, music as well as television and video services sectors.

Figure 2. Examples of OTT service providers



Source: <http://ottsource.com/ott-blog>

Digital Terrestrial Transmission

- 4.3.3 South Africa is still at the early stages of transitioning its terrestrial television transmission technology from analogue to digital. Although the country missed the June 2015 deadline set by the International Telecommunications Union (ITU) for switching off of analogue television broadcasting, the regulatory framework is in place in preparation for the migration.

4.3.4 The country's digital migration policy¹⁹ currently provides as follows:

5.1.2(A) In keeping with the objectives of ensuring universal access to broadcasting services in South Africa and protecting government investment in subsidised STB market, STB control system in the free-to-air DTT will be non-mandatory.

"5.1.2(B) The STB control system for the free-to-air DTT STBs shall (a) not have capabilities to encrypt broadcast signals for the subsidised STBs; and (b) be used to protect government investment in subsidised STB market thus supporting the local electronic manufacturing sector.

"5.1.2(C) Depending on the kind of broadcasting services broadcasters may want to provide to their customers, individual broadcasters may at their own cost make decisions regarding encryption of content."

4.3.5 As the Authority noted in the Discussion Document, the impact of DTT on subscription television broadcasting services is varied in countries that have undergone full digital migration.

4.3.6 The Authority returns to the analysis of DTT and its likely impact on subscription television broadcasting services in sections 6.5.27 to 6.5.44 below.

¹⁹ Amendment of Broadcasting Digital Migration Policy 2015. Government Gazette No. 38583, 18 March 2015

5. MARKET DEFINITION

5.1 Overview

5.1.1 Section 5 of the Discussion Document considered the theoretical approach to market definition, presented relevant case law, as well as research undertaken in the area of television broadcasting and analysed the responses received by the Authority to the information gathering Questionnaire. On these bases the Authority formulated its preliminary views on market definition and posed questions to stakeholders.

5.1.2 It is worth repeating a point made in the Discussion Document and emphasized at the public hearings, that is, the fact that market definition is not an end in and of itself but rather is a means to an end. In this context, the end is determining whether there are any impediments to competition in the relevant markets. Thus, market definition allows the analysis to be confined to the relevant goods or services that pose a competitive constraint on each other within a defined geographical area.

5.1.3 The Authority presented an approach to market definition as detailed in paragraph 3.2 of the Guideline for Conducting Market Reviews²⁰. The following questions were then posed to stakeholders:

1. *Do you agree with the theoretical approach to defining relevant markets and market segments?*
2. *Are there aspects of this market definition theoretical framework that would not apply to subscription television broadcasting services?*

5.2 Stakeholder comments

5.2.1 The SABC agrees in general with the Authority's theoretical approach to defining relevant markets and market segments. However, it indicates that using product substitutability as an approach for market definition could potentially result in failure to deal with the impact of ineffective competition

²⁰ ICASA. Guideline for Conducting Market Reviews, March 2010

in the subscription television market upon the whole South African television industry.

- 5.2.2 e.tv also agrees with the theoretical basis and value chain approach to market definition. However, it notes that the Discussion Document did not go into detail as to the regulatory measures the Authority will prescribe in order to address failures in each segment of the value chain²¹.
- 5.2.3 Econet Media broadly agrees with the Authority's theoretical overview of the purpose and methodology of market definition. However, it submits that the SSNIP test should be applied with caution in the broadcasting market given its specific characteristics.
- 5.2.4 This is so because, rapid technological development (enabling consumption of content across various devices and platforms – thus providing for converged product offerings) has implications for this Inquiry, as the regulation of television broadcasting must keep up with changes in the sector. The incumbent's ability to extend its services across multiple platforms and devices increases barriers to entry for competitors in subscription television broadcasting.
- 5.2.5 Telkom agrees with the use of the SSNIP test in defining markets but recommends that variables specific to the audio-visual market need to be considered in the market analysis.
- 5.2.6 According to MultiChoice, whilst the theoretical approach to defining markets set out by the Authority reflects to some extent the central market definition question of competitive constraints, it does not fully explore the implications of an approach based on understanding such competitive constraints.
- 5.2.7 MultiChoice submits that market definition should be conducted with reference to constraints. Moreover, these constraints should be assessed in aggregate; the focus should be on responses of marginal consumers; and chains of substitution should be taken into account.

21 Paragraph 37.3 of e. tv's submissions.

- 5.2.8 MultiChoice expresses its concern that the theoretical principles laid out in the Discussion Document were not sufficiently explored later in the Discussion Document and the analysis that followed did not heed these central and fundamental principles of assessing competitive constraints. In summary MultiChoice raises the following main concerns with the Authority's approach to market definition in the Discussion Document:
- 5.2.8.1 The need for a rigorous and evidence based assessment of the current characteristics in South Africa of the sector in question;
- 5.2.8.2 Constraints need to be considered in aggregate, not individually;
- 5.2.8.3 What matters are marginal not average consumers;
- 5.2.8.4 Constraints may operate through a chain of substitution;
- 5.2.8.5 Two-sided markets require consideration of both sides of the market;
- 5.2.8.6 Differences in product characteristics do not necessarily imply products belong in separate markets; and
- 5.2.8.7 Outdated case conclusions from other jurisdictions are not informative.
- 5.2.9 Furthermore, according to MultiChoice, the Discussion Document limits its perspective to "*subscription television broadcasting services*". Market definition should not be circumscribed in any way, other than by reference to competitive constraints and should allow for a market which is far broader than subscription television broadcasting services.
- 5.2.10 The Commission submits that the differentiated nature of the subscription television service offering renders the process of defining relevant antitrust markets to be quite complex. In most cases, the nature of economic evidence considered for such purposes, *inter alia*, includes product characteristics, survey evidence, and trends in prices and subscriber numbers. In terms of survey evidence, the key question relates to the customers' (stated) preference to switch to potential substitute products such as general entertainment alternatives like movies. However, such survey evidence is

complicated by the fact that customers may potentially overstate or understate their willingness to switch, owing to a number of factors

5.2.11 Nonetheless, the Commission argues that in defining the relevant upstream market(s), the following factors are instructive:

5.2.11.1 International case precedents, where relevant;

5.2.11.2 The valuation of rights by broadcasters;

5.2.11.3 Product characteristics; and

5.2.11.4 Consumer preferences and/or popularity based on viewership and subscription numbers.

5.2.12 In the end, the Commission states that the theoretical approach to market definition as set out in the Discussion Document accords with globally accepted principles insofar as it relates to the consideration of both demand and supply-side factors.

5.3 The Authority's findings

5.3.1 The theory of market definition featured prominently during the course of this Inquiry, and for good reason. The Authority understands that whilst market definition is not undertaken for its own sake, it has far reaching implications since the rest of the analysis hinges on a properly defined market. For this reason, the Authority finds it prudent to recap some of the principles and state the Authority's findings in this regard.

5.3.2 The Authority is satisfied that most stakeholders agreed with the theoretical principles of market definition outlined in the Discussion Document and will not repeat these in this Draft Findings Document except insofar as it is necessary to clarify or amplify certain aspects.

5.3.3 The Authority heeds the caution given by Econet Media that the SSNIP test should be applied with caution in the broadcasting services sector given its peculiar nature. A similar rider was given by Telkom that variables specific to the audio-visual market need to be considered in the market analysis, in addition to the theoretical framework.

- 5.3.4 The Authority notes the concerns expressed by MultiChoice regarding the analysis of competitive constraints. It is the Authority's view that any competition analysis, including market definition, is about consideration of competitive constraints. This can be done in a number of ways, including the approach taken in the Discussion Document of, *inter alia*, analysing product characteristics, price comparisons, or business models, in addition to the SSNIP test. These are analysed with a view to determining whether two or more products/services pose a competitive constraint on each other. Where the link between such analysis and competitive constraints was not apparent in the Discussion Document, it will be clarified further in the analysis that follows below.
- 5.3.5 The Authority does not agree that reference to "subscription television broadcasting services" as done in the Discussion Document, purely for purposes of describing or naming a service, limits the Authority's perspective and circumscribes the market definition exercise. Merely naming a service and defining a relevant market for purposes of a section 67 inquiry should not be conflated.
- 5.3.6 With respect to the question of marginal and average consumers, the Authority wishes to state it clearly that its analysis in the Discussion Document did not make reference to nor did it consider average consumers. The test that has to be met in defining a relevant market is whether enough consumers would consider switching to the next best alternative when faced with a SSNIP. The Authority has considered the contention by MultiChoice that the analysis should be limited to marginal consumers without consideration of whether enough of such marginal consumers are likely to switch to render the SSNIP unprofitable and it is not persuasive.
- 5.3.7 Moreover, it is also improper to ignore what are called 'core', 'committed' or 'infra-marginal' customers. There are instances where such core customers can be regarded as central to market definition.
- 5.3.8 The question of the quantum or degree of the switch is well established in competition economics. Conventionally, the critical loss analysis has been

utilized particularly in merger investigations. Recently, many competition authorities employ diversion ratios inherent in the Upward Pricing Pressure model and its variant the Gross Upward Pricing Pressure Index in order to measure the magnitude of the substitution. The Authority states this to make the point that market definition concerns itself with not just the concept of marginal or core consumers, but their number and behaviour to determine whether enough such consumers would consider switching in the face of a SSNIP.

- 5.3.9 That being the case, the Authority's analysis will continue to consider whether enough consumers are likely to switch in the event of a SSNIP.
- 5.3.10 The Authority agrees with Multichoice's view that chains of substitution should form part of the market definition exercise, although in the Authority's view this is not a strict requirement of market definition. Moreover, chains of substitution should be applied with caution. Jurisdictions that include chains of substitution in their market definition guidelines also offer a proviso in the application of chains of substitution²² as they can lead to absurdities. What matters is the competitive constraint exerted.
- 5.3.11 Taking into account the theoretical principles of market definition in the Discussion Document, which are not under dispute, the Authority wishes to emphasise the following:
- 5.3.11.1 The starting point in the market definition exercise is the identification of a focal product or service, which is usually the product under investigation, within a focal geographical location. The SSNIP test is then applied on the focal product taking into account both demand-side and supply-side competitive constraints.
- 5.3.11.2 Thus, in this case, when instituting the Inquiry, the Authority identified challenges in the subscription television broadcasting services. Therefore, logically, when applying the SSNIP test, the Authority considered the

²² See for example the UK, EU and Australian market definition guidelines. As well as EU Commission "Notice on the definition of relevant market for the purposes of Community competition law" (97/C 372/03): par. 58

hypothetical monopolist of subscription television broadcasting services (the focal product) in South Africa (the focal geographical area). This is only the starting point. It does not imply that the relevant market should therefore be confined or restricted to subscription television broadcasting services in South Africa. Depending on the evidence and analysis, the market can either be narrower or broader than subscription television broadcasting services in South Africa.

5.3.11.3 In the end the Discussion Document defined a number of relevant markets, taking the above principles into account. The market definition exercise will be re-visited in section 5.6 below.

5.3.12 It is also worth emphasising that there are mainly three sources of competition that have an impact on the relevant market. The two sources, traversing demand-side and supply-side competitive constraints, are considered to have an immediate impact. The third source of competition, referred to as potential competition is considered at the stage of competition assessment, due to its time limitations. Whilst market definition and the assessment of competition are intricately linked, standard practice is to start with the former, followed by the latter. This sequence is also confirmed in section 67 of the ECA.

5.3.13 When considering demand-side substitution the following elements are usually taken into account:

- 5.3.13.1 Barriers and costs associated with switching demand to potential substitutes;
- 5.3.13.2 Product characteristics and intended use;
- 5.3.13.3 Evidence of substitution in the recent past;
- 5.3.13.4 Views of customers and competitors;
- 5.3.13.5 Consumer preferences; and
- 5.3.13.6 Patterns in price changes.

- 5.3.14 In the Discussion Document, the Authority stated that it is common practice that (in the absence of relevant data) to test for substitution an analysis of the product features as well as business models can be used. The Authority wishes to re-iterate this point. It is an established approach in competition economics that following the application of the intuitive SSNIP test the analysis often proceeds to consider evidence of substitution. From the demand side such evidence could include product characteristics and intended use, price-related evidence, consumer purchase behaviour, habits and preferences as well as switching costs. Evidence on product characteristics may provide useful information on whether customer substitution patterns are likely to be influenced significantly by those characteristics. For instance, where the objective characteristics of products are very similar and their intended uses are the same, this could be an indicator that the products are close substitutes. However, the following caveats apply:
- 5.3.15 even where products apparently have very similar characteristics and intended use, they may still not be substitutable in the presence of high switching costs and entrenched brand loyalty;
- 5.3.16 consumers may not necessarily view products that have similar characteristics, as close substitutes; and
- 5.3.17 products with very different characteristics may be close substitutes if, from a customer's point of view, they have a very similar use²³.
- 5.3.18 This principle dates back to the seminal Brown Shoe²⁴ case where the US District Court found that in determining the relevant market it had to go to the facts of the case and make its determination guided by the "*practices in the industry, the characteristics and uses of the products, their interchangeability, price, quality and style*". This approach was upheld on appeal by the US Supreme Court which listed '**practical indicia**' to consider in market definition, as being –

23 Botswana Competition Commission. Market definition guidelines

24 *Brown Shoe* 370 US 294; 82.C.T. 1502

- industry or public recognition of the submarket as a separate economic entity;
- peculiar characteristics and uses of the products;
- uniqueness of production facilities;
- existence of distinct customers;
- existence of distinct prices;
- customer sensitivity to price changes; and
- existence of specialised vendors.

5.3.19 It is also important to note the injunction by the South African Competition Tribunal in *Massmart v Moresport*²⁵, in this context, that –

*“Practical indicia are considered by competition authorities not simply to determine that one business is different from another, but for the purpose of determining the **market in which companies (businesses) strive for profit or where in fact competition exists.***²⁶ *Indeed the “determination of a relevant product market is a matter of business reality ...of how a market is perceived by those who strive for profit in it.”*²⁷ *It is not an exercise whereby the practical indicia are simply enumerated in an exhaustive manner in order to highlight the similarities or differences between businesses but is rather an exercise in which competition authorities endeavour to identify from whom and from where a business faces competitive constraints or effective competition.”*

5.3.20 As indicated above, the Commission in its submission stated that in most cases, the nature of economic evidence considered for such purposes, *inter alia*, includes product characteristics, survey evidence, and trends in prices and subscriber numbers²⁸.

5.3.21 There are a number of sources that can be relied upon for demand side evidence, such as consumer surveys, industry studies, journals and

25 Competition Tribunal of South Africa. *Massmart Holdings Limited and Moresport*. Case No: 62/LM/Jul05

26 *Federal Trade Commission v. Staples Inc. and Office Depot Inc.* 970 F. Supp. 1066.

27 *Federal C Trade Commission v. Swedish Match et al*, 131 F. Supp.2d 151 (D.D.C. 2000)

28 Competition Commission Comments on the Discussion Document for the Inquiry into Subscription Television Broadcasting Services. 17 December 2017

publications, previous agency investigations and court cases, international precedent as well as internal company strategic documents. This inquiry also relies on submissions from stakeholders in response to both the information gathering Questionnaire and the Discussion Document as well as questions posed during the public hearings and followed up with written communication with some stakeholders, and the consumer survey commissioned by the Authority.

- 5.3.22 As such, the Authority does not agree with Multichoice's contention that consideration of product characteristics and other factors is a short-cut to market definition, relies on value judgment and is impressionist. In the Authority's view, product characteristics, price levels, business models and other factors are critical in the context of analysing competitive constraints. This view is supported by a number of competition authorities and sector regulators around the world, as reflected in their guidelines for market definition and has been considered in numerous merger and anticompetitive conduct investigations. Indeed, the UKCC's Movies on Pay TV Market Investigation that MultiChoice has extensively relied upon in its submission, does consider product characteristics in defining relevant markets and states that –

*"In the light of the above, we judged that a hypothetical monopolist retailer of pay-TV would be able profitably to increase prices compared with competitive levels. For this reason, **and on the basis of evidence on product characteristics** (see paragraph 4.76) **and rivalry more generally**²⁹, we found that the appropriate retail market definition for our inquiry did not need to be widened beyond pay TV."*

- 5.3.23 Paragraph 4.76 of the report states that –

"As a general observation, we noted that pay-TV products were quite different from other products. Pay-TV products (a) require a monthly subscription (for most traditional pay-TV subscribers this is substantial,

²⁹ Own emphasis

often more than £200 per year); and (b) offer the ability to choose from a large range of content by viewing linear channels and/or on-demand content immediately on TV...."

- 5.3.24 The fact that in the end the UKCC defined a retail market wider than Sky movies is beside the point. The fact of the matter is that product characteristics and other factors were considered as an established principle of market definition. Indeed, it is to be expected that based on the evidence provided overall, an authority may arrive at a conclusion that includes or does not include products with different characteristics. What cannot be done is to exclude certain principles *a priori* from the analysis without good reason.
- 5.3.25 That being the case, the Authority has not found any compelling reason not to analyse product characteristics, price levels, business models and other factors or practical indicia, in addition to the SSNIP test to arrive at a definition of the relevant market.
- 5.3.26 The Discussion Document discussed the two-sided nature of broadcasting markets and applied the principle in determining the retail markets. The Authority will in this Draft Findings Document consider, again, the two-sided nature of the broadcasting services.
- 5.3.27 The Authority agrees with MultiChoice that chains of substitution can be taken into account in market definition. However, it is important to point out that chains of substitution are not a substitute for the SSNIP test but are considered like any other factor that would assist in arriving at a properly defined relevant market.
- 5.3.28 In brief, the chains of substitution recognize that it is possible for a focal product to be part of a long chain of substitutes. An example often given³⁰ to illustrate chains of substitution is where five products are labelled A to E,

³⁰ Office of Fair Trading. Market Definition Guidelines

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284423/of403.pdf

University of Roma. Practical Guideline to Market Definition.

http://economia.uniroma2.it/public/ppm/files/lecture%20content/Guidelines_on_Relevant_Market_Definition.pdf

where the closer two products are in the alphabet, the more substitutable they are from the point of view of customers. These products may be differentiated in terms of product quality and other characteristics. Thus, consumers whose favourite product is C consider B and D to be very good substitutes for C but consider A and E to be poorer substitutes for C. This way, whereas C, B and D may be defined to belong in the same relevant market, due to their proximity (from a substitutability perspective), products A and B are also close substitutes, and so are products D and E. Thus, through this chain of substitution, products A and E, which do not directly constrain each other, may belong in the same relevant market.

5.3.29 However, it is important to recognise that even though all products in the chain may be substitutes, this may not mean that the whole chain is the relevant market, under certain conditions. For instance, a chain of substitution would not hold where there is a break in the chain or in the presence of price discrimination.

5.3.30 Thus, the mere existence of a chain of substitution is not sufficient to conclude that products that do not directly constrain each other belong in the same relevant market. Furthermore, a chain of substitution is not a substitute for the application of the SSNIP test, properly applied, which should still result in the inclusion in the relevant market of firms exerting indirect constraints on each other.

5.3.31 With respect to what MultiChoice terms 'outdated case conclusions from other jurisdictions' the Authority notes that this was addressed at the hearings and MultiChoice conceded that there is no time limit to referencing an economic principle³¹. This is especially, in circumstances where the relevant principles are still relevant and applicable to the subject matter. In its submission, MultiChoice lists 8 cases spanning between 1998 and 2010 cited in the Discussion Document, which it considers outdated. Notwithstanding the above, MultiChoice also relies on two of these cases³² in its submission.

31 Transcription of the ICASA Inquiry into Subscription Television: MultiChoice (Session 1 & 2), p104-105

32 MultiChoice M-Net's presentation: Icasas Subscription Television Inquiry. 11 May 2018

5.3.32 For instance, it quotes the 1999 British Broadcasting Group plc and Manchester United LPC case where the UKCC stated that –

"We agree that there is a degree of price constraint [from FTA television] – people have to be persuaded that pay TV is worth buying at all."

5.3.33 It also quotes the 2007 BSkyB and ITV³³ case where the UKCC stated that –

"Our view, based on the evidence [...] is that FTA and pay services compete with one another within a market for 'all-TV', which includes VoD"

5.3.34 Furthermore, MultiChoice relies heavily on the 2012 UKCC Movies on Pay TV Market Investigation throughout its submission.

5.3.35 While the Authority does not repeat in this Draft Findings Document, the case law cited in the Discussion Document, except where necessary for purposes of emphasis, the Authority maintains its position that consideration of relevant local and international case precedent, regardless of date, is an integral part of a prudent decision making process. Therefore, the Authority is not persuaded by the approach proposed by MultiChoice.

5.4 Value chain and market definition

5.4.1 Having provided the theoretical basis for market definition in the Discussion Document, the Authority then discussed the television broadcasting value chain in order to assist in understanding the various stages involved in the process of providing a television broadcasting service and to contextualize the market definition exercise. The relevant markets need not necessarily correspond with the stages of the value chain. The Authority wishes to emphasise that the approach of using a value chain to assist in framing market definition has precedent³⁴. As recent as in 2018, the European Commission took into account the television broadcasting value chain in its analysis of the market³⁵. Similarly, MultiChoice has also relied on the broadcasting value

33 UKCC. Acquisition by British Sky Broadcasting Group pl of 17.9 per cent of the shares in ITV plc, Report, 14 December 2007, para 4.30

34 See for example the News Corp/ BskyB case - Case No COMP/M.5932.

35 European Commission. Liberty Global / Ziggo. Case No M.7000

chain in recent court proceedings³⁶. In the end what matters is whether the market definition analysis is based on evidence.

5.4.2 The Authority then posed the following two questions:

3. Do you agree with the approach of using the value chain to identify functional markets?

4. If not how would you go about defining the relevant market/s in subscription broadcasting?

5.4.3 The SABC views itself as playing across the entire broadcasting value chain, except for transmission networks, however, it is of the view that the Authority's market definition should be across the entire broadcasting market.

5.4.4 e.tv proposes that technical services be added in the value chain to address access restrictions imposed by the need to encrypt signals for access by paying customers only.

5.4.5 e.tv also agrees with the Authority that an accurate representation of the subscription television broadcasting value chain is helpful to identify functional markets.

5.4.6 Cell C agrees with the value chain approach to identifying functional markets, however, it proposes that the wholesale market and content producers should not be conflated with acquisition and commissioning of content. Therefore, a separate layer should be introduced in the value chain that specifically deals with content acquisition and commissioning.

5.4.7 It states that acquisition and commissioning of content is carried out at channel provision and content aggregation level. Thus, in the value chain diagram, the top level should refer to content production, with the level below consisting of acquisition, commissioning, aggregation and channel packaging.

36 Competition Appeal Court. *Caxton and CTP Publishers and Printers Limited and Others v MultiChoice Proprietary Limited and Others* (140/CAC/MAR16) [2016]

5.4.8 Telkom agrees with the use of the value chain to identify functional markets. Telkom suggests that technical services, as described in section 5.10 of the Discussion Document, be included in the value chain. Telkom further contends that limiting the inquiry to pay-tv only could undermine the impact of dominance across the whole broadcasting sector.

5.4.9 MultiChoice does not agree with the approach of using the value chain to identify functional markets. Instead, the relevant market definition question requires an assessment of competitive constraints. Merely identifying the activities at different levels of a supply chain ignores the fundamental question.

5.4.10 The relevant vertical markets must be defined having regard to the constraints on a hypothetical monopolist of any particular activity in the supply chain. If a hypothetical monopolist of that activity would be unable to profitably impose a SSNIP then there would not be a relevant market defined around that activity alone.

5.5 The Authority's findings

5.5.1 Most stakeholders agree with the use of a broadcasting value chain in order to contextualise the market definition exercise. Whilst there have been instances where relevant markets have been defined to correspond with such a value chain³⁷, the Authority does not take such an approach. Instead, the market definition follows the standard approach of using the SSNIP test and other evidence. Where relevant markets correspond with the value chain, this is not by design but rather a result of the appropriate analysis.

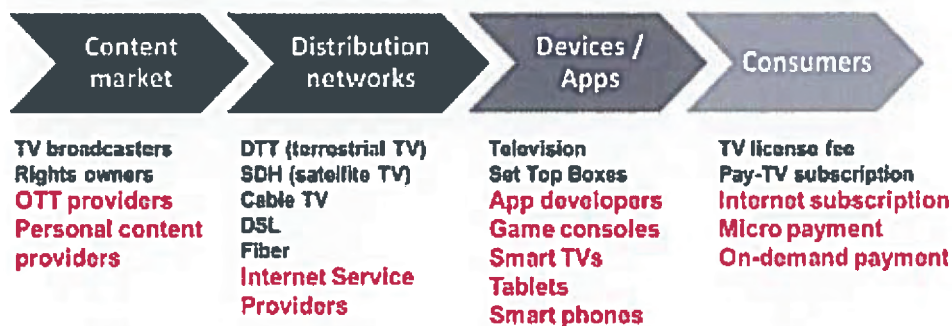
5.5.2 Therefore, the Authority considers the value chain as an important aspect in gaining an understanding of the various activities involved in the supply of a service. In the Discussion Document the Authority had provided a typical broadcasting value chain comprising of three vertical layers; the production of content and licensing of rights by content rights holders; the wholesale

³⁷ See for example: *Caxton and CTP Publishers and Printers Limited and Others v MultiChoice Proprietary Limited and Others* (140/CAC/MAR16) [2016]

channel provision by channel providers; and retail broadcast service provision to consumers.

- 5.5.3 Given the input received, the Authority wishes to present an amended version of the value chain that clearly depicts both television broadcasting and OTT activities, as follows:

Figure 3. Broadcasting Television and OTT value chain



5.6 Defining the relevant retail markets

- 5.6.1 The next section in the Discussion Document delved into the actual market definition analysis.
- 5.6.2 The Authority considered the following factors in defining the relevant markets:
- Use of the SSNIP test;
 - Product characteristics, price levels, business models and other differentiators;
 - Consideration of evidence provided by stakeholders in response to the information gathering Questionnaire;
 - Case precedent, both local and international; and
 - Findings from research papers, studies and reports.
- 5.6.3 In defining the relevant markets in the Discussion Document, it became apparent that content is a differentiator when it comes to FTA and subscription offerings. The Authority then discussed the concept of 'premium content' and proposed a definition of premium content as *"valuable content that is*

acquired on an exclusive basis and made available on high end premium bouquets"

5.6.4 The Authority then posed the following two questions:

5. Do you agree with the Authority's definition of what constitutes premium content?

6. What other content would you classify as premium in the South African context and why?

5.7 Stakeholder comments: Premium content

5.7.1 Whilst Telkom agrees with the Authority's definition of premium content it points to the fact that there is no exact definition for premium content, and this was made clear by the various definitions provided in the responses to the Authority's information gathering Questionnaire by the SABC, NAB, MultiChoice, Siyaya, SACF, e.tv and Telkom.

5.7.2 From Telkom's perspective therefore, emphasis is placed on high audience ratings, high audience appeal and the definition implies that there is also a time-sensitive component. As such, it implies that premium content is linked to consumer demand for content and can be described as content which viewers find desirable and are willing to pay a subscription fee for. However, it should be noted that in the South African context, premium does not necessarily imply that it is content that is available on the highest available subscription package/bouquet. It may also refer to content which will draw the most viewers.

5.7.3 According to Econet Media, premium content can be seen as content that has wide appeal, has no substitutes and is time critical. Local and international series satisfy these conditions. Local content especially has become important in the South African context. Econet Media further submits that while it agrees with the Authority's definition of premium content, some types of content such as kids content, comedy content, reality television or genre specific channels are also important drivers of subscription services. If this type of content starts generating higher viewership numbers and hence more revenue for

broadcasters, it is likely that in future it may also satisfy the definition of premium content.

5.7.4 The Commission's view is that it is generally accepted that the attractiveness of any particular television broadcaster to potential subscribers or viewers depends heavily on its ability to acquire content, particularly premium content. Broadly defined, premium content, *inter alia*, includes sports, movies and series. With respect to movies, they derive their premium element from the 'release window' structure whereby consumers value movies more the closer they are to the theatrical release date. When it comes to sports, for it to be regarded as premium the Commission is of the view that it must have the following five features: (i) be of a high quality production; (ii) must be broadcast live; (iii) with sufficient regularity; (iv) popularity; and (v) costs of acquiring the content rights should be relatively higher.

5.7.5 While Cell C agrees that there should be a distinction between premium and non-premium content, it further notes that there is no one way of defining premium content. Nevertheless, Cell C proposes to define premium content as follows:

"Content determined to be valuable [either by a financial or public interest standard]; and/or that is made available on bouquets that are priced above the price of the majority of content, or subject to a retail buy-through, or both³⁸.

5.7.6 According to Cell C, the MultiChoice conclusion that *"there is no relevant distinction between content traditionally considered to be "premium" and other content"* is not supported by evidence.

5.7.7 SOS agrees with the Authority's definition of premium content and the list in table 17 of the Discussion Document.

5.7.8 MultiChoice submits that so called 'premium' content as a must-have is well understood to be obsolete. Content such as FSPTW and football was deemed a driver for subscriptions and a potential bottleneck to competition in the past,

38Cell C written submission to ICASA on the Subscription Television Broadcasting Inquiry

elsewhere. There is now no single piece of content that is a 'must have' due to the proliferation of content that can be used to build substantial audiences.

5.7.9 Furthermore, it is well understood today that audiences are diverse and fragmented, and a broad array of content is capable of building a customer base. The lack of scarcity and ability to invest in producing popular content means that there is no longer any basis or utility in distinguishing between premium and basic content.

5.7.10 e.tv argues that traditionally first window rights have mainly been available to and taken up by Pay TV because of the exorbitant cost. Free to Air broadcasters dependent only on advertising income cannot afford to bid for first window rights. The first window rights are globally accepted to be Pay TV rights. The revenue potential of any content, be it movies or series in the first window compared to the second or third window, is incomparable. With the increase in social media usage and audiences commenting about movies and programmes the ability to generate new interest in such programmes is difficult and curtails the potential of income for FTA broadcasters in the second or third window.

5.7.11 e.tv disagrees with MultiChoice that content is evolving and the terms 'premium', 'must have' and 'essential' do not provide a basis for relevant market definitions. To support its view e.tv uses the examples of WWE and UEFA Champions League. e.tv states that both WWE and UEFA Champions League are premium content and since losing the bids for their rights to MultiChoice it has not been able to find similar programmes to recover the viewership lost.

5.8 The Authority's findings

5.8.1 Content has been a driving force behind changes in the television and video-on-demand industry. This has manifested in the way content is captured (first on film, then videotape, and later, digital media) to the way it is delivered (via live broadcasts, then cable, satellite, and online platforms) to the way it is consumed (via television sets, computers, tablets, and mobile phones). These changes have brought new players with new business models to the

landscape. However, there is no denying that despite these changes, the strategic nature of different types of content remains relatively constant.

5.8.2 Content can be categorised into three main broad areas: news; sport; and entertainment.

- **Sport** has the strongest reputation for delivering large audiences and/or numbers of subscribers for broadcasters and pay TV providers. It remains a premium product for which viewers are willing to pay a higher amount and in return for paying that higher amount, they expect a premium experience. Operators and channels have shown a willingness to spend substantial amounts on this proven customer-acquisition tool and ARPU driver. This translates into significant revenue generation, of both advertising and subscription. Global sports programming spend has been increasing over time, totalling \$26.5 billion in 2016, a 60% increase on spend of \$16.6 billion in 2007³⁹. Although sports accounts for only 15 percent of all viewing, it accounts for some 65 percent of the direct revenues earned by content creators⁴⁰. It is a significant differentiator among broadcast networks and distributors in most markets.
- **News** is regarded as having a more strategic than economic value for broadcasters and content producers. It accounts for only about 2 percent of direct payments to producers and rarely creates sustainable profits for networks⁴¹. However, news can help channels offer a full range of programming and, while it can take varying forms, some more premium (for example, investigative journalism) than others, it is generally not as expensive as sports and entertainment.
- **Entertainment** can either be scripted, such as films, series, comedy and drama or it can consist of reality shows and live events. This type of programming drives the lion's share of network profitability⁴².

³⁹ IHS Markit. New Frontiers for Distribution of Sports Content. December 2017

⁴⁰ Boston Consulting Group. The value of content.

⁴¹ Ibid

⁴² Ibid

5.8.3 In the Discussion Document the Authority referred to a number of cases and research where premium content was defined and examples of premium content given⁴³. The Authority does not repeat the case precedent here, suffice it to indicate that the Authority maintains its position that there is a distinction between premium and non-premium content.

5.8.4 The Authority agrees with Cell C's contention that the MultiChoice conclusion that "*there is no relevant distinction between content traditionally considered to be "premium" and other content*" is not underpinned by evidence.

5.8.5 The Authority returns to this issue in sections 5.15 and 5.16 below, where it provides reasons why it believes that there is a difference between premium content and other content. Amongst other reasons, the Authority reaches the above conclusion in light of the contradiction between what MultiChoice states in its public pronouncements on the issue of "premium content" and what is contained in its business plans (which statements, for reason of their confidential status in terms of section 4D of the ICASA Act, are not set out herein).

5.8.6 Having defined premium content, the Authority then proceeded to define the relevant retail markets and posed the following question:

7. Do you agree with the Authority's characterisation of the retail market and the market definition as outlined above? If not, how would you define the relevant market/s in this regard?

5.9 Stakeholder comments: Free-To-Air and subscription services

5.9.1 Cell C agrees with the Authority's definition of the market but notes that there is no determination of a time horizon for a forward-looking review of competition in the market. Cell C proposes a time horizon of at least 3 years. Cell C disagrees with the conclusion that a two-sided market exists when a licensee does not make a majority of its revenue from subscription and

⁴³See for example IV/36.539 - British Interactive Broadcasting/Open

OECD. 2013. Competition Issues in television and broadcasting. Policy Roundtables

Nicita. A and Ramello. G.B. 2005. Exclusivity and Antitrust in Media Markets: The case of Pay-TV in Europe. Available at [www.http://poseidon01.ssrn.com/delivery.php](http://poseidon01.ssrn.com/delivery.php)

sponsorship. Cell C is of the view that drawing a distinction between pay-TV and Free-to-Air on the basis of subscriptions and advertising revenue distorts the focus from content, which it considers a key component of this inquiry. Cell C proposes that the market definition be narrowed down to the pay-TV market. Cell C also does not consider the technical aspects of pay-TV to be particularly relevant to market definition.

5.9.2 In its presentation Cell C argues that whereas MultiChoice refers frequently to the UK as a source of its arguments, specifically that *"the UKCC referred to FTA as an "out of market constraint to be taken into account in an assessment [of a market]"*, the point is that imposing some kind of constraint on pricing is not the same thing as FTA being in the same market as subscription tv.

5.9.3 Also, the UK is renowned for its exceptionally strong FTA market on any measure. It is an entirely different thing in South Africa where it is arguably *not* competition or innovation or investment that has resulted in the SABC gaining viewers, but availability and affordability of the signal.

5.9.4 Cell C further argues that contrary to the MultiChoice prediction, it is entirely likely that less than 10% of Multichoice's Premium subscribers will leave MultiChoice if the price of their package increases. In any event, MultiChoice does increase prices year on year, but not enough subscribers leave to render the increase unprofitable. Instead, within the MultiChoice stable, consumers "frequently switch" between different bouquets at different price points. Multichoice's evidence of subscriber numbers increasing for FTA broadcasters does not prove that FTA/OTT is materially increasing as a constraint on MultiChoice. If they were to raise prices as they claim, there is no evidence that subscribers would be lost to FTA.

5.9.5 Telkom notes that subscription television is defined as a separate market from audio-visual content and FTA services. However, these markets compete for advertising revenue. This may potentially limit the inquiry from assessing the impact of dominance on the whole broadcasting sector.

- 5.9.6 Telkom recommends a more thorough analysis of substitutability between OTT and subscription TV. Telkom suggests a market for premium channels and one for all other channels
- 5.9.7 Vodacom agrees with the Authority's market definition in general. However, in line with their recommendation of the European Commission's three-criteria approach and recognition of Market No. 18, Vodacom believes the Authority should specifically identify transmission platforms as a market.
- 5.9.8 According to the PSL, the identification of a market for 'the acquisition of premium live soccer matches for retail distribution in South Africa' implies that ICASA considers the PSL as the only supplier of soccer in the broadcasting market, to the exclusion of the English Premier League and UEFA.
- 5.9.9 According to MultiChoice, it competes in a highly competitive and dynamic electronic audio-visual services market that includes services on all distribution technologies, including OTTs and linear as well as non-linear video-on-demand services. It also includes all electronic audio-visual services, free as well as paid-for without distinction by content, genre or price point.
- 5.9.10 MultiChoice submits that the rise of OTT services as compelling alternatives for consumers has brought much change in the electronic audio-visual services sector and substantial disruption to traditional pay-tv broadcasting services. OTT services offer consumers a tremendous variety of content together with considerably greater convenience, allowing them to view what they want, when they want, how they want.
- 5.9.11 Therefore, the relevant market is platform neutral regarding distribution technologies and includes non-linear formats together with linear channels. The market also includes FTA TV broadcast and free online content accessed over OTT platforms (Facebook and Google), including pirated content.
- 5.9.12 There have been seismic shifts in audio-visual content such that FSPTW and sports events traditionally thought of as important for building subscriptions are no longer important in face of explosion of other content of greater quality and attractiveness. A lot of content has been developed by OTTs. Local content

is now sought after by local broadcasters. With respect to sport, new competitions are developing such as the Twenty-20 cricket and local leagues.

5.9.13 MultiChoice notes that there are large proportions of pay tv subscribers who have OTT services over high speed broadband as a substitution option. Consumption of electronic audio-visual services is shifting to a variety of devices rather than just the TV set. There are changes in electronic audio-visual content consumption patterns from linear to non-linear services. DTT is a prospective distribution technology for paid-for electronic audio-visual services.

5.9.14 Therefore, according to MultiChoice, the relevant retail market is the market for electronic audio-visual services.

5.10 The Authority's findings

5.10.1 Market definition at this level is first assessed from the viewer's perspective and then from a supply-side perspective. Since the Authority's focal product for purposes of this inquiry is subscription television, this is the product on which the SSNIP test is applied. The Authority agrees with Telkom that –

"The SSNIP test should start with the narrowest possible market and then consider potential substitutes. In the current case, the relevant question is whether subscription television broadcasting services form a separate market, whether there are separate sub-markets or whether similar services (e.g. video-on-demand) form part of the relevant market"⁴⁴.

5.10.2 Therefore, the question to pose is whether a hypothetical monopolist of subscription television services in South Africa, can profitably increase subscription fees by a margin of between 5% and 10%. In order to answer the question, the Authority considers what would be the likely alternatives available to a subscriber faced with such a price increase. The Authority starts by identifying possible alternatives at a broad level and then analysing substitution between subscription television and each identified alternative

⁴⁴ Submission by Telkom SA SOC on the Discussion Document into subscription Television Broadcasting Services, 4 December 2017, para 11.

service. At a basic intuitive level, it would seem that there are alternatives such as other subscription television services, free-to-air television services and video-on-demand services (including transactional, subscription and free video-on-demand services). There are other services that offer video entertainment such as short-form video services available through social media platforms, including Facebook, Instagram, Snapchat and Twitter. In order to arrive at an informed determination on whether the identified services would qualify as alternatives to a hypothetical monopolist of subscription television broadcasting services, the Authority conducts further analysis below.

5.10.3 The Authority starts this analysis by considering whether enough subscribers faced with a 5-10% increase in subscription fees would switch to a free-to-air television service to render such an increase unprofitable to the hypothetical monopolist. In order to properly analyse such substitution, the Authority takes into account the behaviour of a typical subscriber. A subscriber to a subscription television service chooses a bouquet that meets his or her preferences both in terms of content, affordability and accessibility. In the Discussion Document the Authority had identified two tiers of bouquets, basic and premium. In this Draft Findings Document, the Authority adds a third tier, which is the middle-level. This is consistent with the evidence submitted by both MultiChoice and StarSat who adopt models that segment consumers into different target groups based on household income levels, being the low income, middle income and high income. Deukom offers a single bouquet that appears to be targeted at viewers in the high-income bracket. Therefore, the Authority distinguishes between three different bouquets, being (i) basic-tier or entry level bouquets; (ii) middle level bouquets; and (iii) high-end or premium bouquets.

5.10.4 As explained in the Discussion Document, subscription television services in South Africa, as elsewhere, are supplied through a bouquet of channels, usually starting with a basic package of content, like kids' shows, news, music and a couple of general interest factual channels. There is then a buy-through to the middle level bouquets in order for a subscriber to access other content such as selected movies, series and sport. This is followed by another buy-

through to the high-end or premium bouquets, which in addition to channels in the basic tier and middle-level bouquets offer a wide variety of the latest movies and series, a much wider selection of sport channels as well as a host of other general channels. A subscriber to a basic tier bouquet faced with a SSNIP can only churn out of the service. However, free-to-air viewers who want to purchase subscription television services have to invest in a satellite dish and decoder in addition to paying an installation fee as well as committing to a monthly subscription. The investment made by the consumer becomes a sunk cost, since some of the equipment purchased cannot be used elsewhere.

- 5.10.5 During the public hearings, SOS Media gave evidence that viewers in the lower LSMs (now SEMs) move from free-to-air services (using analogue transmission) to subscription television services (using digital satellite transmission) as a form of progression, in order to not only access particular content but to receive better quality transmission as well. When asked to clarify the point about consumers acquiring a satellite service in order to access SABC programmes, SOS stated that –

"With regards to whether or not it's competition vs substitution, I don't think there are polar or exclusive issues, I think it's a progression because there is a fact that you are trying to get a specific type of content what we would find is that the public would say, okay, if I cannot access it the way that I am accustomed to accessing it, then I am going to access it in a different space. But it's still competition in the sense that when I weight up the two pros and cons between doing it the way that I am doing it now through my arial versus paying, even though I don't have money and I just told you now that I don't have money now for the STB box, but I am going to pay for the DStv box tells you that there is a desire on the part of the public, not to substitute it per se, but to have a better media content offering.⁴⁵"

- 5.10.6 This is consistent with the results of the Authority's survey which found that a better quality TV signal is the strongest reason to purchase the Basic DStv

⁴⁵ Transcript of the public hearings, p89

package over the FTA offering. Other reasons relate to the type of programming content enjoyed⁴⁶.

- 5.10.7 If viewers perceive subscription television services as of better quality than free-to-air services it means that once they upgrade from free-to-air to subscription they are highly unlikely to substitute backwards from subscription services to free-to-air services.
- 5.10.8 In the Discussion Document the Authority stated that given the growth in the viewership of subscription television services over the years, there is no evidence suggesting reverse substitution from subscription to free-to-air services.
- 5.10.9 Therefore, we find that it is highly unlikely that enough viewers would switch from subscription television services to free-to-air television services in the face of a SSNIP⁴⁷.
- 5.10.10 The Authority had further suggested that based on the characteristics of the two services, in terms of significant differences in their price points, content and quality, it is unlikely that free-to-air television viewers would consider subscription television as a substitute, neither would subscription television subscribers substitute for free-to-air television in the event of a small but significant increase in subscription fees.
- 5.10.11 The Authority maintains its view that based on product characteristics and other factors as outlined in the Discussion Document free-to-air services do not constrain subscription television services.
- 5.10.12 According to the pre-listing statement by MultiChoice it competes with several electronic audio-visual services providers in Africa. However, the Group's primary pay-TV competitor is StarTimes. This indicates that MultiChoice

46 Pulse Research (Pty) Ltd. Research Report: Consumer Online Survey. November 2018. p98

47 ICASA. Discussion Document: Inquiry into Subscription Television Broadcasting Services. Government Gazette No No. 41070, 25 August 2017, p.54 para 5.7.4

regards StarTimes as a direct competitor and other services as indirect competitors⁴⁸.

5.10.13 The Authority arrives at this decision also taking into account case precedent. The Authority does not repeat the case law in the Discussion Document but in the following cases the courts found FTA and subscription broadcasting television services to belong in separate relevant markets:

5.10.13.1 NewsCorp/Teleiu (2003, Italy) (COMP/M.2876

5.10.13.2 SFR/Tele2 (2007, France) (COMP/M.4504

5.10.13.3 NewsCorp/Premiere (2008, Austria and Germany) (COMP/M.5121)

5.10.13.4 NewsCorp/BSkyB) (2010, UK and Ireland) (COMP/M.5932)

5.10.14 In the Newscorp/Telepiu⁴⁹ case it was recognised that there is limited substitution between free-to-air and subscription television services. The European Commission made the same finding in Newscorp/BSkyB⁵⁰ that the retail supply of subscription television and free-to-air television constituted separate markets. In addition, the UKCC in the Movies on Pay-TV Market Investigation⁵¹ found that there was a retail market for pay-TV, whilst noting the evidence suggesting that FTA TV imposed some constraint on pay-TV retailers. The UKCC further accounted for FTA as an 'out-of-market' constraint, reflecting that consumers have different preferences for FTA TV and pay-TV but that there are some pay-TV subscribers for whom the next best alternative is FTA TV.

5.10.15 In the 2014 *Liberty Global/Ziggo*⁵² merger decision the European Commission noted that in its previous decisions it had divided the market for the licensing and acquisition of individual content in the following manner: (i) Pay TV versus Free-To-Air ("FTA") TV,¹⁸ (ii) linear versus non-linear broadcast,¹⁹ (iii) by

48 MultiChoice Group Limited. Pre-listing Statement. 21 January 2019

49 COMP/M.2876 – Newscorp/Telepiu

50 COMP/M.5932 Newscorp/BSkyB

51 UKCC, Movies on Pay-TV Market Investigation, para 4.91

52 European Commission. Liberty Global / Ziggo. Case No M.7000

exhibition window, that is to say subscription VOD, transactional VOD, PPV, first Pay TV window, second Pay TV window,²¹ and FTA, (iv) by content type, that is to say films, sports, other content.

- 5.10.16 In the 2018 decision the European Commission's market investigation confirmed the traditional distinction between FTA and Pay TV content. However, since the Dutch market was essentially a pay TV market with only three FTA channels, the European Commission concluded that the distinction between FTA and pay TV was of little relevance and the definition could be left open.
- 5.10.17 Despite the afore-going, the Authority received compelling evidence pointing to substantial competitive pressure exerted by subscription broadcasting services on free-to-air services. The evidence given by e.tv and the SABC is quite instructive in this regard. Both service providers point to fierce competition from MultiChoice, both for viewers and advertisers. The Authority discusses this aspect next.
- 5.10.18 The usual assumption when it comes to substitution is that it is symmetrical such that if consumers are willing to substitute product A for product B then it follows that they will also be willing to substitute product B for product A. However, it is possible for substitution to occur one way and not in reverse, the so called asymmetric substitution. Asymmetric substitution could result from a number of factors, such as consumer preferences, the introduction of new technologies, the potential for price discrimination, quality differences and the position of the product in question in the supply chain (i.e. whether it is an input or a final product sold to consumers)⁵³. In such instances, one or both products can be included in the relevant market.
- 5.10.19 The convention is that if there is substitution from the focal product to the alternative product, but no substitution from the alternative product to the focal product, then the alternative product is included in the relevant market. If on the other hand there is no substitution from the focal product to the

⁵³ OECD. 2014. Defining relevant markets in telecommunications.

https://www.oecd.org/daf/competition/Defining_Relevant_Market_In_Telecommunications_web.pdf

alternative product, but only substitution from the alternative product to the focal product, the alternative product should not be included in the relevant market⁵⁴. The Authority analyses the possibility of asymmetric substitution next.

- 5.10.20 Free to air services in South Africa are normally provided through analogue transmission, with the exception of the new e.tv service, OpenView HD which is satellite based. There are obvious quality differences between analogue and satellite transmission. In terms of value for money, viewers have access to a lot more channels through satellite transmission, including FTA channels, due to the requirements of the Must Carry Regulations.
- 5.10.21 The type of content shown on subscription television and free-to-air also differs. For instance, movies from Hollywood's six major studios⁵⁵ are released in windows based on time of release. Consumers are willing to pay extra for the ability to view first run movies on subscription television channels, hence the higher subscription fees for high end bouquets that show such movies. Free-to-air broadcasters cannot compete with subscription television broadcasters for such movies because of the terms and conditions surrounding their release. Furthermore, a feature film, documentary or series distribution cycle gives subscription television preference over free-to-air television.
- 5.10.22 There is evidence suggesting that FTA viewers have been migrating to subscription television, as evidenced by the fact that FTA television households decreased by 3.5% from 8.4 million in 2012 to 8.1 million in 2016, whilst subscription television households increased by 37% from 3.9 million in 2012 to 6.2 million in 2016⁵⁶. The subscription television households figure has increased about 7 million. As such, it is highly unlikely that enough subscribers would switch back to analogue FTA services in the event of a SSNIP.
- 5.10.23 Whereas MultiChoice's premium bouquets have stagnated over the recent past, phenomenal growth has come from its basic tier and middle tier

54 Berec. Berec report on impact of fixed to mobile substitution in market definition. December 2011

55 20th Century Fox, Warner Bros, Paramount, Sony, Universal and Walt Disney

56 E.tv submission

bouquets. For instance, over the three years to March 2018, basic tier subscribers grew by 1.3 million, a 14% increase while middle tier subscribers increased by 144 000 or 2%. In the same period premium subscribers saw a 5% decline.

- 5.10.24 Further evidence was given by e.tv when responding to the information gathering Questionnaire, by indicating that it regards the SABC as its main competitor for viewership although lately there has been some switching away by viewers from analogue terrestrial broadcasting towards the lower-cost subscription television broadcasting digital satellite bouquets such as DStv's Easyview.
- 5.10.25 From the consumer survey, DStv subscribers cited a number of reasons why they would not be satisfied with a FTA offering, including signal quality (25%), product affinity (15%), and content offering (movies, sport and children's programs). The consumer survey found that a better quality TV signal is the strongest reason to purchase the Basic DStv package over the FTA offering. Other reasons relate to programming content enjoyed⁵⁷. The basic-tier subscription television bouquet subscribers cited reasons for not moving up into mid-tier bouquets as affordability (49%), and cost of service not reflective of value offered.
- 5.10.26 The importance of satellite transmission as determinant for service uptake is also noted in the MultiChoice pre-listing statement, that:

*"DTH is television delivered by means of a communications satellite and received by a satellite dish and decoder. This distribution channel is particularly popular in both remote/rural and urban areas to reach where cable and, in some cases, terrestrial television services are limited or non-existent. DTH provides additional functionality combined with high-quality and reliable viewing, as its signals are received directly from satellites."*⁵⁸

⁵⁷ Consumer survey report, p98

⁵⁸ MultiChoice Group Limited. Pre-listing Statement. 21 January 2019. p22

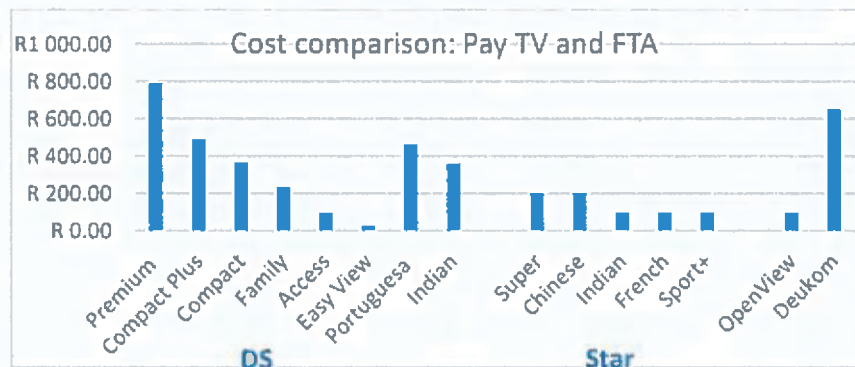
- 5.10.27 In addition, the Must Carry Regulations limit the extent to which FTA television services would constrain basic tier subscription television services given that all FTA offerings are available on subscription television offerings.
- 5.10.28 The preceding analysis points to strong asymmetric substitution from free-to-air television services to basic tier subscription services. This suggests that free-to-air and subscription services belong in separate relevant product markets.

Satellite-based free-to-air television services

- 5.10.29 Therefore, given the argument about the quality of satellite compared to analogue television broadcasting transmission services, the Authority cannot discount reverse substitution from basic tier bouquets to satellite FTA. The Authority understands that e. tv's decoders have dual encryption, allowing them to pick up FTA services that are carried on the satellite platform. The Authority also understands that the OpenView HD service is now capable of using the DStv satellite dishes, thus reducing the transactions and switching costs for viewers.
- 5.10.30 Barring transmission technology, the main distinguishing feature between free-to-air and subscription television services, is content, both in terms of quantity and quality. Viewers are willing to pay a fee to access a wide variety of quality content associated with subscription television. However, in terms of value for money, basic-tier bouquets by their very nature, contain basic channels that justify the payment of a minimum entry-level fee. Thus, in an environment where free-to-air services are available through digital satellite transmission, offering a wide variety of channels, the distinction between satellite based free-to-air television services and satellite based subscription television basic-tier bouquets becomes blurred. Therefore, from a quantity perspective, in terms of the number of channels, and from a quality perspective, satellite based FTA and subscription basic tier television bouquets have a lot in common. The only difference becomes price, where a subscription fee is required in addition to installation and equipment purchase costs.

5.10.31 Yet, in terms of price, Figure 4 below suggests that basic-tier bouquets and satellite FTA channels belong in the same price point⁵⁹.

Figure 4. Cost comparison: FTA and Pay television services



Source: Adapted from Econet Media Presentation⁶⁰

- 5.10.32 [REDACTED]. Price sensitivity can be an indicator of whether a product has close substitutes or not. [REDACTED]. The information reviewed by the Authority relevant to this aspect underscores the Authority's finding that there is competition between satellite FTA and basic tier bouquets, although in the Authority's view substitution from basic tier subscription services to satellite FTA is weak.
- 5.10.33 Since broadcasting is a two-sided market, the Authority also considers the possible reaction of advertisers when faced with a SSNIP.
- 5.10.34 Advertisements are often targeted at specific audiences that are segmented according to certain characteristics such as SEM level, gender, age, language and race. Basic-tier bouquet and free-to-air audiences tend to be targeted at

⁵⁹ Whilst FTA is offered for free, for ease of comparison purposes the OpenView HD price of a decoder, dish and installation is taken as a proxy for subscription and assumed to be paid over 12 months

⁶⁰ Econet Media presentation to ICASA, 10 May 2018, slide 39

people in the lower level SEMs. Thus, advertisers may easily substitute between basic-tier bouquet channels and free-to-air channels.

- 5.10.35 Econet Media notes that subscription television attracts more advertising revenue which crowds out the primary source of revenue for FTA channels.
- 5.10.36 In both their written and oral submissions, e.tv and the SABC lamented the competition for advertising revenue exerted by subscription broadcasters on free-to-air television. According to e.tv, advertising revenue for FTA declined by 14% between 2012 and 2016, whilst that of subscription television grew by 7% over the same period⁶¹. According to e.tv, MultiChoice accounts for 37.8% of the total television broadcasting advertising revenue⁶². The SABC quotes the Adynamix data which indicates that at 48% market share, MultiChoice had almost half of the total advertising revenue in 2017⁶³. e.tv contends that this tide of subscription services accounting for a bigger share of advertising revenue started to turn when MultiChoice began encroaching on the lower LSMs, i.e., when basic tier bouquets were introduced.
- 5.10.37 Thus, the advertising side of the market also reveals that there has been one-way substitution by advertisers, from FTA to subscription channels.
- 5.10.38 The Authority then considered whether chains of substitution are at play in this regard. In order for the chain of substitution to hold the assumption is that a subscriber to a premium bouquet faced with a SSNIP is likely to churn down to a middle level bouquet, or churn out more to an OTT service, than to a free-to-air television service. Similarly, a subscriber to a middle level bouquet is more likely to churn down to a basic tier bouquet or a similarly priced OTT service than churn out to a free-to-air service in the face of a SSNIP, whereas a subscriber to a basic-tier bouquet is likely to churn out to a free-to-air service.

61 Comments by e.tv on the Discussion Document Into Subscription Television Broadcasting Services. p 5, para 18.

62 E.tv presentation. Inquiry Into Subscription Television Broadcasting Services. 10 May 2018

63 SABC submission on the Icasas Discussion Document: Inquiry Into Subscription Television Broadcasting Services. p. 26 para 3.1.4

5.10.39 Thus, basic tier bouquet services are more likely to face a competitive constraint from satellite-based free-to-air services, than middle level and premium bouquets. Therefore, assuming that this chain exists, the relevant market would appear to be all television and OTT services. Nonetheless, the Authority does not find that this is indeed the case for the reasons set out in detail below and in particular in 5.12.

5.10.40 However, in reality free-to-air viewers are highly unlikely to consider OTT services as an alternative based on affordability. Thus, already there is a break in the chain. According to the European Commission from a practical perspective, the concept of chains of substitution has to be corroborated by actual evidence, for instance related to price interdependence at the extremes of the chains of substitution, in order to lead to an extension of the relevant market in an individual case. Price levels at the extremes of the chains would have to be of the same magnitude. In this case they are not, hence a break in the chain.

5.10.41 Similarly, the quality and amount of content shown on free to air and basic-tier bouquets and premium bouquets differ vastly. The Authority is also able to circumscribe specific boundaries around free-to-air, basic tier, middle-tier, premium and OTT viewers based on SEM levels, which indicates the services offered or targeted at each income level belong in distinct relevant markets.

5.10.42 In the Discussion Document, the Authority had concluded that it is unlikely that viewers of free-to-air channels distributed terrestrially would consider the more expensive subscription television packages as close substitutes, due to significant differences in their price points, unique content proposition and quality. However, the Authority is inclined to consider free-to-air services distributed digitally to be close substitutes to basic-tier subscription services, based on slight differences in price, quality and quantity of channels provided.

5.11 Stakeholder comments: Subscription television and OTT services

5.11.1 Next, the Authority considers substitutability between subscription television services and OTT services. For purposes of this analysis, OTT services include transactional video-on-demand, subscription video-on-demand and free video-on-demand services.

5.11.2 Much has been said about the threat of OTT services to traditional television services, including subscription television.

5.11.3 Econet Media contends that the Authority's finding that subscription television falls in a separate relevant market to FTA and OTT/VOD needs to be more thoroughly supported. It then provides further analysis of the competitive dynamics between subscription and OTT services, quoting various comparative studies and finds the following:

- More households have television sets than the proportion that have the internet access necessary to be able to switch to OTT
- South Africa has low internet penetration: not many households have the internet access necessary to switch to OTT
- For households that do have internet access, the internet speed is generally too slow to watch OTT content with a high video quality
- South Africa's internet data costs are expensive relative to other countries
- Some consumers cannot afford to switch to OTT due to the high internet costs
- When the total cost of OTT (subscription fee + internet) is compared to the cost of subscription-TV (subscription fee), it is higher than most subscription-TV packages, even when using conservative estimates for OTT costs. Even for households that already have internet access, the choice is not only between subscription fees of subscription-TV and OTT because not all current access is fast enough, is enough data for viewing content, or is via the 'ideal' device for viewing for OTT content;
- OTTs are seen as a complementary service to subscription-TV;
- A large proportion of poor households watch television;
- Some of these are subscription-TV subscribers;
- For some of these the total cost of OTT will be too high to switch;

- Not all rich households have the devices necessary to switch to OTT; and
- Some of these households will not want to spend the additional money.

5.11.4 According to Econet Media, the above situation is expected to remain this way in the short to medium term. As a result, not enough consumers will switch to OTT when faced with an increase in subscription fees, causing a price increase in subscription-TV to be profitable.

5.11.5 Therefore, based on the above, Econet Media concludes that subscription-TV and OTT are not in the same product market.

5.11.6 SOS's main concern appears to be the exclusion of OTTs from the regulatory net. It states that despite limitations to access and high data costs, all of the evidence internationally points to the fact that OTT services are fundamentally changing the way audiences consume audio-visual content and that regulators must act to prevent a situation where OTT services cannibalise traditional broadcasting because of the light- or no-touch regulatory approaches adopted. SOS then calls on the Authority to regulate OTTs in the same manner that they are regulated in the European Union.

5.11.7 Act-SA indicates that data costs and internet accessibility remain a hindrance to the take up of OTT services, especially in rural areas. It states that *"...we have not reached to that point yet as South Africa or as even Africa to start talking about OTTs being a significant player in this particular sector. No they've very far (sic)."*

Cricket South Africa states that it is unable to maximise the commercial viability of its content offering in the absence of adequate competition within the broadcasting sector and particularly within Pay TV due to lack of competition. CSA is of the view that the rapid growth of broadband within South Africa in the near future will unlock new opportunities in respect of live streaming and OTT providers that may result in new key revenue streams.

5.11.8 In its presentation, e.tv went into detail to discredit the narrative that OTTs pose a competitive constraint on broadcasting services in South Africa. According to e.tv the OTT challenge may be formidable in name and may well be so in the future, but its current impact is not felt in the industry. It is not

big in South Africa. Moreover, other platforms started have failed. OTT players may be monsters but they are on the horizon.

- 5.11.9 In its response to the Discussion Document, MultiChoice contends that the Discussion Document does not pay sufficient attention to the impact of OTTs.
- 5.11.10 MultiChoice points to a changing audio-visual landscape, driven by the entry of OTT players. In South Africa, the expansion of OTTs is spurred by rapid broadband roll-out, both mobile and fixed; exponential growth in consumer data usage; internet speeds that are sufficient for audio-visual services as well as broadband prices that are continuously decreasing.
- 5.11.11 MultiChoice equates the impact of OTTs on the subscription broadcasting market to how they altered the newspaper and music industry. Besides direct competition with local broadcasters OTTs also have a hidden impact in the sense that they are not regulated, hence do not have to contend with a myriad of obligations placed on local broadcasters such as licence fees, local quota requirements, tax obligations, MDDA and USAASA contributions as well as BBBEE requirements.
- 5.11.12 Apart from OTTs, MultiChoice analyses the impact of other services such as out of home viewing, other regional subscription television services and telecommunications service providers on subscription television and conclude that they exert competitive constraints on its business. In addition to the above, MultiChoice contends that piracy acts as a competitive constraint. At page 5 of its response to the Discussion Document, MultiChoice stated as follows:

“in addition to the emergence of legitimate OTT providers, the piracy of electronic audio-visual content is on the rise and posing a huge threat to traditional Pay TV services. For example, MultiChoice estimates that more than 2 million people view pirated versions of the series and movies available on DStv in SA. Piracy in sports is also pervasive. The reality is that piracy is a further competitive constraint on Pay TV services in SA”.

- 5.11.13 MultiChoice estimates the number of Netflix subscribers to be [REDACTED] as of May 2018⁶⁴, yet in its 2018 business plan MultiChoice provides a conservative estimate in relation to the number of Netflix subscribers compared to its Showmax and DStv Now Subscribers [REDACTED].
- 5.11.14 Econet Media (in its presentation to the Authority dated 10 May 2018) disputes MultiChoice's position by pointing out that the then UK Competition Commission's finding⁶⁵ that there was sufficient rivalry between OTT and traditional subscription TV services does not apply in South Africa due to the fact that⁶⁶;
- 5.11.14.1 this inquiry considers all content, not just movies;
- 5.11.14.2 the UK's broadband market is much more developed than in South Africa;
- 5.11.14.3 South Africans cannot subscribe to premium film content only since MultiChoice bundles premium film content, premium series content and non-premium content;
- 5.11.14.4 content is made available in different release windows in OTT and subscription TV; and
- 5.11.14.5 there is limited supply side substitutability since a subscription television licence is necessary for such service whilst OTTs are unregulated.

5.12 The Authority's findings

- 5.12.1 There is no doubt that there is rapid global and local expansion of OTT services. Despite a number of OTT players having launched and subsequently discontinued their services, new OTT services have become available to South African viewers in the last 3 years. These include Showmax (part of

64 Page 40 of MultiChoice presentation to the Authority titled "MultiChoice and M-Net's Representations in ICASA's Subscription Television Inquiry" (11 May 2018) available online at <https://www.icasa.org.za/uploads/files/multichoice-Inquiry-into-Subscription-TV-Presentation.pdf>.

65 UK Competition Commission. Movies on pay-tv market investigation. 2012

66 Page 31 of the Presentation.

Multichoice), Netflix, DEOD, Vodacom VideoPlay, Google Play, Amazon Prime, Kwesé Play, Telkom LIT, Cell C's Black and iflix.

- 5.12.2 These services impact on viewing patterns and behaviour, and have implications for traditional television broadcasting, including subscription television. However, there are several factors that mitigate against OTTs constituting a strong constraint on subscription television services in South Africa. We consider these factors next.

Viewing patterns: Live television v video-on-demand

- 5.12.3 In the South African context, out of 14.4 million households with a television set, 8% have an internet enabled TV set with only 3% of them claiming to have used the internet functionality on their TV sets⁶⁷. Despite the growth of OTT services in South Africa, about 96% of households still watch live television content⁶⁸ and only 3% of the population watch online video content⁶⁹. Cape Town TV underscores this observation in its written submission. Therefore, these figures suggest that the claim that OTT distributors is a major threat to subscription TV is overstated.
- 5.12.4 These observed viewing patterns are in line with international trends. For instance, in the UK traditional live broadcast TV is still at the heart of people's viewing experience. In a survey conducted for Ofcom⁷⁰, when asked what they would do first when wanting to watch a TV programme or film, the top response was *'switch on the TV and see what's airing on live broadcast TV'*. This response was chosen by half (50%) of people in the UK. The second-ranked answer, accounting for about 12% of respondents, was *'go straight to Netflix, Amazon Prime, Now TV or other on- demand services that you pay a monthly subscription for'* (12%), followed by *'go straight to recorded TV via DVR'*, selected by 11% of people in the UK. Broadcast TV made up 71% of this of all total TV and audio-visual daily viewing, across all devices, in 2017. The

67 Broadcast Research Council. TAMS Update. October 2018. <https://brcsa.org.za/brc-tams-update-october-2018/>

68 Ibid

69 Ibid

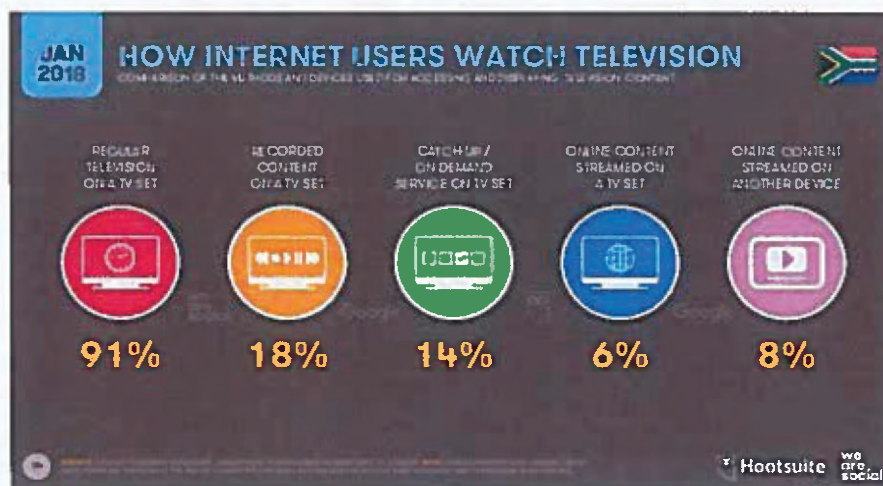
70 Ofcom. Communications Market Report. 3 August 2017 https://www.ofcom.org.uk/data/assets/pdf_file/0022/117256/CMR-2018-narrative-report.pdf

remaining 29% was non-broadcast content such as YouTube and subscription on-demand services such as Netflix and Amazon Prime Video⁷¹.

5.12.5 In 2018, 78% of US households continued to have a subscription television service, down from 88% in 2010. More than 69% of the US households had a subscription video-on-demand service from one of the major players. This was up from 64% in 2017, 59% in 2017 and 52% in 2015⁷². There is prevalence of 'cord stacking', where OTT services tend to complement rather than replace subscription TV services. For instance, about 53% had both a subscription TV service and SVOD service in 2018. One quarter had a subscription TV service but no SVOD and 16% had an SVOD service only with 6% having neither service⁷³.

5.12.6 Figure 5 below depicts a similar trend in South Africa as in the UK and US where live television, at 91% is still the most preferred method of watching content. The live streaming of content via a television set and other devices (including mobile phones) has a low prevalence at 6% and 8%, respectively.

Figure 5. Methods of accessing content



Source: We Are Social⁷⁴

71 Ofcom. Media Nations. https://www.ofcom.org.uk/data/assets/pdf_file/0014/116006/media-nations-2018-uk.pdf. July 2018

72 Marketing Charts. Most TV households report having both a pay-TV and a streaming video service. September 2018

73 Ibid

74 We Are Social Digital 2019 – South Africa. <https://datareportal.com/reports/digital-2019-south-africa>

- 5.12.7 In the past three years, there have been rapid developments including entry of OTT services into the South African market. OTT services and premium subscription television services are targeting similar audience profile in terms of income brackets and broadband reach. In addition, the propositions from both services are similar in terms of content proposition.
- 5.12.8 Given the above background and trends, the question that arises is whether in the event of SSNIP, a subscription television service consumer would switch to OTT services. From the chains of substitution analysis above, the Authority discards switching from a basic tier bouquet to OTT services, on account of substantially different price points. This then confines the analysis to middle-tier and premium bouquets.

Differences in content

- 5.12.9 Traditional broadcasting, including subscription television broadcasting is largely based on professionally produced content. Video-on-demand services on the other hand offer a mixture of content, including professionally produced; semi-professionally produced content and user-generated content⁷⁵. There are a number of content creators in the video-on-demand space who provide unique content which is not available on traditional television.
- 5.12.10 In the South African market, the most significant distinction in terms of offering between linear subscription television and OTTs remains the unavailability of premium live sport content on OTT services. The majority of rights to premium sports are locked up in long term contracts and thus not available for distribution on other platforms. The consumer survey conducted by the Authority revealed that access to sport and latest movie channels is a key driver for premium subscription television uptake, (20% of the respondents cited sport as a key driver while 12% cited latest movies). Value added services available to premium service subscribers such as CatchUp and

⁷⁵ Semi-professionally produced content refers to consumer or user-generated content that has professional or industrial qualities e.g. shot with professional-grade equipment, using professional talent, and which may be produced exclusively for online audiences; User generated content is publicly available and created or produced by consumers, often with little to no brand recognition

DStv Now App were other key drivers. In addition, Cell C submits that linear subscription television consumers that do not switch to OTT services are limited by inability to access live sport.

5.12.11 The Authority considered the advent of piracy and whether it constrains subscription broadcasting as claimed by MultiChoice. The Authority came to the conclusion that since there are various efforts to stem the tide of piracy not only in South Africa but globally, it does not offer a strong competitive constraint on subscription television.

5.12.12 According to IHS Markit, live sports, however it is consumed, is a premium product and viewers paying for such expect a premium experience. The IHS Markit consumer survey revealed that for streaming services this means experiencing seamless streaming, low latency and high quality video with no interruptions. It concludes that achieving all three is more difficult than it seems at the moment⁷⁶.

5.12.13 MultiChoice appears to share this view when it states in its pre-listing statement that –

*"Sports content is a significant feature of pay-TV, and surveys show that it remains an important criterion for subscribers."*⁷⁷

5.12.14 Most OTTs also do not offer news. This is likely to remain a forte for traditional broadcasters, including subscription broadcasters, for some time to come.

5.12.15 The following quote by the Netflix CEO indicates that Netflix has no intention of competing head on with MultiChoice, especially in the area of live sports and news broadcasting in the continent:

"Other firms will do sport and news; we are trying to focus on movies and TV shows. There are a lot of areas that are video that we are not doing: sports, news, video-gaming, user generated content. We don't have live sport....We are not replacing MultiChoice at all. They serve a need that's

⁷⁶ IHS Markit. New Frontiers for Distribution of Sports Content. December 2017

⁷⁷ MultiChoice Group Limited. Pre-listing statement. p22

independent of the internet, via low-price satellite. There is no intention of capturing that audience. If they are growing, its because they serve a need⁷⁸."

- 5.12.16 This quote puts paid the argument whether OTTs pose a competitive constraint on subscription broadcasting.

Broadband access and cost

- 5.12.17 The Authority's consumer survey further revealed that the cost of data and access to high speed internet were limiting the ability of viewers to migrate to the OTT offerings. Mobile broadband subscriptions excluding cellular M2M increased marginally from 50.5% to 57.8% from 2016 to 2017⁷⁹. According to MultiChoice, fixed line internet penetration remains subdued at about 1 million homes with little or no growth expected during 2018 as DSL (fixed line) users switch to fibre.

- 5.12.18 According to MultiChoice, the uptake of SVOD services (including Netflix) in the region has been muted by the limited availability of broadband.

[REDACTED]

[REDACTED] The 2018 MultiChoice Business Plan estimates the number of Netflix subscribers to be [REDACTED].

- 5.12.19 While MultiChoice points to decreasing costs of data, the fact remains that (a) the cost of data is still high, (b) is decreasing at a rate slower than elsewhere in the world, and (c) data allowances are likely to be exhausted quickly if watching video content or HD TV.

- 5.12.20 In its prelisting statement MultiChoice states that all African countries show a relatively higher cost of mobile and that it is estimated that mobile data cost will likely decrease over the next five years⁸⁰. The Authority's data tariff analysis report reveals that generally, the standard headline tariff for prepaid voice and data prices have been constant over the past five years whilst the

⁷⁸ Arthur Goldstuck. "We're not replacing MultiChoice". *Business Times*. 24 March 2019

⁷⁹ Icasa. Report on the State of ICT In South Africa. 31 March 2018. <https://www.icasa.org.za/uploads/files/State-of-ICT-Sector-Report-March-2018.pdf>

⁸⁰ Ibid p28

effective tariff has been decreasing⁸¹. Operators across the board are also offering OTT related price bundles, with lower effective rates per MB. However, despite these initiatives, data prices are still relatively high in South Africa.

5.12.21 For instance, South Africa ranked 50th out of 100 countries, in the 2019 Facebook Inclusive Internet Index. The overall index score is based on the scores of the availability, affordability, relevance and readiness of internet categories⁸².

5.12.22 Research conducted by ICT Research Africa revealed that South African data prices are 134% more expensive than the cheapest data prices in the group of comparator countries. The cost of the cheapest 1GB in South Africa (\$8.28 and R99) is eight times the cost of the cheapest 1GB in Egypt (\$1.13). It was also found that the poorest 20% of South Africans have to spend 19% of their monthly income for just 1GB of data and the top 20% of income earners spend less than 1% of their income for the same 1GB of data. South Africa has the second highest data contract prices among BRICS countries, coming second only to Brazil⁸³.

5.12.23 Mobile operators point to the following as factors impacting data prices in South Africa –

5.12.23.1 lack of radio frequency spectrum;

5.12.23.2 high input costs such as labour, property, energy and company tax;

5.12.23.3 battery theft and vandalism at base station sites;

5.12.23.4 costly, time-consuming applications to municipalities;

5.12.23.5 the cost of rolling out and upgrading the network (network equipment is priced in dollars); and

81 Icasa. BI-Annual Report on the Analysis of Tariff Notifications Submitted to Icasa for the Period 01 July 2018 to 31 December 2018

82 Facebook Inclusive Internet Index: 2019. Available at <https://theInclusiveInternet.eu.com/assets/external/downloads/3i-executive-summary.pdf>

83 Comins, L. SA's data prices most expensive on continent. 24 October 2018. <https://www.pressreader.com/>

- 5.12.23.6 the topology of South Africa, including population density⁸⁴.
- 5.12.24 Thus we agree with Econet Media that when the total cost of OTT (subscription fee + internet) is compared to the cost of subscription-TV (subscription fee) it is higher than most subscription-TV packages, even when using conservative estimates for OTT costs.
- 5.12.25 Despite what MultiChoice states in its written submission about the cost of data decreasing, in its prelisting statement it states that all African countries show a relatively higher cost of mobile data and that it is estimated that mobile data cost will likely decrease over the next five years⁸⁵.
- 5.12.26 Notwithstanding the above, the Authority and the Commission are both currently engaged in processes aimed at reducing data costs. On 30 June 2017, the Authority published a Notice of Intention to Conduct an Inquiry to Identify Priority Markets in the Electronic Communications Sector⁸⁶, as part of a number of initiatives to address the high cost of communication including the cost of data, in South Africa. Around the same time, on 18 August 2017, the Commission initiated a market inquiry into data services in South Africa in terms of Chapter 4A of the Competition Act. On 28 February 2019, the Authority published the End-User and Subscriber Service Charter Second Amendment Regulations, which came into force on 1 March 2019, also aimed at addressing challenges with respect to data services. The Authority expects that through these interventions data prices are likely to decrease gradually over time.

Viewer experience

- 5.12.27 There are differences in viewing experiences from watching traditional tv and streaming or watching video-on-demand services.

84 Fin24. Special Report: Are we being overcharged for data? How SA stacks up against 9 peer countries. 19 January 2019

85 MultiChoice Group Limited. Pre-listing statement. p28

86 Government Gazette No. 40945

- 5.12.28 Out of the 23 million South Africans who have permanent internet access, only a third can only access the internet using their smartphones⁸⁷. This is not the best platform for streaming content. Moreover, very few consumers would have a 10Mbps fibre/ADSL internet package required for good quality, high speed internet connection.
- 5.12.29 Subscription television viewers on the other hand only need a decoder and satellite dish to have a good quality viewing experience.
- 5.12.30 However, traditional television viewers can watch only the content which is being broadcasted, with no control in terms of fast forwarding or changing the program, although catch up features are now common with most subscription television services.
- 5.12.31 Whilst a television viewer has to wait for the program to be broadcast on air at a particular set time, a video-on-demand user chooses to watch any video, movie or clip anywhere, anytime at his or her convenience. With respect to content, a video-on-demand user can find any type of programme of his or her interest.
- 5.12.32 Online viewing also allows consumers to choose a payment plan that suits their viewing habits whether it is weekly, monthly or quarterly subscriptions or flexible charge per download.
- 5.12.33 A standard feature of television services is advertising. From a consumer perspective, adverts interfere with the viewing experience and can be irritating. Online advertising on the other hand targets a specific audience which is actually interested in the product or service.
- 5.12.34 The importance of user experience in market definition featured prominently in the *Facebook/WhatsApp*⁸⁸ case regarding the boundaries between consumer communications applications and social networking services, such as Facebook. Whilst there are undoubtedly some overlaps between these

87 DStv vs Netflix: Which is better for the South African viewer <https://www.thesouthafrican.com/dstv-vs-netflix-which-is-better-for-the-south-african-viewer/>

88 European Commission. 2014. Facebook / Whatsapp. Case No COMP/M.7217

services, for instance in the functionalities offered, as both enable users to exchange text and audio messages, the European Commission's investigation revealed significant differences between them. For instance, social networking services tend to offer a richer social experience compared to consumer communications apps. Users of social networks are able to indicate their interests, activities or life events, create photo albums and express opinions on other users' postings (for example, by commenting or "liking"). Also, in social networks, a user's contact list is by default visible to other users which facilitates adding new contacts. The functionalities of consumer communications apps on the other hand are currently limited and focus on enabling basic communication between users rather than creating a richer experience around their digital identity.

- 5.12.35 Moreover, whilst consumer communications apps facilitate instant real-time communication (with handsets ringing and notifications being pushed to recipients), responses are generally sent promptly allowing a conversation, messages in social networks, such as comments on a posting, are not normally expected to be responded to in real time. Also, social networks tend to enable communication and information sharing with a wider audience than consumer communications apps, which are more personal and targeted.
- 5.12.36 However, due to the fact that these services are constantly evolving the European Commission chose to leave open the question of a possible distinction between consumer communications apps and social networks.
- 5.12.37 Subscription for premium content is dominant among urban dwellers who largely subscribe to OTT services in addition to other television broadcasting services. Some high-end consumers subscribe to OTT services only as they do not see premium subscriptions as value for money and they prefer on-demand viewing. The premium market is saturated, and introduction of new providers will not increase the pool of subscribers but will merely change the market share. The non-premium subscribers are value driven and would only change their packages when something valuable is added to the more expensive packages.
- 5.12.38 The consumer survey indicates that cord shaving occurs when prices change drastically and there is a limited extent of cord cutting. Therefore, when the price of premium subscription television increases drastically, consumers

generally opt for the mid-range subscription options. Insignificant changes in subscription price do not affect premium subscription television, as the price is in-elastic.

- 5.12.39 The significance of live sport content to premium subscription television services subscribers, and the high preference for linear television as a mode of audio-visual content consumption in the South African context limits the current ability of OTTs to be reasonable or credible substitutes.
- 5.12.40 Furthermore, the March 2018 BRCSA's Establishment Survey revealed that a TV set is still the preferred mode of audio-visual consumption for South Africans (98%) with smart phones (5%), laptop/PC (1%), Tablet (1%) and Games console (1%).
- 5.12.41 With respect to mid-range packages, Multichoice's submissions demonstrated sufficient migration into premium subscription television services and vice versa. The Authority thus believes that midrange subscription television services could be substitutes for premium subscription television services and therefore considers them to constitute the same market.
- 5.12.42 MultiChoice states that whilst broadband speed requirements for live streaming of audio-visual content is relatively low, at 3 Mbps for standard definition and 5 Mbps for high definition, improvements in compression technology mean that the speed requirements will become lower in future, making the provision of audio-visual content via broadband even more widely accessible to South Africans⁸⁹.
- 5.12.43 MultiChoice indicates that OTT services, but especially the entry of Netflix into the South African market poses a competitive threat to Multichoice. This position is contradicted in its 2016 business plan wherein MultiChoice states, in relation to Netflix, that [REDACTED]
[REDACTED]
[REDACTED].
- 5.12.44 Taken overall, MultiChoice appears to engage in what could be considered a 'threat inflation' tactic that is not underpinned by any hard evidence in the

89 MultiChoice submission to Icasa: Inquiry into Subscription Television Broadcasting Services. Para 89.2

South African market, beyond anecdote. It cites data from other countries and transposes the market dynamics to the South African context. In the Authority's view South Africa exhibits different market dynamics with different market outcomes.

- 5.12.45 In the Authority's view, data shows that MultiChoice is firmly in control of the market and will continue to do so in the foreseeable future, despite the entry of OTTs in South Africa. MultiChoice has pre-empted the impact of OTT entry by adopting new business strategies, [REDACTED] and has launched new services that compete directly with OTT services.

5.13 Substitutes or complements?

- 5.13.1 Perhaps an important point to consider is that to a large extent OTT services are more of a complement than a substitute to traditional television broadcasting services. Whilst a lot of attention has been given to cord-cutting, cord-shaving and cord-never-ing, very little is said about the prevalence of 'cord stacking', where OTT services tend to complement rather than replace subscription TV services. According to Ofcom⁹⁰ on-demand and streaming services such as Netflix, Amazon Prime and NOW TV are mainly complementary to, rather than a replacement of, traditional subscription TV services, with 74% of subscribers to on-demand and streaming services also having a subscription TV subscription.
- 5.13.2 In the US, 52% of broadband households have a subscription to both pay TV and one or more OTT video services, compared to 17% who exclusively rely on an OTT subscription only for video entertainment⁹¹. As indicated above, Marketing Charts puts this figure at 53% of households having both a subscription TV service and SVOD service in 2018⁹², compared to about 25% with a subscription TV service but no SVOD and 16% with an SVOD service only and 6% having neither service⁹³.

90 Ofcom. Media Nations. https://www.ofcom.org.uk/data/assets/pdf_file/0014/116006/media-nations-2018-uk.pdf. July 2018

91 Parks Associates. Market Snapshot: OTT and Pay TV – Partnerships and Competition.

<https://www.parksassociates.com/bento/shop/whitepapers/files/ParksAssoc-OTTMarketSnapshot2018.pdf>

92 Marketing Charts. Most TV households report having both a pay-TV and a streaming video service. September 2018

93 Ibid

- 5.13.3 Research carried out in Mexico in 2017 revealed that 88.9% of households with pay TV intended to continue their subscription or even considered hiring a premium package (cord-keepers). Among the remaining proportion, 6.0% were thinking of migrating to a lower-cost monthly package (cord-shavers) and only 5.1% considered to cancel their subscription pay TV (cord-cutters). The research concluded that in general, the OTT platforms are not considered an absolute substitute for the consumption of video content through pay television.
- 5.13.4 South African households are no different, also taking up OTT services to complement subscription television services. Key reasons cited by respondents to the consumer survey were that OTTs do not have sport content and therefore would not satisfy their needs. MultiChoice's data shows that [REDACTED]
[REDACTED]
[REDACTED].
- 5.13.5 MultiChoice launched Showmax, a video-on-demand service, in March 2016, just after the launch of Netflix in the country. Showmax is available to both DStv subscribers and non-subscribers. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].
- 5.13.6 The complementarity between OTT and subscription television services is further illustrated by the fact that MultiChoice has a distribution deal with [REDACTED]⁹⁴.

- 5.13.7 MultiChoice acknowledges the fact that the OTT market is expected to develop in parallel with, and to complement pay-TV in the future, both in terms of subscribers and revenue⁹⁵.
- 5.13.8 According to PWC, while OTTs continue to grab the headlines, in the short term at least, the likes of Netflix and Amazon Prime will, in the short term at least, likely be taken as a complementary service due to their dearth of **premium entertainment content** in the South African market⁹⁶. Moreover, PWC views MultiChoice's access to premium sporting rights as another reason why OTT services will most likely be taken as complimentary, thus leaving subscription TV services little changed.
- 5.13.9 In the *Liberty Global/Ziggo*, case the European Commission defined the relevant markets according to broadcasting windows. It found that, given the different conditions for the acquisition of rights for each exhibition window, and the limited instances in which a window could be replaced by another, there were indications that a different market for each exhibition window could be distinguished. As regards video-on-demand, the market investigation indicated a clear distinction between subscription video-on-demand and transaction video-on-demand, mostly due to the fact that both types of services had different business models, different pricing conditions, and fell into separate and distinct viewing windows.
- 5.13.10 The differences in business models and pricing conditions suggested that SVOD and TVOD could constitute two separate product markets. However, since the transaction did not raise competition concerns, the European Commission left open the question whether licensing and acquisition of broadcasting rights for each exhibition window, belonged to the same markets or not.
- 5.13.11 Next, the Authority considers supply-side substitution.

95 MultiChoice Group Limited. Pre-listing statement. 21 January 2019. p27

96 PWC. Entertainment and media outlook: 2018-2022. An African perspective. www.pwc.co/za/outlook

- 5.13.12 From a supply-side perspective the question is whether there are alternative suppliers who would switch production to the focal product, in this case subscription television services, in the event of a price increase.
- 5.13.13 First, the Authority considers whether FTA service providers would switch. In the South African context, a subscription television service licence is required in order to provide a service. This means that FTA service providers would not be able to provide certain content, such as FSPTW movies and all the sports programming currently being offered on subscription, until the expiry of the current sports rights. Therefore, switching would not occur immediately nor would it occur at least cost.
- 5.13.14 When it comes to OTT service providers, again they would not be in a position to offer content that is currently found on subscription service such as FSPTW movies, premium sport content and local content. In order to offer FSPTW movies OTT service providers would need a subscription television licence. This is not possible in the short-term, given the fact that the invitations to apply for new licences are done infrequently. It is also highly unlikely that OTT service providers would want to enter the traditional subscription television market. Instead, it is traditional subscription television service providers who are entering the OTT service space. Also given the fact that OTT services rely on good quality, affordable and widely accessible broadband services, any switching would only capture a small portion of the subscription TV audience. Therefore, supply side substitution by OTT service providers would require a lot of time and investment in order for it to be effective in South Africa.
- 5.13.15 Thus taken in aggregate, the Authority does not find evidence pointing to a strong competitive constraint on subscription television broadcasting to render a SSNIP unprofitable.
- 5.13.16 In the *Liberty Global/Ziggo* merger case⁹⁷ the court found that the OTT platform was not yet sufficiently developed in the Netherlands at that time to

97 European Commission. *Liberty Global / Ziggo*. Case No M.7000

allow TV broadcasters to switch their distribution instantly and entirely from the classic fixed networks in favour of the Internet.

- 5.13.17 Given the above, the Authority recognises the competitive constraint posed by OTTs on subscription services. However, it is the Authority's view that such constraint is not strong enough to warrant including OTTs in the same relevant market as subscription services. Thus, the Authority considers subscription broadcasting services as falling in a separate market with OTT services constituting an out of market competitor. When determining the effectiveness of competition in section 7, the Authority will consider whether FTA, OTT and other similar services constitute potential competition to subscription TV services.
- 5.13.18 From a geographic market perspective, whilst all other stakeholders point to a national market confined to South Africa, MultiChoice considers itself to be in competition not only with domestic free-to-air broadcasting services, subscription broadcasting services and electronic communications network service providers but also with regional and international OTT and other video-on-demand service providers.
- 5.13.19 The Authority maintains the view expressed in the Discussion Document that insofar as the geographic market definition is concerned, broadcasters are licensed on a national basis. OTT service providers also tend to configure their service taking into account local viewer preferences, in addition to international content like movies and series. Rights to content are also given for specific geographical areas, usually limited to national boundaries. Thus, it is the Authority's finding that the relevant geographic market is South Africa.
- 5.13.20 Given the above considerations, the Authority has defined the following retail markets:
- 5.13.20.1 a market for the retail distribution of analogue based free-to-air television services in South Africa;
- 5.13.20.2 a market for the retail distribution of basic-tier subscription television services and satellite-based free-to-air television services in South Africa;

5.13.20.3 a market for the retail distribution of premium subscription television services in South Africa; and

5.13.20.4 a market for the retail distribution of video-on-demand services in South Africa.

5.14 Upstream wholesale market: *Channel provision*

5.14.1 In the Discussion Document, based on the value chain diagram, the Authority discussed the level of channel provision. Television channel suppliers acquire or produce individual audio visual content and package it into television channels, that are distributed to viewers through different distribution networks, which in South Africa include, analogue terrestrial, digital terrestrial, satellite and Internet.

5.14.2 Traditionally, the distribution of television channels in South Africa occurred either on a FTA basis or on a subscription basis. Channels can also be distributed individually or as part of a bouquet. The supply-side of the market comprises TV channel suppliers. Its demand side comprises providers of retail TV services, which either limit themselves to "carrying" the TV channels and making them available to end users, or also act as channel aggregators, which also "package" TV channels.

5.14.3 Broadcasters can also self-provide channels from content produced through commissioning or in-house production. A question that arises is whether a hypothetical monopolist of a television channel can profitably raise its price by 5%-10%. The Authority considers how broadcasters who purchase wholesale channels would respond to such a price increase.

5.14.4 Following some analysis, the Authority then defined two markets at this level:

(a) a market for the wholesale supply and acquisition of basic-tier subscription-tv channels in South Africa; and

(b) a market for the wholesale supply and acquisition of premium-tier subscription-tv channels in South Africa.

5.14.5 Cell C contends that it may be appropriate to define premium and non-premium content without any sub-markets because in time sub-markets are bound to change, due to changes in viewing preferences and trends. As such,

trying to shoehorn content into narrow categories or any categories at this time would seem premature.

- 5.14.6 In addition, Cell C posits that if one were to apply the SSNIP test, it would have to be applied to the entire bouquet of channels offered by MultiChoice, since the channels are not available on an individual basis.
- 5.14.7 Telkom broadly agrees with the Authority's definition of the wholesale market for channel provision, although it suggests having a market for premium channels and one for all other channels.
- 5.14.8 Whilst e.tv agrees with the Authority's definition of the wholesale supply of television channels, it points out that in reality, both the retail and wholesale markets include FTA channels as part of a bouquet.
- 5.14.9 Act-SA states that the wholesale market as defined does not appear to accord with the way channels are produced, based on a business case. Broadcasters and OTT players use channels based on the choices of their customers. The wholesale market also seems to be artificially limited by referring only to subscription broadcasting, when there are other players in the market such as OTTs and FTA service providers.
- 5.14.10 According to MultiChoice⁹⁸, the market for the wholesale supply of linear channels should be assessed on constraints. There are direct and indirect constraints from non-linear content. Retailers can acquire content directly and use it either in non-linear offerings or in channels they package themselves. Although channel packaging may be identified as an activity distinct from content production, distribution and retailing, this does not necessarily imply that the supply of channels forms a relevant market.
- 5.14.11 When assessing the constraints on a hypothetical monopolist one must consider whether a stand-alone wholesale monopolist supplying television channels to independent audio-visual retailers would be able to impose a SSNIP over the competitive price level. According to MultiChoice, since for consumers linear channels are readily substitutable for non-linear content,

98 MultiChoice submission. Icasas Discussion Document on Subscription Broadcasting Television Services. Para 420-424

retailers would find such substitution at the wholesale level as well. Such a hypothetical monopolist would also be constrained by original content owners who distribute directly to consumers using OTT. Also, retailers do not need to acquire content in aggregated form since they can readily undertake the aggregation themselves.

5.14.12 Therefore, MultiChoice submits that there is no separate upstream market for the wholesale supply of channels or any other aggregation form of content such as VOD libraries.

5.14.13 MultiChoice quotes the UKCC's findings to support its assertions with respect to the wholesale market for channel supply⁹⁹.

5.14.14 Econet Media agrees with the Authority's characterization of the wholesale channel supply market, indicating that it accords with the European Commission's definition in the NewsCorp/BSkyB merger¹⁰⁰, where it was found that premium content channels were not substitutable with basic tier channels because premium content was not broadcast on any other channels. Ofcom came to a similar conclusion in its pay TV market investigation¹⁰¹. Furthermore, the segmentation of the relevant markets for premium and basic tier channels is a function of content aggregation higher up the value chain.

5.15 The Authority's findings

5.15.1 In the Discussion Document, the Authority indicated that the demand for television channels/bouquets at the retail level is driven by the type of content shown in each channel. Similarly, channel providers would supply channels to broadcasters on the basis of whether such channels carry premium content or not. Thus demand-side substitution at the wholesale level is a reflection of demand-side substitution at the retail level. The Authority then considered whether from a demand side substitution perspective, a television broadcaster would, on behalf of its viewers, consider two or more channels as substitutes.

99 UKCC. Movies on Pay TV Market Investigation, 2 August 2012, para 4.126

100 European Commission. NewsCorp/BSkyB notification of 3 November 2010. Case No COMP/M.5932, p7

101 Ofcom. 2007. Pay TV Market Investigation - Consultation Document, p9

The Authority considered that whilst channels in the same genre may compete against each other, for instance, documentary channels such as Nat Geo Wild and Animal Planet competing or lifestyle channels such as E! Entertainment and Spice TV also competing, it is highly unlikely that a SSNIP on a documentary channel, would lead to switching by broadcasters to a movie channel, for instance.

5.15.2 What is also important to consider at the wholesale level is demand side substitution by advertisers because channel producers use television content or programmes to produce channels, typically by including advertising, promotional and presentational material alongside the television content. Therefore, channels might be regarded as being in the same relevant market if a rise in the cost of advertising on one would lead advertisers to switch to advertising on the other. Since advertisers chase after audiences that are attracted to a particular channel, the Authority does not believe that channels of different genres would be substitutable from an advertiser's perspective.

5.15.3 From the supply side, the test for substitutability is whether an increase in the price of a channel will attract suppliers of other channels. Since channel providers tend to specialize in certain type of content it is still the Authority's view that in the event of a hypothetical monopolist increasing prices it is unlikely that providers of channels in different genres would switch immediately.

5.15.4 The Authority's view accords with the findings of the European Commission that –

"The wholesale price of acquiring film and sports channels is also far higher than that of other channels: small permanent increases in relative prices have been profitable. Taking the figures most favourable to BSkyB from BSkyB's wholesale price list (rate card) for the supply of its channels to cable operators, the cost to a cable operator of acquiring a single film or sport channel is at least seven times as much as the most expensive Sky basic channel. This demonstrates that the wholesale supply of film and sports channels forms a separate market."

5.15.5 The Authority does not agree with MultiChoice's submission that there is no separate upstream market for the wholesale supply of channels. In the *Caxton v Multichoice*¹⁰² matter the Group CEO for MultiChoice testified that over the years MultiChoice has concluded channel licensing agreements with a number of channel providers which were also broadcasters in the South African market. He indicated that –

"There is nothing unusual about a channel distribution agreement between a vertically related channel provider and retail broadcaster which happen to compete against one another in the downstream market for retail broadcasting services."

5.15.6 This points to the existence of a wholesale market for the supply of channels.

5.15.7 The Authority also does not agree with MultiChoice that linear channels are readily substitutable for non-linear content. As already submitted, the windowing model for movie release circumscribes service providers according to distribution channels, thereby imposing a form of price discrimination. When it comes to sport, most streaming service providers currently do not offer any sport in their programming. Indeed, there could be general content that is substitutable, but it is a fallacy that linear and non-linear content is currently readily substitutable in South Africa. Perhaps, this would be true sometime in the future but the Authority is not persuaded that this would be the case in the short or medium term.

5.15.8 Thus, on the basis of information at its disposal the Authority is unable to find plausible the argument of a single homogenous global content offering. In our view there is still a distinction between premium and non-premium content and the appeal of content is dependent of a number of factors such as culture, language, geography, live v non-live, first window v other windows.

¹⁰² *Caxton and CTP Publishers and Printers Limited and Others v MultiChoice Proprietary Limited and Others* (140/CAC/MAR16) [2016] ZACAC 3 (24 June 2016)

5.15.9 Thus the Authority maintains its position and finds that there are separate markets for premium and non-premium content, and therefore separate channels.

5.15.10 This notwithstanding, the Authority agrees with Econet Media's submission to the effect that the segmentation of the relevant markets for premium and basic tier channels is a function of content aggregation higher up the value chain. That being the case, the Authority does not deem it necessary to conclude on the wholesale market for channel provision. Rather, the Authority restricts its focus to consideration of the wholesale market for content provision.

5.16 Upstream wholesale market: *Content provision*

5.16.1 The first level of the television broadcasting value chain consists of content acquisition or production. Television content can be produced internally, commissioned through independent producers or purchased from third-party content rights holders locally or internationally, such as sport bodies, movie houses and other television programme content creators. Broadcasters or channel producers compete for the purchase of content acquired from third parties. As such, market definition at the upstream level is approached from the broadcaster's or channel provider's perspective.

5.16.2 Cell C submits that in this, the first such inquiry, too many market subdivisions are unhelpful, or too complex, but that certain subdivisions are critical. The complex approach proposed by ICASA may well obscure the fact that MultiChoice is, as a matter of fact, dominant in the subscription television market and for premium content acquisition and distribution. Cell C agrees that the relevant upstream market for the acquisition of electronic audio-visual content (as MultiChoice describes it) includes rights for distribution using all technologies, and linear and non-linear rights as well, but does not agree that one entity should acquire all of these rights and "squat" on them, that is, buy the rights to offer content across various platforms and then only use one subset of them via satellite distribution. When other platforms try to acquire content, it is sterilised, often for long periods of time. Cell C claims that it has

asked for content and been refused by Multichoice. Cell C requests the Authority to examine every contract concluded by MultiChoice in order to establish whether it is not controlling content in these markets.

5.16.3 The Commission notes that in the upstream wholesale market for the supply of premium content, as defined, the sports federations, as owners and sellers of the sports content rights, may decide (in the context of a bidding process, for example) how and to whom to sell their sports broadcasting rights, the duration and the territory. In the context of private negotiations, these factors are an outcome of the bargaining process that takes place.

5.16.4 Experience has shown that there are a limited number of buyers (i.e. broadcasters) in South Africa to which sports federations can sell their broadcasting rights. In respect of subscription television services, these include SuperSport and ODM while for FTA services, the SABC and e.tv would be contenders. This, in the view of the Commission, significantly limits the sports federations' bargaining power as there is an insignificant number of potential buyers to whom content rights owners could sell. This is further exacerbated by the fact that even on other considerations such as the capacity to broadcast live matches, expertise and production quality standards, subscriber base and the ability to pay the required amounts for rights, there are limitations which rule out other buyers. These limitations include the capacity and technical expertise to broadcast sports events at the required level of quality of production, for example. This effectively narrows down the number of suitable buyers even further, thus limiting the alternatives available to content rights owners.

5.16.5 As a result, it is noteworthy that certain sports federations have repeatedly sold their content rights (on an all-inclusive basis) exclusively to a single broadcaster over a significant period of time. This is illustrative of the limitations faced by content rights owners and indicative of the constraints on their bargaining power given the limited buyer alternatives available¹⁰³.

¹⁰³ Competition Commission Comments on the Discussion Document for the Inquiry into Subscription Television Broadcasting Services, para 8.3 – 8.5

- 5.16.6 Econet Media by and large supports the Authority's characterisation and definition of the wholesale market for content acquisition. It states that there is a large volume of precedent supporting distinct markets for different types of content at the top-most level of the broadcasting supply chain. Econet Media references findings by the European Commission and Ofcom as supporting the Authority's market definitions¹⁰⁴.
- 5.16.7 Act-SA submits that it is difficult to determine what constitutes premium content. Yet, it could be argued that all content on a subscription television platform is premium on the basis that viewers are prepared to pay to receive it as opposed to remaining on a free platform.
- 5.16.8 Act-SA concludes that there is clearly a market for audio-visual content, both linear and non-linear. Within that market there is some high value content that is desirable to have on an exclusive basis, whether by a subscription, FTA or OTT service provider.
- 5.16.9 e.tv agrees with the Authority's definition of the market for the wholesale supply of content, but points out that in reality, both the retail and wholesale markets include FTA channels as part of a bouquet
- 5.16.10 Telkom agrees broadly with the Authority's definition of the wholesale market for content acquisition. However, it states that the concept of premium content is fluid since channels sometimes successfully make a sporting event premium which was previously not. As such, the definitions should not be cast in stone by the Authority, but be adaptable and flexible to address the fluid market¹⁰⁵.
- 5.16.11 MultiChoice submits that the market for the acquisition of electronic audio-visual content is a broad one. This is based on the fact that there is no relevant distinction to be drawn around rights sold for distribution using different technologies. Also, there is no relevant distinction between premium and non-premium content. Furthermore, the term 'premium' is vague and does not

104 Econet Media. Submission in respect of the Discussion Document: Inquiry into Subscription Television Broadcasting Services. 4 December 2017 para 5.12.1 – 5.12.4

105 Telkom submission to ICASA: Discussion Document on the Inquiry into Subscription Television Broadcasting Services. 4 December 2017, para 36

derive from an analysis of competitive constraints on a hypothetical monopolist, hence it does not provide a reliable basis for definition of the relevant market.

5.16.12 MultiChoice argues that when assessing whether there are separate markets for the acquisition of electronic audio-visual content in different genres, regard must be had to the fact that retailers compete for subscriptions, and viewers' subscription decisions depend on the overall programming offered by various electronic audio-visual services., rather than on the availability of a specific content genre within a specific service.

5.16.13 Moreover, as upstream demand is derived from retail demand, these characteristics of retail demand imply that when acquiring content rights, a retailer can choose from among a variety of content. Thus, if faced with a SSNIP, retailers may substitute to content in other genres in order to build compelling packages which will attract subscribers¹⁰⁶.

5.16.14 MultiChoice further argues that there's no distinction to be drawn around rights sold for distribution using different technologies. From the demand side a hypothetical monopoly supplier of content rights for distribution using a particular technology would be constrained from imposing a SSNIP by competitors supplying the same content for distribution using other technologies. Where rights are sold as a bundle. Retailers who use different technologies are in direct competition for those rights. Therefore, there can be no separate markets.

5.16.15 From the supply side, once the content has been created and licensed for distribution using one technology, the barriers to licensing for another technology are very low.

5.16.16 There is no distinction between premium and non-premium content, any such distinction is vague since there's no clear means of determining whether any content within a particular genre is premium.

106 MultiChoice submission to Icas: Inquiry into Subscription Television Broadcasting Services. Para 387 - 396

- 5.16.17 Retailers trade-off what content rights or channels to acquire, by considering whether the additional cost of higher priced content provides a sufficient benefit in terms of subscription and advertising revenues in excess of the amount that must be paid for the content
- 5.16.18 A hypothetical monopolist of aggregated content or channels based on FSPTW Hollywood movies would be constrained by the direct-to-consumer OTT models of many studios such as Disney and HBO which offer not just movies in other windows, but very high quality series content.
- 5.16.19 Viewers' subscription decisions are based on the overall programming offered by various electronic audio-visual services rather than on the availability of a specific content genre within a specific service (this is exactly why people subscribe to a pay-tv. Different content genres do not fall within separate markets

5.17 The Authority's findings

- 5.17.1 The Authority starts its analysis by asking what a television or video-on-demand service provider, would do if the price of a particular set of content increases by a margin of 5%-10%.
- 5.17.2 Intuitively, it is easy to assume that such a distributor has various options given the proliferation of content. Therefore, a hypothetical monopolist would not be able to profitably raise prices. This appears to be the position that Mutichoice takes, that all types of content, linear and non-linear, are substitutable and there is no basis to differentiate among genres or between premium and non-premium content. Such analysis is overly simplistic. The Authority does not believe that all content is substitutable for the following reasons:
- 5.17.2.1 First, as has previously been indicated in this Draft Findings Document, the wholesale demand for content is a derived demand. Broadcasters act to satisfy the preferences of their viewers. For example, it would be a fallacy to assume that lovers of live soccer would all of a sudden be satisfied with watching a movie, drama series, a reality show or news, in the event that

a broadcaster that airs such live matches is faced with a SSNIP and decides to purchase other content. A broadcaster who does that would lose viewers. This explains the high demand for rights to live soccer matches despite the high cost of such rights. There is a lot of evidence from around the world pointing to the rising cost of acquiring sports rights in general over the years. For instance, global sports programming spend has been increasing over time, totalling \$26.5 billion in 2016, a 60% increase on spend of \$16.6 billion in 2007¹⁰⁷. In the South African context, the cost of broadcast rights for the English Premier League soccer is said to have increased thirty-fold over the past 25 years to 2017. According to MultiChoice the cost of acquiring football rights increased [REDACTED] between 2014 and 2018. Over the same period, costs of rugby rights increased [REDACTED] while other sports increased to [REDACTED]¹⁰⁸, while general entertainment costs increased from [REDACTED] to [REDACTED]. [REDACTED] MultiChoice has historically had as part of its strategy to grow and sustain the business the retention of what it calls key sports and content rights. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹⁰⁹. MultiChoice also appears to distinguish itself from OTT content by stating that:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹¹⁰.

107 IHS Markit. New Frontiers for Distribution of Sports Content. December 2017

108 MultiChoice presentation of confidential business plan Information to Icasa. 19 November 2018.

109 MultiChoice2016 Business Plan, p6; 2017 Business Plan p3,

110 MultiChoice2016 Business Plan, para 2.4.3, p16

5.17.2.2 This acknowledgement of the difference between OTT content and 'premium' television content is also apparent in MultiChoice's 2019 Business Plan, which in projecting the Showmax business, states that:

"[REDACTED]
[REDACTED]
[REDACTED].¹¹¹"

5.17.2.3 The Authority does not believe that the difference between premium television content and OTT content is no longer in existence as MultiChoice contends. Certainly, the difference is still acknowledged globally and even in MultiChoice's own internal strategic documents.

5.17.2.4 Whilst MultiChoice argues in its written submission and oral presentation that there has been proliferation in the range and volume of content that is attractive to viewers such that content that may have been regarded as premium in the past, such as FSPTW rights to Hollywood movies and certain sports, has been declining in importance, this is contrary to its actions and strategy [REDACTED].

5.17.2.5 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. In practice MultiChoice has gone on to acquire the majority of rights to premium or what it calls 'key' live sports matches, including the PSL, the English Premier League, La Liga and UEFA Champions League. These are the most popular competitions in South Africa. [REDACTED]
[REDACTED] the Authority terms 'premium content'. Specifically, in its 2017 integrated annual report¹¹² MultiChoice states that M-Net delivers premium thematic channels and exclusive content, sourced from international content owners or specifically commissioned (the Authority's local productions). This premium entertainment is distributed to DStv customers on selected packages. It

¹¹¹ MultiChoice 2019 Business Plan, para 6.3.1, p24

¹¹² MultiChoice. Integrated Annual Report, p5 and p 27

further states that its digital video-rental product, BoxOffice, continues to perform well, providing a quality home-video service where customers can access the latest and best premium movies ahead of the pay-TV window.

[REDACTED]
[REDACTED]¹¹³.

Therefore, the Authority does not agree with MultiChoice's contention that premium content ceased to exist in the distant past, when it continues to make strategic plans around premium content and also reports on it in its statutory integrated annual reports.

5.17.2.6 Second, Hollywood movies are sold in windows that clearly delineate different types of distributors, indicating that such movies cannot be equated to any other content. The windowing model ensures that content rights are split across platforms, geographies, and time periods. The idea is that by doing so, content creators and rights holders can maximize the value generated by a single unit of content across multiple buyers. The price discrimination inherent in the windowing model means that content providers are able to segment customers according to their demand elasticities and also prevent re-selling from one group to another. Therefore, price discrimination can point to markets that are separate.

5.17.2.7 MultiChoice has been able to buy most of the premium first run movies from the major movie studios for distribution in South Africa. MultiChoice admits that the cost of premium first pay movies [REDACTED]
[REDACTED]¹¹⁴.

5.17.2.8 Third, research¹¹⁵ indicates that sports programming remains a driver of domestic and global growth for traditional television. In some markets it is lifting otherwise flat or negative trends in spending for traditional tv content. Without sports programming, some markets, such as Italy and France, would be declining in terms of content production spend.

¹¹³ MultiChoice2017 Business Plan, p28, 2018 Business Plan 44

¹¹⁴ MultiChoice2016 Business Plan, para 6.5.4

¹¹⁵ BCG. The Future of television: The Impact of OTT on video production around the world.

5.17.2.9 According to Arthur Goldstuck, an industry expert, in responding to the entry of Netflix in South Africa in 2016 stated that –

"The real strength of DStv lies in its live sports coverage, and that's an area where no video-on-demand service can compete at this stage."¹¹⁶

5.17.2.10 Recently the CEO of MultiChoice was quoted as saying –

"Netflix just offer you video-on-demand. We offer you much more than just that. We have continued to strengthen our local content offering which Netflix will never be able to do. We are also strong in sport"¹¹⁷

5.17.2.11 Moreover, MultiChoice states in its 2016 Business Plan that –

[REDACTED]
[REDACTED]
[REDACTED]¹¹⁸.

5.17.3 Fourth, the Authority made a point in the Discussion Document, worth repeating here, that content also has different appeal depending on the characteristics of particular audiences. For instance, whilst blockbuster movies would appeal to a lot of people across different countries, the same cannot be said about sporting events, which tend to depend on a nation's culture, taste and preferences. Not all sporting events that are popular in the UK or Kenya, for instance, would necessarily be popular in South Africa.

5.17.4 Fifth, in the Discussion Document the Authority considered a number of cases that have come before the EC where a distinction has been drawn between a market for premium content and a market for non-premium content. In its document defining relevant markets in the media sector¹¹⁹, the EC identifies markets for the wholesale supply of subscription TV premium content channels

¹¹⁶ Drum Digital. MultiChoice welcomes Netflix competition In SA. 8 January 2016.

<https://www.news24.com/Drum/Archive/multichoice-welcomes-netflix-competition-in-sa-20170728-3>

¹¹⁷ Vermeulen. J. What MultiChoice has been doing to prepare for Competition from Netflix. *Mybroadband*. 19 Sep 2018 available online at <https://mybroadband.co.za/news/broadcasting/275517-what-dstv-has-been-doing-to-prepare-for-competition-from-netflix.html>,

¹¹⁸ MultiChoice2016 Business Plan, para 6.5.4 p38

¹¹⁹ Media Market Definitions In EC Competition Law – Recent Developments, available at http://ec.europa.eu/competition/sectors/media/documents/chapter_1_ec_final.pdf

and wholesale markets for the supply of premium film and sport rights, among other broadcasting markets.

Similarly, in the *Viacom/Channel 5 Broadcasting* decision, the European Commission noted its previous approach of considering (i) sport events, (ii) premium films and (iii) other TV content (such as documentaries, youth programmes, etc.) as separate product markets¹²⁰. In *News Corp/ BskyB*¹²¹ the EC found that a majority of content distributors also consider that a distinction should be drawn between premium and non-premium audio-visual content. A similar distinction between premium and non-premium content is made in *British Interactive Broadcasting/Open*¹²².

The Authority does not agree with MultiChoice that viewers' subscription decisions depend on the overall programming offered by various electronic audio-visual services, rather than on the availability of a specific content genre within a specific service. The results of the Authority's survey clearly indicate that viewers take into account the type of content offered, in their decision making. Specifically, the Authority finds that movies, sport and drama series are mentioned most frequently when personal preference is at play. Such preferences influence the type of service that viewers would ultimately choose, other things being equal.

5.17.5 The Authority also heard evidence during the public hearings that viewers in the lower LSMs move from free-to-air services to subscription television services as a form of progression, in order to access particular content, among other things¹²³.

5.17.6 The European Commission, in the *Liberty Global/Ziggo* case¹²⁴ also assessed the existence of possible separate markets for premium and non-premium content both in sports and in film rights licensing. Its market investigation revealed differences in price and ability to attract viewers (e.g. films with high

120 Case No Comp/M.7288 - Viacom/ Channel 5 Broadcasting

121 Case No COMP/M.5932 - News Corp/ BskyB available at

http://ec.europa.eu/competition/mergers/cases/decisions/m5932_20101221_20310_1600159_EN.pdf

122 Case IV/36.539. *British Interactive Broadcasting/Open*, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31999D0781&from=EN>

123 SOS oral presentation

124 European Commission. *Liberty Global / Ziggo*. Case No M.7000, para 54

box office success and popular sports, such as Formula 1, UEFA Champions League and the FIFA World Cup). This suggested the existence of a distinction between the acquisition of rights for premium content and the acquisition of rights for non-premium content. This view was corroborated by the responses of TV retailers to the market investigation who indicated the existence of premium and non-premium content. However, for the purposes of its decision, the question whether broadcasting rights for premium and for non-premium content constituted different markets was left open.

- 5.17.7 According to the European Commission¹²⁵, the qualification of content as premium or not, seems to depend not solely on the nature of the content, but also on contingent circumstances (for instance the emergence of a national champion or talent in the case of sports).
- 5.17.8 Taking the foregoing into account, the Authority maintains its position that there is premium and non-premium content. The Authority agrees that premium content is a fluid concept that is dependent on the circumstances prevailing at a particular point in time in a market and is specific to a geographical area, given the culture and preferences of the population. Therefore, for purposes of this enquiry the Authority considers the following to be premium content: (a) Hollywood premium FSPTW movies and series; (b) major live soccer matches including Bafana Bafana, FIFA World Cup, PSL, EPL, UEFA, La Liga, Bundesliga, Ligue 1 and Serie A live soccer matches; (c) major live rugby matches, including Rugby Championships, Super Rugby, World Rugby Sevens Series and the Currie Cup Premier Division and the Super 14; and (d) live cricket matches, including the IPL, T20, ODI and test matches involving the Proteas.
- 5.17.9 Having established that premium content consists of FSPTW movies, series and live sports the next question is what would a television broadcaster or video-on-demand service provider, do when faced with a SSNIP on say premium movies. According to Multichoice, such a service provider would turn to all other types of content available in the market. The Authority disagrees.

125 Ibid para 74

For instance, live sports are not substitutable for movies in the Authority's view. Neither are series or local content.

- 5.17.10 The Authority wishes to restate the same arguments proffered in this regard in the Discussion Document in terms of defining this market.
- 5.17.11 Advertisers also consider the profile of viewers in order to place an advert on a particular channel. A male dominated sport channel is likely to attract adverts targeted at males of a particular age, race and SEM groupings. However, for a gender-neutral advert it may be immaterial in which channel to advertise if the numbers are the same, thus making no distinction between types of channels. Viewers on the other hand would not necessarily regard live sport as a substitute to movies, for instance.
- 5.17.12 Furthermore, the characteristics of movies, sport and other premium content also differ. For instance, movies have a much longer shelf life and for that reason are sold in specific time-bound windows, whereas live sporting events on the other hand are perishable and lose value much faster once the event is over. Thus, the Authority proposes a further distinction, between types of premium content, distinguishing between feature films and movies; series and live sport, including live rugby, cricket and premium soccer matches.
- 5.17.13 When it comes to live sport, a nation's culture, tastes and preferences determine what constitutes premium sport. In South Africa live rugby, cricket and PSL soccer matches are regarded as the top three sporting codes with a large following and offered on exclusive basis on television. Therefore, the three sporting codes can be viewed as premium content¹²⁶. However, live soccer, rugby and cricket also differ in terms of characteristics and the profile of followers. Rugby and cricket have traditionally been seen as having a large following from the white community whilst soccer on the other hand has more black followers¹²⁷. Thus, a broadcaster is unlikely to substitute soccer for

126 The "Top Ten" and the "Big 3" of South Africa sports, available at <http://www.south-africa-tours-and-travel.com/south-africa-sports.html>

127 South African sport still divided by race, available at <https://www.theguardian.com/world/2013/jan/21/southafrica-sport-divided-race>

See also 'Sport in South Africa', <https://www.safarinow.com/cms/sport-in-south-africa/lrie.aspx>

rugby or cricket. Despite these differences, the Authority does not deem it necessary to further divide the markets in terms of sporting code.

- 5.17.14 From a supply side substitution perspective, creators of content are specialised entities with a focus on specific areas, such as movies, sports, soaps, lifestyle magazines and others. Substitution from one area of focus to another would come at an added cost and would not happen within a reasonable timeframe, thus confirming separate markets for movies, series, sport other premium content.
- 5.17.15 Non-premium content is usually bundled up with premium content in order to create a bouquet or package for retail offering. For the Authority's purposes it is not necessary to consider whether all non-premium content is substitutable from a demand side.
- 5.17.16 Ofcom¹²⁸ defined the premium movies sector as comprising rights to the output of the six major Hollywood studios, and it found that Sky controlled the UK rights to the first subscription pay TV window of all six studios. Ofcom noted that Sky also acquired subscription video-on-demand rights to first run movies, although it was not at that time heavily utilising these rights.
- 5.17.17 Ofcom concluded that this was evidence that BSkyB had market power in the linear channel distribution of premium movies. And at a time when growing SVOD services were disrupting the pay TV market, Ofcom concluded that Sky's position in the market could also limit competition in on-demand services in the future.
- 5.17.18 The consultation with local stakeholders indicated that this definition of premium content on international content is consistent with OFCOM's definition. Local players believe the first run window of international blockbusters constitutes premium content. They have observed that the agreements entered into by MultiChoice have increased the duration of their first run of the premium content.

128 UKCC. Movies on Pay TV Market Investigation: A report on the supply and acquisition of subscription pay-TV movies rights and services, 2 August 2012

- 5.17.19 Ofcom¹²⁹ also defined the market for premium sports channels as consisting of Sky Sports 1 and Sky Sports 2, which are wholly owned and operated by BSkyB. These channels together carry Sky's coverage of English Premier League football, which is a major driver of premium pay TV in the UK. Ofcom noted that Sky consistently held a 90% share of the premium sports channel market, and that its long-term hold on key rights – of which the English Premier League rights were the most important – were a barrier to entry and expansion for other providers. Finally, Ofcom saw Sky's high profitability as evidence that it was dominant in the wholesale market.
- 5.17.20 Ofcom argued that, while Sky was dominant at retail and wholesale level, it was at wholesale level where Sky had the strongest incentive to exercise market power. Ofcom's key concern was that Sky was able to use its market power in the wholesale market to restrict the wholesale supply of Sky Sports 1 and Sky Sports 2 to other retailers, which was prejudicial to fair and effective competition.
- 5.17.21 Ofcom's finding was based on Sky's behaviour in commercial negotiations with BT, Virgin Media and other pay TV providers. Ofcom took intelligence from competitors about Sky's negotiating practices as evidence that Sky did not engage constructively in negotiations and that it was withholding supply for strategic reasons. For example, Ofcom noted that Sky set high wholesale prices for standard definition channels and did not supply its high definition channels to competitors. Sky was, according to Ofcom, forgoing revenue for strategic reasons – to protect its own retail business in DSAT and to reduce the risk of stronger competition in the bidding for content rights.
- 5.17.22 The results of consultations with stakeholders indicate that certain sport categories constitute premium content in South Africa. The rights to these sports rights are held by MultiChoice and this is considered to be its competitive advantage.
- 5.17.23 MultiChoice has been able to increase prices by more than ■■■ on average for most of its bouquets and still remained profitable. Figure 6 below shows annual

129 Ibid

price increases between 2014 and 2017. Figure 7 below indicates the profitability trend during the same period but up to 2018.

Figure 6. MultiChoice average % price increase per bouquet: 2014-2017

REDACTED



Figure 7. MultiChoice revenue and trading profit 2014-2018¹³⁰

REDACTED

Source: MultiChoice business plans

- 5.17.24 Insofar as the geographical boundary of the market is concerned, content can be sourced from anywhere in the world. However, in most instances such content rights are acquired and granted for a specific geographical area, usually on a national basis. All respondents indicated that their primary geographical market is South Africa, in line with their licences, although MultiChoice stated that it also competes with international players.
- 5.17.25 Therefore, taking into account (a) the SSNIP test; (b) characteristics of premium and non-premium content; (c) responses to the Discussion Document; (d) internal research; and (e) case precedent, we define at the upstream level –
- 5.17.26 a wholesale market for the supply and acquisition of premium content for distribution in South Africa; and
- 5.17.27 a wholesale market for the supply and acquisition of non-premium content for distribution in South Africa.

¹³⁰ 2018 are forecast figures

6. CONSIDERATION OF THE EFFECTIVENESS OF COMPETITION IN RELEVANT MARKETS

6.1 Overview

6.1.1 Once the relevant markets and market segments have been identified and defined the ECA provides that the Authority must then assess the effectiveness of competition in those markets and market segments.

6.1.2 Section 67(4A) of the ECA provides a guide that should be followed when making a determination regarding the effectiveness of competition in a relevant market. It states that –

*“(4A) When determining whether there is **effective competition**¹³¹ in markets and market segments, the Authority must consider, among other things –*

(a) the non-transitory (structural, legal, and regulatory) entry barriers to the applicable markets or market segments; and

(b) the dynamic character and functioning of the markets or market segments, including an assessment of relative market share of the various licensees or providers of exempt services in the markets or market segments, and a forward looking assessment of the relative market power of the licensees in the markets or market segments.

6.1.3 In the Discussion Document the Authority proposed to consider the following factors or approach in fulfilling the requirements of section 67(4A):

- Non-transitory (structural, legal and regulatory) barriers to entry;
- The dynamic character and functioning of the market (including market power and concentration levels);
- the nature and extent of vertical integration in the market; and
- whether competition law alone will be sufficient to deal with the identified market failure.

6.1.4 In light of the above, the Authority posed the following questions in the Discussion Document:

¹³¹ Own emphasis

Q14. Do you agree with the Authority's proposal to use the above factors in determining the effectiveness of competition? Please substantiate your answer

Q15. In your view, are there any competition concerns and is there a need for regulatory intervention in the market for the acquisition of non-premium content?

6.2 Stakeholder comments

- 6.2.1 Econet Media proposed that the Authority should use the three-criteria test of the European Commission. The Authority's proposed list of factors to consider in assessing the effectiveness of competition did not include the condition that the market does not tend to effective competition in a relevant time horizon, nor did it state that these conditions need to be cumulatively true. A market that passes the three-criteria test should be assessed in more detail to determine whether any firm has significant market power.
- 6.2.2 Cell C also supports the use of the three-criteria test in addition to other factors stipulated in section 67(4A) of the Act.
- 6.2.3 According to Econet Media a distinction needs to be made between dominance in terms of high market shares and SMP. While dominance is usually determined through analysing market shares with respect to thresholds stipulated in the Competition Act, determining whether a specific firm exerts market power requires a more detailed and nuanced approach. Thus, although a structural analysis of market shares is a good first step, further analyses are required to make a determination on market power.
- 6.2.4 Telkom agreed that the four factors listed by ICASA should form part of the determination of the effectiveness of competition. However, Telkom notes that this list of factors to be considered is less exhaustive than the list provided in ICASA's Guideline for Conducting Market Reviews. In addition to evaluating the more complete list provided above, it is recommended that ICASA follow the method set out by the EU Commission with respect to electronic communications markets. This entails a two-phased approach. The first phase

entails conducting a three-criteria test to determine if a specific market should be regulated, where the following steps are evaluated cumulatively: (i) if there exist high and non-transitory barriers to entry of a structural, legal or regulatory nature; (ii) if the market structure does not tend towards effective competition in a relevant time horizon; and (iii) if the application of competition law alone would not adequately address the market failure(s) concerned. If a market passes the first phase (the three-criteria test), it needs to be assessed to determine whether any firm has SMP. Importantly, Telkom stresses that with the assessment of market shares and dominance, it is important to be cognisant of the fact that high market shares do not necessarily equate to SMP.

6.2.5 MultiChoice submits that a crucial step in any inquiry under section 67 of the ECA is to determine whether competition in an identified relevant market is ineffective. This exercise should not simply be a structural analysis of static market shares, but rather a more holistic approach which seeks to identify all the competitive constraints faced by the current operators in the market. MultiChoice put forward the following issues that need to be considered when analysing the effectiveness of competition:

6.2.5.1 Forward looking assessment – According to MultiChoice the assessment of competition has both an existing and forward looking component, given that the purpose is to determine if ex ante regulation is necessary to address any finding of ineffective competition.

6.2.5.2 Assessment must be of market dynamics, not only structure – MultiChoice argues that the economic field of industrial organization and the assessment of competition by economic regulators has progressed considerably from the simplistic Structure-Conduct-Performance paradigm of the 1950s which posited that conduct and performance can be inferred from concentration levels and the nature of entry barriers. MultiChoice then goes on to list other factors that should be considered when assessing the effectiveness of competition, including market characteristics; nature of actual entrants and scope of expansion; threat of potential competitors; as well as technological developments and convergence.

- 6.2.5.3 Wholesale markets should only be reviewed if competition in the retail market is ineffective.

6.3 The Authority's findings

- 6.3.1 The Authority wishes to re-iterate that it is a creature of statute and derives its powers from the legislation it administers. Therefore, it can only act in accordance with the powers given to it by the legislature. This is not to say that the Authority is prohibited from utilising good practice and learn from other jurisdictions when undertaking such an inquiry. This is certainly the case when it comes to the factors that need to be considered when assessing the effectiveness of competition.
- 6.3.2 Section 67(4A) of the ECA is quite clear in terms of what factors the Authority must consider when assessing the effectiveness of competition. It states that the Authority must consider among other things (a) the non-transitory (structural, legal, and regulatory) entry barriers to the applicable markets or market segments and (b) the dynamic character and functioning of the markets or market segments, including (i) an assessment of relative market shares of the various licensees or providers of exempt services in the markets or market segments, and (ii) a forward looking assessment of the relative market power of the licensees in the markets or market segments
- 6.3.3 In the Discussion Document the Authority elected to use a combination of the factors in section 67(4A) and the three-criteria test. The list in section 67(4A) is non-exhaustive and the Authority can use its discretion to decide on what other factors to use so long as they are relevant to determining the effectiveness of competition. The Authority generally has no difficulty in using our discretion to apply the European Commission's three-criteria test as proposed by Econet Media, Cell C and Telkom.
- 6.3.4 However, the Authority agrees with MultiChoice that the three-criteria test is a threshold test for establishing whether further analysis of the market is required to determine the effectiveness of competition¹³². The test is applied

132 MultiChoice presentation slide 93

cumulatively such that if one of the three criteria does not hold, the market is excluded from further competition analysis. The three criteria are:

- (a) the presence of high and non-transitory barriers to entry;
- (b) a market structure which does not tend towards effective competition within the relevant time horizon; and
- (c) the insufficiency of competition law alone to adequately address the market failure(s) concerned.

6.3.5 According to the European Regulators Group (ERG) Guideline on the application of the three criteria test¹³³, following indicators may be useful in assessing the magnitude of the barriers to entry.

- Existence of sunk costs
- Control of infrastructure not easily duplicated
- Technological advantages or superiority
- Easy or privileged access to capital or financial resources
- Economies of scale, economies of scope
- Vertical integration
- Barriers to develop distribution and sales network
- Products or services diversification

6.3.5.1 With respect to assessing whether a market tends towards effective competition the ERG recommends the following criteria as possible indicators:

- Market shares
- Price trends and pricing behaviour
- Control of infrastructure not easily duplicated
- Product/services diversification (e.g. bundled products or services)
- Barriers to expansion
- Potential competition

6.3.6 The above factors that are recommended in applying the three-criteria test are similar to the factors stipulated in section 67(4A) of the ECA and the ICASA Guideline for Conducting Market Reviews, that should be considered when

133 European Regulators Group. ERG Report on Guidance on the application of the three criteria test (June 2008)

assessing the effectiveness of competition. Since the three-criteria test is only a filter, where-after an assessment of competition still needs to be conducted, the Authority finds it unnecessary to apply the three-criteria test only to use the same factors to assess the effectiveness of competition. Therefore, for purposes of this Draft Findings Document the Authority has in doing an assessment in terms of the requirements of section 67(4A) also considered the above factors.

- 6.3.7 MultiChoice and Telkom refer to the twelve (12) factors that are contained in the ICASA Guideline for Conducting Market Reviews. However, the list of factors in the Guideline derive from the old section 67(4) of the Act, which was replaced through the ECA Amendment Act, by section 67(4A). That notwithstanding, the list in the Guideline is also not mandatory but provides guidance to the Authority on what factors it may consider in its analysis. The Authority will exercise its discretion in terms of both the number and the type of factors to consider.
- 6.3.8 MultiChoice would want us to believe that a structural approach to assessing the effectiveness of competition is neither required nor relevant for this inquiry. Yet, section 67(4A) of the Act specifically requires the Authority to consider the non-transitory entry barriers, which include structural, legal and regulatory entry barriers. The Guideline for Conducting Market Reviews also refers to, among other factors, an assessment of relative market shares; the level, trends in concentration and history of collusion in the market; the overall size of each of the market participant; ease of entry into the market; the nature and extent of vertical integration; and economies of scale and scope, which are all structural factors.
- 6.3.9 Other local and international sector regulators that are required to assess the effectiveness of competition, also consider structural and dynamic factors. The Authority examines the approach of energy regulators in South Africa and the UK, since the energy sector also faces rapid technological changes.

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Energy sector (South Africa)

6.3.10 For instance, section 21 of the Gas Act, No 48 of 2001 states that –

(1) The Gas Regulator may impose licence conditions within the following framework of requirements and limitations:

(a) ...

(b)...

*(p) maximum prices for distributors, reticulators and all classes of consumers must be approved by the Gas Regulator where there is **inadequate competition** as contemplated in Chapters 2 and 3 of the Competition Act, 1998 (Act No. 89 of 1998).*

6.3.11 Chapter 3 of the Competition Act deals with merger control. Of particular relevance to the assessment of competition is section 12(2) which states that "When determining whether or not a merger is likely to substantially prevent or lessen competition, the Competition Commission or Competition Tribunal must assess the **strength¹³⁴ of competition** in the relevant market, and the probability that the firms in the market after the merger will behave competitively or co-operatively, taking into account any factor that is relevant to competition in that market, including –

- (a) the actual and potential level of import competition in the market;*
- (b) the ease of entry into the market, including tariff and regulatory barriers;*
- (c) the level and trends of concentration, and history of collusion, in the market;*
- (d) the degree of countervailing power in the market;*
- (e) the dynamic characteristics of the market, including growth, innovation, and product differentiation;*
- (f) the nature and extent of vertical integration in the market;*
- (g) whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and*

134 Ibid

(h) whether the merger will result in the removal of an effective competitor.”

- 6.3.12 In terms of this section of the Competition Act, an assessment of the strength of competition should be made taking into account the structure of the market and the conduct of firms in that market. This is in line with the assessment contemplated in section 67(4A) of the ECA.

Energy sector (UK)

- 6.3.13 The United Kingdom’s Office of Gas and Electricity Markets (Ofgem), conducts periodic assessments of the state of competition in the market. In so doing Ofgem considers the following five potential sources of harm:

- consumer engagement and response – including the ease with which consumers are able to access, assess and act on the offers in the market;
- unilateral market power – manifesting in, among other things, the inability of customers to switch suppliers;
- tacit coordination – an assessment of how vigorously suppliers in the market compete with each other;
- barriers to entry and expansion – looking at barriers to entry, exit and expansion, covering levels of entry and growth; and
- vertical integration – the extent to which vertical integration can promote or stifle competition in the market

- 6.3.14 The second part of section 67(4A) requires the Authority to consider the dynamic character and functioning of the markets or market segments. This would include an assessment of relative market shares of the various licensees or providers of exempt services in the markets or market segments, and a forward looking assessment of the relative market power of the licensees in the markets or market segments.

- 6.3.15 Again, the Act is clear in terms of what the Authority is expected to do. The Authority is enjoined to undertake an analysis of the dynamic character and functioning of the markets. This considers market dynamics and the interactions of market players. Part of this assessment is to then take into account the relative **market shares** of the various licensees or providers of

exempt services and to conduct a forward looking assessment of the relative **market power** of the licensees in the relevant markets.

- 6.3.16 MultiChoice makes reference to the EC Recommendation on Relevant Markets and the three-criteria test and comes to the conclusion that a discussion of barriers to entry misunderstands their role; a discussion of market power and dynamics is wrong and that vertical integration is not a form of market power nor does it imply foreclosure.
- 6.3.17 Yet, the three-criteria test discussed above considers both a structural and a dynamic approach. Moreover, competition authorities globally, make use of market shares and concentration ratios in determining whether a merger is likely to raise competition challenges or not. Essentially, MultiChoice is proposing that the Authority applies a test that is not consistent with the prescripts of the legislative framework from which it derives its powers.
- 6.3.18 In its submission MultiChoice contends that what constitutes 'ineffective competition' must be a state of competition which results in significant harm to consumers¹³⁵. The Authority disagrees with this contention as it is inconsistent with the legislative prescripts. Consumer harm is what some competition authorities are required to prove, in *ex post* investigations. The ECA provides a clear guideline in terms of what the Authority should consider when assessing the effectiveness of competition.
- 6.3.19 From the above, it is clear that the Authority is enjoined to apply both a structural and dynamic analysis of the market. It cannot do the one and not the other, since both are requirements of the law. Of course, in the end, a decision on whether competition is effective or not will be arrived at based on the conspectus of all factors under consideration. Therefore, to then attempt to elevate one set or type of factor over another is misdirected.
- 6.3.20 The Authority will for purposes of its analysis consider both static and dynamic factors as enjoined by the ECA.

¹³⁵ MultiChoice written submission, para 465

6.3.21 Having discussed the factors that need to be taken into account when assessing the effectiveness of competition in the Discussion Document, the Authority then applied those factors on the identified markets and posed the following questions:

Q16. Kindly comment on the nature of barriers to entry in the upstream market

Q17. What in your opinion are the premium rights in the South African television sector? Who currently holds them?

Q18. Kindly comment on the Authority's proposal to use the number of rights as a unit of measure for market share calculation purposes. What other factors should be analysed to determine the dynamic character and functioning of the market?

Q19. Do you consider the nature and extent of vertical integration in subscription television likely to harm competition? Kindly elaborate your answer.

Q20. Do you agree with the Authority's preliminary view that competition law alone is not sufficient to deal with possible market failures in the market for the acquisition of premium content?

Q21. Kindly comment on the above analysis of possible barriers to entry at the retail level of the market. What other barriers to entry are prevalent in this market?

6.4 Stakeholder comments

6.4.1 Telkom agrees with the three barriers to entry discussed in the Discussion Document, namely the scarcity and cost of premium content, long-term exclusive contracts, and incumbency of special relationships. These barriers to entry in acquiring premium content play an important role in the viability of a broadcast network. It notes that these barriers to entry are also present in the upstream market for non-premium content, but that it poses less of an

impediment to success for broadcasters than is does in the case of premium content.

6.4.2 Telkom agrees with the Authority's proposal to use the number of rights as a unit of measure for market share calculation purposes as reflected in Table 3 in the Discussion Document. However, Telkom proposes to also include:

1. TV series from the major Hollywood production houses – owned by MultiChoice, or MultiChoice affiliated channels; and

2. Special Events i.e. FIFA World CUP, Olympics Pay-TV rights owned by MultiChoice, noting further that with some of them they have gatekeeper rights.

6.4.3 Telkom does not agree with the Authority's calculation of market shares as provided in Table 1 of the Discussion Document. There is no indication of why the rights are given the same weighting. Aspects that must be considered include the length of time each of the rights is in place, the amount of content (whether in terms of minutes or number of events/movies) each right encompasses, and the popularity of the content, since more popular content will be more valuable in terms of attracting subscribers. These aspects will be more accurately captured by the value of the rights, as indicated by the amount that broadcasters are willing to pay to acquire it.

6.4.4 Additionally, since separate markets have been defined for different types of content, it is unclear why market shares are then calculated for combined content. Telkom recommends that market shares be calculated for each of the identified markets

6.4.5 Since vertical integration can have pro- or anti-competitive effects, Telkom agrees that this should be an area of focus for the inquiry, specifically given MultiChoice's prominent position in the market and its fully vertically integrated structure.

6.4.6 As such, Telkom agrees that there is a likelihood that vertical integration in the subscription TV market may harm competition. However, it notes that the

Discussion Document provides a very limited discussion regarding the nature and extent of vertical integration in the subscription TV industry. A more detailed analysis of the pro- and anti-competitive effects of vertical integration in the subscription TV market needs to be undertaken by the Authority before concluding that vertical integration is *likely* to harm competition. Of particular interest would be the effect of MultiChoice's position in the market.

6.4.7 With respect to the applicability of competition law Telkom agrees with the Authority's view that competition law alone is not enough to deal with challenges in the relevant markets. A market failure is not necessarily the result of anti-competitive behaviour. As such, competition law, which is backward-looking, cannot sufficiently address market failures on its own. Regulatory action is required to address structural problems in the market on an ex ante basis, especially given the rapidly changing landscape of the television broadcasting industry.

6.4.8 Econet Media submits that the market share of a firm can provide an indication of dominance, but needs to be considered in conjunction with factors such as barriers to entry before conclusions about market power can be drawn. Similar to Telkom, Econet Media is concerned that the Authority identified a number of relevant markets yet only calculates aggregate market shares and that the number of rights held by a licensee is not an appropriate measure of market shares.

6.4.9 With respect to vertical integration Econet Media notes that it is in general considered to be pro-competitive and efficiency enhancing, but it may limit effective competition in the subscription broadcasting market. Econet Media cites Ofcom in this regard which stated that –

"We are now at a point in time where new market entry is becoming possible based on new distribution technologies (IPTV, DTT, Internet, mobile TV). We therefore need to be particularly alert to the risks associated with dynamic foreclosure, i.e. the risk that firms already present in the market might exploit or benefit from certain dynamic characteristics of the market to foreclose entry by new providers"

- 6.4.10 Ofcom highlights three factors that may strengthen the position of the incumbent satellite provider (Sky) in this regard: its vertical integration, its firm grasp on attractive content that it acquires on an exclusive basis, and its retail customer base which is larger than those of all other subscription TV operators combined.
- 6.4.11 Econet Media further states that its analysis indicates various potential sources of market failure in the broadcasting sector, such as the limited availability of rights to especially premium content, switching costs that make entry more difficult, and the advantages that MultiChoice's incumbency gives to it by for instance allowing it to commission more content than smaller players. While these market characteristics may not amount to anti-competitive behaviour *per se*, they do increase entry barriers, substantially lessen competition and need to be addressed through *ex ante* regulatory interventions.
- 6.4.12 The Competition Commission is in agreement with the barriers to entry consideration noted in the Discussion Document. The Commission is of the current view that the existence of barriers to entry is a crucial indicator of market power and creates an environment that would be conducive for competitive harm to arise in markets.
- 6.4.13 The Commission is of the current view that barriers to entry in the relevant markets, *inter alia*, include **sunk costs** (such as the cost of acquiring content rights, marketing expenditure, among others), **economies of scale and scope, incumbency advantages** and **brand loyalty, exclusive contracts** and **network effects** as detailed in the Discussion Document.
- 6.4.14 The Commission is in agreement with the proposals to use the number of rights as a unit of measure for market share calculation purposes. Further, the use of revenue figures as well as the number of subscribers as a basis for market share calculation is a well-accepted approach in these markets.
- 6.4.15 In respect of the other factors for consideration, the Commission notes that given the differentiated nature of the products in these markets as well as the fact that these are sometimes bidding markets, it is helpful to consider the strength of both existing and potential competitive constraints. In this regard,

an incumbent firm with a high market share in a market characterised by significant entry barriers is likely to have market power. In the alternative, it is well recognised that the likely constraint from potential competitors is increased when barriers to entry or expansion are lower

- 6.4.16 The Commission notes that, depending on the circumstances, vertical integration can give rise to either pro-competitive efficiencies or anticompetitive outcomes or at times both.
- 6.4.17 The Commission further argues that vertical integration in subscription television broadcasting stifles competition by giving upstream (wholesale) firms an incentive to deny downstream (retail) firms adequate content, leading to the form of market foreclosure associated with an uncompetitive broadcasting environment.
- 6.4.18 According to the Commission, in the context of there being possible suboptimal outcomes in the acquisition of premium content in South Africa, especially with the bulk of premium content vesting on the incumbent firm, it is likely that *ex post* interventions through competition law may have limitations. Instead, a regulatory intervention may be needed to promote favourable conditions for all broadcasting licence holders to compete.
- 6.4.19 Accordingly, the Commission is of the current view that a combination of competition law and *ex ante* regulatory interventions are required to deal with the market failures and potential competition challenges that are observed in these markets.
- 6.4.20 Cell C agrees with the Authority's assessment of the numerous barriers to entry for potential competitors seeking to enter the market for electronic audio-visual content.
- 6.4.21 MultiChoice argues that there are no barriers to entry in the electronic audio-visual services market. Alternatively, the barriers to entry are low and capable of being surmounted by well-resourced and efficient entrants.
- 6.4.22 To this end MultiChoice submits that premium content is not a barrier since the notion of 'premium' has become obsolete; content to build audiences is

not scarce, and readily accessible; the staggering of rights is not a barrier to entry; exclusivity over a period of years is standard; and bundling is the global norm.

6.4.23 According to MultiChoice, OTTs have substantially reduced the cost of entry and opened up opportunities for small players in the market.

6.4.24 When it comes to the calculation of market shares MultiChoice does not believe that subscriber numbers are the appropriate unit of measure for such an exercise. Static market shares reflect the recent nature of entry rather than the strength of competitors.

6.4.25 With respect to vertical integration MultiChoice does not believe that it is a feature of the market that impacts on the effectiveness of competition in the retail market nor does it raise any particular concerns. Broadcasters do not need to have in-house content production capabilities as most content is acquired from third parties and own content development is mostly done through commissioning independent producers.

6.4.26 On the question of the adequacy of competition law MultiChoice submits that there are no competition concerns that need addressing but that competition law should be given primacy over ex ante regulation.

6.5 The Authority's findings

6.5.1 The Authority agrees with MultiChoice that an assessment of the effectiveness of competition should start at the retail level and only proceed to the wholesale markets if there are competition challenges identified.

6.5.2 At the retail level the Authority defined four markets: (a) a market for the retail distribution of analogue free-to-air television services in South Africa; (b) a market for the retail distribution of basic-tier subscription television services and satellite-based free-to-air television services in South Africa; (c) a market for the retail distribution of premium subscription television services in South Africa; and (d) a market for the retail distribution of video-on-demand services, (including OTT services) in South Africa.

The market for retail distribution of analogue free-to-air television services in South Africa.

- 6.5.3 There are two national broadcasters currently in this market, the SABC and e.tv and a number of community television broadcasters. The Authority is in the process of considering applications for national free-to-air services who would utilize digital terrestrial transmission technology. Once digital migration is completed, the current incumbents will have capacity to introduce more channels that are of a better quality. This will enable the incumbents and new entrants to compete with basic tier subscription and satellite based FTA services. The Authority is satisfied that since the entry of e.tv in the free-to-air market in 1998 it has managed to gain market share over time.
- 6.5.4 There appear to be no barriers to expansion. Moreover, the Authority is in the process of licensing new FTA players who would compete directly with the SABC and e.tv. The Authority did not receive any evidence suggesting ineffective competition in this market.
- 6.5.5 However, the Authority notes that there appears to be asymmetric competition where MultiChoice is leveraging its market position to exert competitive pressure on FTAs. The Authority notes that e.tv's OVHD service is growing in terms of viewership, although MultiChoice estimates that OVHD will need [REDACTED]
[REDACTED]
[REDACTED]¹³⁶. By the end of 2018 OVHD had grown beyond 1.1 million viewers¹³⁷ indicating that it is holding its own against competition from basic-tier subscription services. Therefore, the Authority does not have reason to believe that competition is ineffective in this market.
- 6.5.6 Thus, the Authority is of the current view that this market is likely to continue to tend towards effective competition within the time horizon of three years.
- 6.5.7 This notwithstanding, the Authority received concerns from FTA service providers regarding MultiChoice unfairly squeezing them out from what they

¹³⁶ MultiChoice2018 Business Plan, p 18

¹³⁷ Channel 24. E.tv launches first PVR for Openview. July 2018

consider to be the ever shrinking advertising revenue pie. The Authority will consider whether there is need for intervention in this regard.

- 6.5.8 Similarly, free-to-air service providers raised concerns with respect to the competition impact of the Must Carry Regulations. Again, the Authority will consider whether there is reason to intervene to address these concerns.

The market for the retail distribution of basic-tier subscription television services and satellite-based free-to-air television services in South Africa

The non-transitory (structural, legal, and regulatory) entry barriers to the applicable markets or market segments

- 6.5.9 Currently there are three players in this market: e.tv, StarSat and Multichoice. e.tv offers the OpenView HD service whilst both StarSat and MultiChoice offer entry level subscription bouquets among, other services.
- 6.5.10 In its application, ODM had indicated that it planned to invest R1.7-billion in offering subscription-tv services and indicated that it would offer an entry-level service of 10 channels costing R150 a month.
- 6.5.11 ODM began broadcasting on 1 May 2010 as TopTV, offering 7 bouquets ranging in price between R99.00 and R249.00. Its target market would consist of middle income consumers in the LSM 5-8¹³⁸. This strategy took into account the fact that MultiChoice had traditionally targeted subscribers in the high income bracket, leaving an untapped sweet-spot of middle and low income households.

Barriers to entry: Switching costs

- 6.5.12 The lack of set-top box interoperability leads to high switching costs. A consumer who has invested in a set-top box and a satellite dish views these as sunk costs that he or she cannot recover when switching to an alternative broadcaster.

138 ODM licence application

- 6.5.13 The added hassle factor associated with switching exacerbates the high switching costs. Whereas OVHD viewers can now utilize MultiChoice dishes when switching, the same cannot be said about StarSat subscribers. Moreover, there still need to purchase a DStv decoder. MultiChoice is also planning to increase [REDACTED] [REDACTED] This has a direct impact on the ability of subscribers to switch services.

Barriers to entry: Brand loyalty

- 6.5.14 Viewers tend to develop brand loyalty, especially in a market such as South Africa where there was a single subscription television broadcaster for a long time. New entrants may find it difficult to break the brand loyalty barrier. In its submission MultiChoice argues that brand loyalty is not regarded as a barrier to entry. The Authority notes this contention and maintains its findings in this regard. The Australian Competition and Consumer Commission for instance, considers brand loyalty and customer loyalty as barriers to entry¹⁴⁰.
- 6.5.15 In its pre-listing statement MultiChoice states that –
- "Our DStv brand, which is a household name in South Africa, has high awareness and consumer support¹⁴¹."*
- 6.5.16 A new entrant has to contend with establishing its brand among consumers and gain their loyalty. This process takes time, thus weakening the competitive constraints exerted by new entrants. The Authority's consumer survey found that lack of awareness and familiarity with StarSat is the main reason for basic-tier DStv subscribers not subscribing to it.

Barriers to entry: Vertical integration

- 6.5.17 The Authority wishes to emphasise a point made in the Discussion Document that whilst vertical integration is a legitimate business model that produces

139 MultiChoice2018 Business Plan, p4

140 Australian Competition and Consumer Commission. Merger Guidelines. November 2008, (amended Nov 2017). European Commission http://ec.europa.eu/competition/mergers/cases/decisions/m5778_2891_2.pdf.

141 MultiChoice Group Limited. Pre-listing Statement. p30

economic benefits, such as internal efficiencies and economies of scope, it can also lead market foreclosure. For instance, in the television broadcasting and video on-demand sector, a vertically integrated incumbent has the incentive to leverage its market position downstream to gain power in an upstream market for content. It would then use its upstream position to exercise additional market power in the downstream market, and consequently, the cycle continues to self-reinforce itself perpetually.

- 6.5.18 MultiChoice is vertically integrated along the supply chain. It has its own in-house content production and channel packaging capabilities. The same cannot be said about its competitors in this market, StarSat and e.tv. Multichoice's vertical integration, whilst legitimate, can weaken the competitive constraint from other subscription and FTA services in this market.
- 6.5.19 In order to be an effective competitor a new entrant would have to enter more than one stage of the value chain, which requires a lot of capital outlay as argued by the SABC.

The dynamic character and functioning of the markets or market segments, including an assessment of relative market share of the various licensees or providers of exempt services in the markets or market segments, and a forward looking assessment of the relative market power of the licensees in the markets

Strategic behaviour by incumbent

- 6.5.20 Strategic behaviour refers to actions taken by a firm in order to improve its competitive position or gain commercial advantage relative to actual or potential competition. Firms can improve their competitive position through innovation or efficiency enhancing investments. However, strategic behaviour can also take the form of inhibiting competition, such as when a firm invests in resources for purposes of limiting rivals' choices.
- 6.5.21 When MultiChoice launched the DStv subscription service in 1995, it was a premium bouquet of 16 channels targeted at consumers in the 8-10 LSM bracket. In 2005, the Authority began a process of licensing new subscription television service providers. From the applications received, most of the

applicants would target lower end and middle income consumers since MultiChoice already catered for the high income consumers. Immediately, MultiChoice introduced DStv Compact, which at the time was an 11-channel bouquet targeted at the middle income consumers in the LSM 5-7, with a price range similar to what new entrants were targeting.

- 6.5.22 This points to possible limit pricing, where an incumbent sets a price just below its profit maximising level in order to make potential entry unprofitable. Since then, MultiChoice has introduced various other packages targeting the lower income consumers, with price points as low as R29 per month. e.tv provides the following list of MultiChoice packages and the corresponding household income levels targeted to show that MultiChoice has covered the entire market in order to prevent new entry:

Premium	LSM 9-10
Compact Plus	LSM 8
Compact	LSM 5-7
Family	LSM 4-7
Select	LSM 4-7
Access	LSM 4-5
EasyView	LSM 4-5

- 6.5.23 From a quantity perspective an incumbent may build extra capacity as a means of reducing pricing and therefore discouraging new entry. By reducing prices or increasing capacity, the incumbent is able to build a much larger customer base, leaving the potential entrant with less of the market, lower prices and lower profits, thus making entry unattractive¹⁴².
- 6.5.24 MultiChoice's move to introduce numerous bouquets at every possible price point leads to product proliferation that crowds out prospective entrants.
- 6.5.25 This kind of strategic behaviour leads to lock-in effects where an incumbent ties up customers, such that switching becomes a less viable or desirable option for them. Although MultiChoice customers do not enter into long term contracts, they nevertheless invest in decoders and satellite dishes that are not inter-operable with those of competitors. This sunk investment, coupled

142 Klemperer P. 1987. Entry Deterrence in Markets with Consumer Switching Costs. *The Economic Journal*. Vol 97: 99-177 available on <http://www.nuff.ox.ac.uk/users/klemperer/entry.PDF>

with strong brand loyalty, makes switching even more difficult and costly for customers. Moreover, MultiChoice also adopted a strategy of locking-in, especially lower end customers into two-year debit order agreements.

- 6.5.26 MultiChoice has [REDACTED] whilst households with e.tv's OVHD are estimated at 1.1 million as at March 2018¹⁴⁵. If an optimistic estimate of 1.2 million viewers for OVHD is considered, with StarSat having about 60 000 subscribers¹⁴⁶, this puts MultiChoice at [REDACTED] of the market. Given its strategic behaviour, it is highly unlikely that MultiChoice will lose its leading market position in terms of subscriber numbers.

Forward looking assessment of relative market power of licensees

Potential competition

- 6.5.27 In the market definition section above, the Authority established that OTTs are neither part of this market nor do they constitute a form of effective potential competition. Perhaps the market power of licensees in this market is likely to be affected by potential competition coming from digital migration.
- 6.5.28 However, there have been challenges with respect to the implementation of the digital migration policy. In 2015 e.tv instituted court action against the Minister of Communications, alleging that the Minister acted outside her powers in amending the digital migration policy to provide for non-encryption of set-top boxes. MultiChoice joined the Department of Communications in opposing the court action. In 2017 the Constitutional court dismissed e.tv's appeal upheld by the Supreme Court of Appeal which had struck out the non-encryption clause from the digital migration policy, thereby confirming government's policy that digital migration will proceed on the basis of non-encryption of set-to boxes. The question of encryption versus non-encryption was central to this case, with e.tv arguing that non-encryption would affect its

¹⁴³ Annexure E: Information requested in paragraph 6.2 of the Authority's letter sent to MultiChoice on 25 May 2018

¹⁴⁴ Total of Family, Access and Easyview subscribers.

¹⁴⁵ Channel 24. E.tv launches first PVR for Openview. July 2018

¹⁴⁶ Letter from StarSat to Icasa confirming subscriber numbers, 2017

ability to offer high definition television services and acquire premium content to compete with Multichoice.

- 6.5.29 In another matter, the S.O.S Support Broadcasting Coalition and others brought an appeal to the Constitutional Court against the decision of the Competition Appeal Court regarding the powers of the Competition Commission to investigate whether the channel licensing agreement entered into between the SABC and MultiChoice (the Agreement), constituted a notifiable merger in terms of the Competition Act.
- 6.5.30 The Constitutional Court held that the Commission has the power under the Competition Act to investigate transactions to determine whether they constitute or give rise to a notifiable merger as defined in the Act. In terms of the channel licensing agreement MultiChoice undertook to pay the SABC fees of more than R500 million over a period of five years, in exchange for which the SABC agreed that the SABC entertainment channels, to *inter alia*, not encrypt any of its free to air channels when the country migrates to digital terrestrial television¹⁴⁷.
- 6.5.31 At the Competition Appeal Court¹⁴⁸, the appellants had argued that the undertaking made by the SABC to accept non-encryption of its channels would fundamentally affect its ability to compete with MultiChoice. It further ensures that subscribers to MultiChoice's low cost offerings will receive everything that the SABC has to offer *via* MultiChoice's decoders plus its new channel offerings. This would increase MultiChoice's market share and solidify its position to the exclusion of other players or potential competitors in the industry.

"This is so, because encryption is critically important for free-to-air channels in order to compete with Pay-TV broadcasters. It provides a high quality signal and is less susceptible to signal piracy. These advantages make it possible for broadcasters to attract premium high definition content. Non-encryption

147 Constitutional Court of South Africa. S.O.S Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation (SOC) Ltd and Others. Case No. CCT 121/17, 28 September 2018

148 Competition Appeal Court. Caxton and CTP Publishers and Printers and others V MultiChoice(Pty) Ltd and others. Case No 140/CAC/MAR 16

would as a result make it difficult for second respondent and potential new free-to-air entrants to access to premium content. First respondent on the other hand, being the only broadcaster with an established base of encrypted signals would remain as the only broadcaster with the ability to attract premium content and would easily be able to increase its market share.”

- 6.5.32 The Commission in its submissions to the Competition Appeal Court also argued for encryption as a means to promote competition between subscription and FTA services.
- 6.5.33 MultiChoice argued that digital migration has occurred around the world with non-encryption of free-to-air decoders.
- 6.5.34 In September 2018 the Constitutional Court granted the Commission its right to investigate whether or not the agreement concluded between the SABC and MultiChoice in 2013 constitutes a notifiable merger and ordered the Commission to file a report on the matter to the Tribunal within 30 days. On 9 November 2018, the Commission filed a report with the Tribunal where-in it found that MultiChoice, through the Agreement, influenced the SABC’s position on the encryption of its free-to-air channels. In the Agreement, the SABC undertook in favour of MultiChoice not to encrypt all its channel signals in respect of its free-to-air channels transmitted on its DTT platform. Critically for purposes of this Inquiry, the Commission found that the encryption of SABC’s free-to-air channels including set-top box control would have, *inter alia*, enabled the entry of new entrants into the market and that the Agreement had the effect of protecting MultiChoice’s dominance in the subscription television market¹⁴⁹.
- 6.5.35 Whilst the Tribunal is yet to pronounce on the Commission’s findings, it is clear to the Authority that the effect of MultiChoice’s position in favour of non-encryption of set-top boxes would have resulted in DTT not having a sufficient

¹⁴⁹ Competition Commission. Media release. Commission finds that the agreement between SABC and MultiChoice enabled MultiChoice to influence the strategic direction of the SABC. 12 November 2018.

competition impact on the relevant subscription television market, in which MultiChoice is dominant

- 6.5.36 Based on the foregoing, the Authority doubts the strength of potential competition on subscription television coming from new DTT entrants given the policy of non-encryption of set-top boxes.
- 6.5.37 PWC predicts that in the longer term some households might look to supplement their digital terrestrial channels with SVOD platforms rather than traditional subscription tv packages¹⁵⁰. Thus, the competition in the digital era will likely be choosing between a subscription video on demand service and a subscription television service as a compliment to DTT.
- 6.5.38 In the Discussion Document the Authority indicated that the impact of DTT on the subscription television broadcasting market has been varied in countries that have undergone full digital migration.
- 6.5.39 For instance, the USA has fully migrated to DTT but it has not developed into a subscription TV platform. Thus, migration to DTT does not necessarily mean that DTT can compete as an alternative platform for subscription TV. It might well result in changed business models, with incumbent players repositioning themselves to take advantage of other platforms such as IPTV to deliver on demand services, with a core network TV offering available through DTT.
- 6.5.40 The Authority also pointed out that there is little subscription DTT across Europe – it accounts for only about 5 per cent of subscription TV subscriptions across the EU. This absence of subscription DTT reflects the technical constraints of the platform itself – with limited spectrum the number of channels is constrained and particularly in high definition, making it a less competitive option compared with cable and satellite.
- 6.5.41 There are also the cultural and policy aspects at work as governments control the spectrum on which DTT distributes and this enables them to influence how the spectrum is used to public service broadcasting ends. However, in Italy, where there is no cable provision, DTT subscription TV service Mediaset Premium accounts for about a quarter of subscription TV subscriptions, and

150 PWC. Entertainment and media outlook: 2018-2022. An African perspective. www.pwc.co/za/outlook

France's TNT (Télévision Numérique Terrestre) has a limited line-up of subscription channels alongside the free TV offering.

- 6.5.42 Kenya's digital switch-over to DTT started in January 2015, firstly with Nairobi (which has 99% TV penetration) and extending to other parts of the country. Kenya is striking in that migration to DTT contributed to the development of the subscription TV market and DTT has a market share of 56% of total subscription TV users.
- 6.5.43 In its market definition in the *Liberty Global/Ziggo* merger case¹⁵¹, the Commission found that satellite and digital terrestrial television appear to be slightly less valid alternatives in the Netherlands, compared to IPTV over DSL, fiber and satellite which were found to be part of the same product market.
- 6.5.44 Noting the above, the Authority does not expect DTT to have a marked competition impact on subscription television broadcasting in South Africa over the next three years or more. The Authority believes that the relative market shares of licensees in this market are likely to remain constant within the review period and beyond.

The market for the retail distribution of premium subscription television services in South Africa

The non-transitory (structural, legal, and regulatory) entry barriers to the applicable markets or market segments

- 6.5.45 There are only two players in this market: MultiChoice and Deukom. Deukom offers a niche service aimed at the German speaking community in South Africa and anyone with an interest in the language. The station has twenty-three channels in a single bouquet that falls within the premium range. By virtue of its target market, Deukom does not pose a competitive constraint on MultiChoice in this market.

¹⁵¹ European Commission. *Liberty Global / Ziggo*. Case No M.7000

Barriers to entry: Switching costs

- 6.5.46 The analysis on switching costs as a barrier to entry in 6.5.12 above also apply in this market. The Authority does not deem it necessary to repeat the analysis here, save to point out that

Barriers to entry: Bundling

- 6.5.47 The Authority stated in the Discussion Document that bundling involves the selling of a primary good or service, in conjunction with one or more secondary goods or services that can be acquired separately. The idea is that the consumer benefits from the convenience and cost saving of purchasing a bundled product than buying the individual elements separately. However, bundling and tying may foreclose the market, by incentivising consumers to purchase from a firm that offers a bundled good or service instead of dealing with other suppliers of the secondary goods or services. In the South African market, the Authority sees an increase in the phenomenon of offering access to discounted data services in addition to subscribing to a television or video-on-demand service.
- 6.5.48 MultiChoice has various products that are available to its premium subscribers, including Showmax, Explora and DStv Now. MultiChoice aims to continue developing and marketing bundled products, that would include DStv Wifi Connectors in order to increase the number of connected Explorers.

Barriers to entry: Brand loyalty

- 6.5.49 The analysis on brand loyalty in 6.5.14 applies in this market and will not be repeated.

Barriers to entry: Vertical integration

- 6.5.50 The analysis on vertical integration in 6.5.17 applies in this market and will not be repeated.

The dynamic character and functioning of the markets or market segments, including an assessment of relative market share of the various licensees or providers of exempt services in the markets or

market segments, and a forward looking assessment of the relative market power of the licensees in the markets

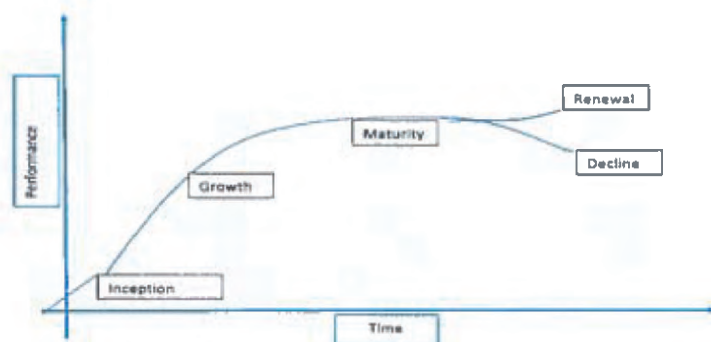
- 6.5.51 MultiChoice occupies a leading position in this market. It offers premium content bundled up with other offerings. The MultiChoice premium bouquet constitutes more than 99% of this relevant market, with Deukom playing in the periphery of the market.
- 6.5.52 The Authority does not foresee changes to the relative market shares of players in this market in the short to medium term.

Potential competition

- 6.5.53 MultiChoice claims that OTTs are eroding its premium subscriber base. However, such a claim is not borne out by the evidence at the Authority's disposal. As argued above, as far back as 2014, before the launch of OTTs in South Africa, MultiChoice already expected decline in the premium subscription numbers on the basis that the premium segment of the market was reaching saturation. [REDACTED]

[REDACTED]¹⁵². Market saturation and maturity is a natural progression of a typical industry or sector of a market, where it goes through the life cycle stages of inception, growth and maturity after which it can either decline or experience renewal as depicted in a simplified graph in figure 8 below.

Figure 8. Industry life-cycle stages



¹⁵² MultiChoice2018 Business Plan, para 4.3 p25

Strategic behaviour by incumbent

6.5.54 Industry or sector renewal can be driven by the re-invention of the business through innovation and the adoption of new technologies. MultiChoice is taking advantage of technological changes happening in the television and video-on-demand sector to try and protect its market position. This, it is doing through the introduction of various service offerings targeted largely at its premium subscribers. In 2016, just before the launch of Netflix in South Africa MultiChoice introduced Showmax, an internet based video-on-demand service that offers a catalogue of TV shows and movies. Showmax is available either as a standalone subscription service or for free as a complementary product to premium subscribers. [REDACTED]

6.5.55 Back in 2014, MultiChoice introduced DStv Now an internet based service that has evolved and now allows DStv Premium, Compact Plus and Compact subscribers to access selected DStv channels and DStv Catch Up content through broadband connections via computers, tablets, smartphones and smart TVs. During the course of 2019 MultiChoice intends to debut a streaming-only version of DStv, in line with what DStv Now currently offers¹⁵³. The new service will be a mirror-image of the DStv offering, less the set-top box.

6.5.56 [REDACTED]

The market for the retail distribution of video-on-demand services in South Africa

6.5.57 The market for retail distribution of video-on-demand services, including OTTs, is still in its nascent stages in South Africa, but showing signs of rapid

¹⁵³ Techcentral. DStv Now apps come to more devices. 15 August 2018.

growth. As already indicated, various local and international players have entered this market. Although some stakeholders pointed to fierce competition from OTTs, the Authority's analysis reveals that by and large, South African viewers tend to take up OTT services to complement rather than substitute subscription television services.

- 6.5.58 There are low barriers to enter this market. This market is technology driven and thus exhibits dynamism. The Authority does not have reason to believe that competition is ineffective in this market at the moment. The Authority will continue to monitor trends and developments. The Authority will intervene to the extent that the legislative framework allows if it finds reason to do so.

The wholesale market for the supply and acquisition of premium content for distribution in South Africa

Barriers to Entry: scarcity and cost of premium content

- 6.5.59 As stated in the Discussion Document, the Authority regards the major barrier to entry into the upstream market for the supply and acquisition of premium content to be the scarcity of premium content. The Authority do not agree with MultiChoice that content is no longer a barrier due to its wide availability. MultiChoice concedes that sport rights have become increasingly expensive and hotly contested¹⁵⁴, having spent R2.3 billion on local sports content and R2.5 billion on local content in 2018¹⁵⁵. As discussed above, the increasing cost of premium content is now beyond the reach of many broadcasters and new smaller local OTT service providers.
- 6.5.60 In 2015 e.tv lost rights to broadcast the UEFA Champions League, citing the prohibitive costs of the rights¹⁵⁶. In 2007, the SABC lost its exclusive rights to the local Premier Soccer League (PSL) to SuperSport, in a deal worth R1.6 billion. Both broadcasters lost viewers as a result of failing to secure these premium sports rights, which MultiChoice has managed to win ever since and leverages on them, among others, to grow its subscriber base. The scarcity

¹⁵⁴ Multichoice. Intergrated Annual Report. 2016

¹⁵⁵ Multichoice. Abridged Integrated Annual Report. 2018

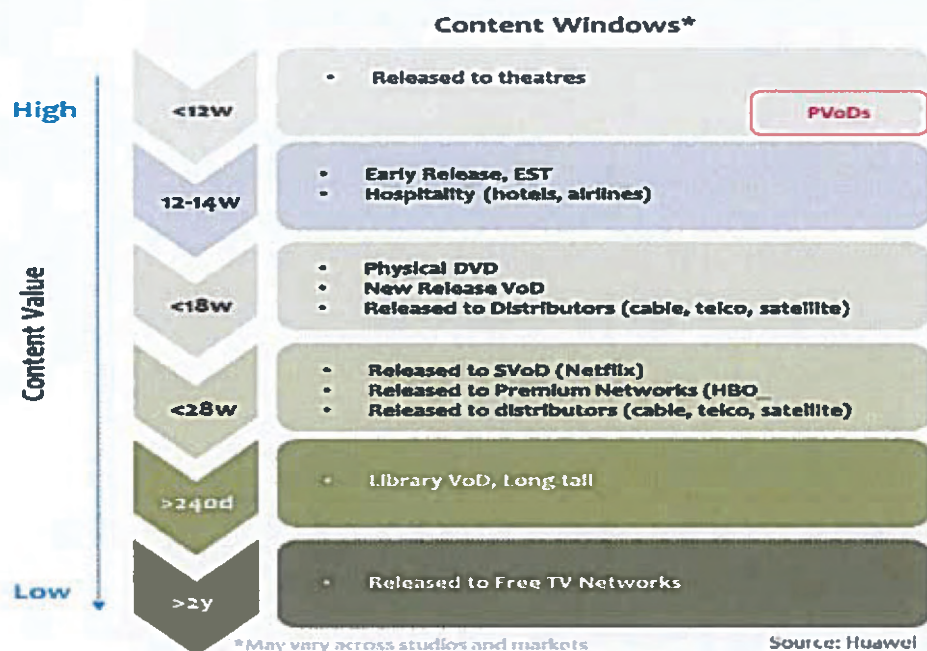
¹⁵⁶ TimesLive. e.tv loses Champions League rights to SuperSport <http://www.timeslive.co.za/sport/soccer/2015/05/26/e.tv-loses-Champions-League-rights-to-SuperSport>

and competition for premium sports content is driving up its cost and pushing it out of reach of new entrants.

- 6.5.61 The PSL's 2011 Invitation to Tender document has minimum production requirements with quality and investment specifications that bidders must meet. It is clear from these requirements that it would be difficult for new entrants to break into the market, without deep pockets. These requirements favour the incumbent and only work to reinforce MultiChoice's ability to keep winning the rights perpetually, thus further negatively affecting competition. It is also not clear why the previous agreement was extended for a further two years without going back to market to give other players an opportunity.
- 6.5.62 The current agreement entered into between MultiChoice and the PSL runs for 5 years, covering the 2019/20 season through to the 2023/24 season. The English Premier League agreement has also been renewed until 2022. Effectively no new entrant will have access to these and other rights currently held by MultiChoice.
- 6.5.63 With respect to premium movies and series, as noted in the Discussion Document, Hollywood movies¹⁵⁷ are released in windows with specific times of release. Free-to-air broadcasters and OTT service providers cannot compete with subscription-tv broadcasters for such movies because of the terms and conditions surrounding their release. Moreover, rights are sold for a particular territory, thus precluding other subscription broadcasters in the same geographical area from acquiring the same rights. The competition for premium movies also increases the cost of acquiring them, especially the first window movies.

157 20th Century Fox, Warner Bros, Paramount, Sony, Universal and Walt Disney

Figure 9. Typical feature film release window



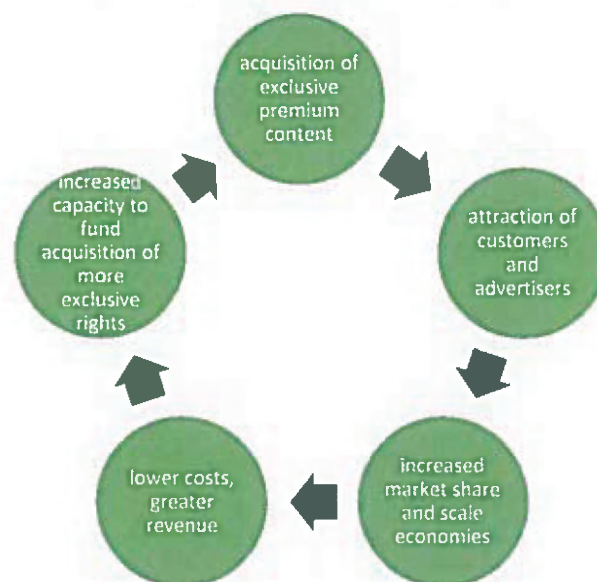
- 6.5.64 According to e.tv, an increase in social media usage and audiences commenting about movies and programmes the ability to generate new interest in such programmes is difficult and curtails the potential of income for FTA broadcasters in the 2nd or 3rd window¹⁵⁸.
- 6.5.65 In its responses to the information gathering Questionnaire, the SABC pointed to high levels of capital investment, high levels of operational investment, market saturation and delays in transitioning to DTT and Siyaya pointed to the cost and scarcity of premium content as major barriers to entry in the subscription television broadcasting market.
- 6.5.66 Furthermore, there are substantial sunk costs involved in setting up a new subscription television broadcasting service and marketing it to potential subscribers.
- 6.5.67 As shown above, new entrants also have to contend with the threat of a strategic competitive response from an incumbent, who can undercut or introduce new offerings that compete with a new entrant.

¹⁵⁸ e.tv presentation to Icasa. Slide 20

Barriers to Entry: long-term exclusive contracts

6.5.68 Apart from the high cost, premium sports content is usually tied up in long term exclusive contracts, meaning that for a new entrant such content would not be readily available until the end of the contract. Even then, there is no guarantee that a new player will outbid an incumbent at the next round of bidding due to the competitive advantage that exclusive content bestows on the holder. The Authority repeats the argument of a vicious cycle depicted in figure 7 below. The cycle begins with the acquisition of premium content on an exclusive basis for a stipulated time frame. Exclusive premium content attracts more viewers thereby increasing the broadcaster's chances of acquiring even more premium content as rights holders would prefer to sell to an established broadcaster with an established and growing subscriber base. More viewers also mean an increase in advertising and subscription revenue that enables the broadcaster not only to outbid its rivals but also acquire even more exclusive content. Consequently, new entrants are foreclosed from the market.

Figure 10. Exclusive premium content and market power vicious cycle



Source: Windsor Place Consulting¹⁵⁹

¹⁵⁹ Windsor Place Consulting. 2012. Exploring content related issues: Will exclusive content rights be the new bottleneck in the Australian telecommunications sector? Paper for the competitive carriers' coalition. Available from www.ccc.asn.au/secure/downloadfile.asp?fileid=1001538

6.5.69 MultiChoice disputes the existence of a vicious cycle in the market for content supply and acquisition, on the basis that the vicious cycle requires the following strict conditions to hold:

6.5.69.1 exclusivity over specific content must be capable of attracting a substantial subscriber base; and

6.5.69.2 a larger installed subscriber base must substantially increase future profits

6.5.70 Without delving into the question of whether MultiChoice is correct in its assertion that the vicious cycle theory is dependent on the cited two conditions, it is the Authority's view that in the South African market, MultiChoice has benefited from the first mover advantage, having provided subscription television services over a long period of time with limited competition. This enabled MultiChoice to secure a large subscriber base and build a strong brand that reinforces customer loyalty. MultiChoice has bid and won premium sports rights, which are globally accepted to be crowd pullers. It has also entered into exclusive multi-year first-window movies rights with major Hollywood studios. MultiChoice subscriber numbers have grown exponentially over the years since its launch, as shown in figure 9 below. This growth continues even in the face of OTTs. MultiChoice also continues being profitable on the back of the kind of programming it offers, based on the premium content acquired as depicted in figure 5 above. To the extent that vicious cycle is dependent on the two conditions, the Authority is satisfied that in the South African market these conditions are met. Thus, whilst the vicious cycle may have been found to not exist in some market, as MultiChoice argues, the Authority finds differently in the South African market.

6.5.71 MultiChoice's premium bouquet boasts over [REDACTED], as of March 2018, with access to about 135 channels. Premium subscription services face competition from video-on-demand services as well as middle-tier subscription services. The strength of the competitive constraint needs to be assessed in order to determine the effectiveness of competition.

- 6.5.72 The PSL in its presentation indicated that it goes out to tender every five years. This is contradicted by information reviewed by the Authority, details of which are not set out in this Draft Findings Document because of their confidential status in terms of section 4D. [REDACTED]

- 6.5.73 In the USA, Cable companies had exclusive rights to provide services in apartment buildings and other multi-family dwellings. The exclusive contracts were considered a primary factor in the rapid rise of cable prices. The FCC concluded that exclusivity clauses cause significant harm to competition and are a barrier to new entry into the multichannel video market place.

Barriers to entry: incumbency of special relationships

- 6.5.74 Incumbent operators take advantage of lack of competition to establish strong relationships with suppliers, advertisers and even viewers. Content suppliers and advertisers would want to do business with an established operator than a new entrant. For an advertiser, an established broadcaster usually has a larger base of subscribers than a new entrant and therefore more eyeballs to see the advert. Similarly, for content producers an established broadcaster ensures that there is broader access to their content than a new entrant's subscriber base.
- 6.5.75 In *Deutsche Telekom* it was recognised that where an incumbent has strong links with certain key constituencies like advertisers these can present barriers to entry and the court held that:

"To have any hope of acquiring broadcasting rights, it is vital to have access to viewers in the form of an established subscriber base since rightholders usually want to see their product distributed widely.... [A] new comer would run a considerable financial risk by concluding output

deals since he would have to guarantee a minimum subscriber base, without knowing whether he could achieve the guaranteed figure¹⁶⁰

- 6.5.76 This phenomenon has been at play in the South African market with some sports bodies loath to do business with service providers that have no track record in the market. Telkom rightly points out that the monopoly position that was enjoyed by MultiChoice for a long time has ensured that it forges long term, exclusive relationships with content suppliers, making it difficult for new entrants to make substantive inroads into the market.

The dynamic character and functioning of the markets or market segments, including an assessment of relative market share of the various licensees or providers of exempt services in the markets or market segments, and a forward looking assessment of the relative market power of the licensees in the markets

- 6.5.77 MultiChoice claims that OTT services constrain subscription television through, cord-shaving, cord-cutting and cord-nevers¹⁶¹.
- 6.5.78 With respect to cord-shaving and cord-cutting, Figure 11 below indicates that the churn-out rate for premium subscribers has been fluctuating between 2014 and 2018, indicating no direct link between the entry of OTT services in the South African market and churn out. If anything, the churn out for premium subscribers has been decreasing since the launch of Netflix in South Africa. The churn down rate for premium subscribers on the other hand shows a downward trend between 2014 and 2018, again proving that there is no direct link between OTTs and cord-shaving in South Africa. In any case, subscribers who churn down, substitute MultiChoice premium bouquets with its middle-tier bouquets.

¹⁶⁰ Case IV/M.1027 Deutsche Telekom/BetaResearch

¹⁶¹ MultiChoice presentation, slide 33 and MultiChoice written submission,

Figure 11. MultiChoice subscriber numbers per bouquet 2008 -2018



REDACTED



REDACTED

Source: MultiChoice submission¹⁶³

6.5.80 Contrary to what MultiChoice claims in its public statements regarding competition from OTTs, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] This prediction had very little, if anything to do with OTTs at the time. Yet even in the presence of OTTs [REDACTED]

[REDACTED]

[REDACTED]¹⁶⁴. From the documents reviewed during the course of this Inquiry, which includes information provided by stakeholders, there is a view that the premium segment is saturated. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The factors highlighted by stakeholders in relation to the loss of premium customers by MultiChoice are in line with the Authority's consumer survey which found that budget constraints and value perspectives are the reasons why DStv Mid-range subscribers do not upgrade to DStv Premium. As a result, MultiChoice is developing strategies to relieve these [REDACTED] concerns by premium subscribers.

¹⁶² Post hearing submission by Multichoice; 7 December 2018

¹⁶³ Annexure E: Information requested in paragraph 6.2 of the Authority's letter sent to MultiChoice on 25 May 2018

¹⁶⁴ MultiChoice2018 Business Plan, para 4.3 p25

6.5.81 Therefore, in light of the factors highlighted above, the Authority did not find evidence that OTTs constitute a strong competitive constraint on MultiChoice's premium bouquet.

6.5.82 As a result, MultiChoice is likely to maintain its current market position into the foreseeable future.

The wholesale market for the supply and acquisition of non-premium content for distribution in South Africa

6.5.83 The market for the wholesale acquisition of non-premium content is characterised by low barriers to entry. Content in this market is generally available with no restrictions. It is the Authority's current view that there are no significant competition concerns in this market. As such, there is no need to proceed with the analysis of significant market power in this market.

7. CONSIDERATION OF LICENSEES WITH SIGNIFICANT MARKET POWER

7.1 Overview

7.1.1 This section of the Discussion Document analysed the Authority's initial views regarding the identification of licensees with significant market power in the proposed relevant markets, as guided by section 67 (5) of the ECA, which provides that –

"A licensee has significant market power in a market or market segment if that licensee –

(a) is dominant;

(b) has control of an essential facility; or

(c) has a vertical relationship that the Authority determines could harm competition"

7.1.2 As indicated in the Discussion Document, once a market has been defined, the next step is to identify players in that market, calculate their market shares and identify those players who have significant market power. The concept of significant market power is used specifically in the electronic communications and broadcasting sectors, not only in South Africa, but in other countries as well. This concept is not different from the concept of market power used in general competition law and policy circles.

7.1.3 The Competition Act defines market power as the ability of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers. A firm is irrefutably presumed to have market power and be dominant in a market if it has 45% or more market share.

7.1.4 A market share of between 35% and less than 45% presumes dominance unless the firm concerned can show that it has no market power. A market share of less than 35% presumes dominance if it can be proven that the firm concerned has market power. In terms of the ECA a licensee has significant

market power if, among other things, it is dominant, within the meaning of the Competition Act.

- 7.1.5 After discussing the concept of significant market power the Authority then posed the following two questions:

Q23. Do you support the Authority's proposed approach in identifying players with significant market power? Kindly elaborate

Q24. Does the nature of any licensee's vertical integration in this market raise competition concerns?

7.2 Stakeholder comments

- 7.2.1 Telkom disagrees with the notion that "...a licensee has significant market power if, among other things, it is dominant, within the meaning of the Competition Act", as stated in the ECA, since this statement implies that having high market shares bestows market power upon a firm. According to Telkom, it is inadvisable to make a priori assumptions regarding the structure of a market and the existence of market power. Such a determination would place significant weight on the market share calculations, which is specifically problematic given the Authority's incorrect method for calculating market shares for the content market. As such, making a determination on whether a firm has SMP given its market shares is essentially flawed.
- 7.2.2 Telkom notes that MultiChoice is the only player in the South African subscription broadcasting industry that is fully vertically integrated and as such should be sufficiently investigated to identify any potential competition concerns.
- 7.2.3 Telkom makes reference to Ofcom's consultation paper on its Pay-TV market investigation which stated that Sky's unique position in the pay TV industry creates a vicious circle that allows Sky to engage in conduct which is harmful to competitors and consumers. It was suggested that the key features of Sky's position are (i) its vertical integration; (ii) its upstream bottleneck (more specifically, its grasp of attractive content that it purchases on an exclusive basis); and (iii) its downstream bottleneck, which includes its gatekeeper

status for the satellite platform (w.r.t. EPG listings and conditional access charges) and its majority share of the retail customer base.

- 7.2.4 Econet Media contends that the Authority refers to the ECA which states that SMP may flow from dominance, control of an essential facility or vertical relationships, but does not mention any market characteristics that may prevent firms with these characteristics from using its market power. However, there are conditions under which even a firm with 100% of the market may not be able to profitably maintain price increases.
- 7.2.5 First, barriers to entry and potential competition can limit a firm's attempts to exercise market power. Second, barriers to expansion, may entrench market power, through factors that prevent firms already in the market from quickly and cheaply increasing their output. Third, the absence of countervailing buyer power means that at the retail level, no other subscription television broadcaster is able to offer the same premium bouquets as DStv, and subscribers therefore have no outside options that can limit MultiChoice's market power in this segment of the market. Fourth, product differentiation may also influence a firm's market power by "softening" the degree of price competition between firms. If firms offer differentiated products or services, fewer consumers may switch following a price increase, making it easier for firms to profitably sustain higher prices.
- 7.2.6 When it comes to vertical integration, Econet Media makes reference to the OECD which states that *"A key issue is that a downstream broadcasting service provider may be able to leverage its market position to gain power in an upstream market for content"*. According to Econet Media this has been true for MultiChoice, whose large footprint in the retail market has allowed it to grow its market share in the upstream market for content production and access to premium content rights, and vice versa.
- 7.2.7 In deciding whether or not to make content or channels that are produced or packaged in-house available to third parties, MultiChoice faces a trade-off between increased income from the sale of the content rights/channels to

potential competitors, and the risk of losing subscribers who may switch to competitors if the content becomes available on other platforms.

- 7.2.8 MultiChoice's access to premium and non-premium content has made it easy for it to enter the OTT market, which has given it a competitive advantage over other pay television broadcasters and OTT service providers. By leveraging from its negotiations for pay television content rights, it also gains access to content to screen on its own OTT platform/s. Competitors are therefore not only blocked out of the first-run television broadcasting window, but also out of the second-run windows.
- 7.2.9 Finally, MultiChoice, through its affiliation with firms such as SuperSport, M-Net and Orbicom is fully integrated, which makes it more efficient, but it also makes it more difficult for other subscription broadcasters to enter and become effective competitors.
- 7.2.10 The Commission is of the view that the identification of players with significant market power is mandated by legislation and is therefore deemed appropriate for the evaluation.
- 7.2.11 In respect of vertical integration, the Commission notes that this can, depending on the circumstances, give rise to either pro-competitive efficiencies or anticompetitive outcomes or at times both. The pro-competitive efficiencies largely relate to the removal of double marginalisation and the reduction of transaction costs which ultimately can be expected to result in lower prices and product quality, among others. On the other hand, vertical integration can contribute to the heightening of barriers to entry and/or expansion in a market as well as perverse incentives on the part of vertically-integrated firms.
- 7.2.12 According to Multichoice, the proper approach when determining significant market power is to first consider the effectiveness of competition in the retail market. If the Authority is unable to find that competition in the retail market is ineffective, then the inquiry ends there. If ineffective competition is found at the retail level and wholesale markets are assessed, it is only those within

which ineffective competition is found which should be the subject of any SMP test.

7.2.13 MultiChoice believes that any analysis of SMP is premature until a proper analysis of effectiveness of competition has been completed.

7.2.14 Furthermore, MultiChoice does not believe that vertical integration is capable of raising competition concerns in this market.

7.3 The Authority's findings

7.3.1 The Authority does not agree with Telkom and Econet Media that significant market power cannot be deduced from market shares. Section 67(5) clearly states that a licensee has significant market power if it is dominant; has control of an essential facility; or is vertically integrated in a manner that harms competition. The ECA ascribes to dominance the same meaning it has in terms of section 7 of the Competition Act, which states that a firm is dominant in a market if –

(a) it has at least 45% of that market;

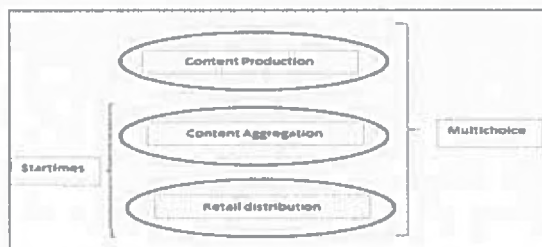
(b) it has at least 35%, but less than 45% of that market unless it can show that it does not have market power; or

(c) it has less than 35% of that market, but has market power.

7.3.2 The Competition Act then defines market power as the ability of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers. A firm is irrefutably presumed to have market power and be dominant in a market if it has 45% or more market share. A market share of between 35% and less than 45% presumes dominance unless the firm concerned can show that it has no market power. A market share of less than 35% presumes dominance if it can be proven that the firm concerned has market power. In terms of the ECA a licensee has significant market power if, among other things, it is dominant, within the meaning of the Competition Act.

- 7.3.3 Thus, from the above, a firm can have significant market power on account of possessing high market shares only. To the extent that other factors are at play, they only magnify the extent of the market power that already exists due to the size of a firm in the market.
- 7.3.4 However, significant market power can also stem from vertical integration and the control of an essential facility. The Authority has determined that MultiChoice is vertically integrated in a manner that allows it to leverage its market power at one end of the value chain to benefit the other end.
- 7.3.5 Contrary to MultiChoice's contention that vertical integration is not a necessary condition to enter the market since content can be obtained from third parties, or commissioned from independent producers, it is vertical integration that has given rise to the current market structure that exhibits outcomes that prevent entry and expansion in the market. There are inherent economies of scale and scope associated with vertical integration. Unfortunately these have given rise to a market structure that results in ineffective competition.

Figure 13. Vertical integration in subscription television



- 7.3.6 The Authority starts its analysis at the retail level where it identified four relevant markets:
- 7.3.6.1 a market for the retail distribution of analogue based free-to-air television services in South Africa;
- 7.3.6.2 a market for the retail distribution of basic-tier subscription television services and satellite-based free-to-air television services in South Africa;
- 7.3.6.3 a market for the retail distribution of premium subscription television services in South Africa; and

- 7.3.6.4 a market for the retail distribution of video-on-demand services in South Africa.

The market for the retail distribution of analogue free-to-air television services in South Africa

- 7.3.7 The Authority did not find major competition challenges in the analogue free-to-air television services market.

The market for the retail distribution of basic-tier subscription television services and satellite free-to-air television services in South Africa

- 7.3.8 The Authority found that MultiChoice and StarTimes offer basic tier subscription TV bouquets and e.tv offers satellite based free to air services in this market. If the Authority considers the Family, Access and Easyview as entry level bouquets, MultiChoice has 2 399 832 subscribers in this market. StarTimes has about 60 000 subscribers to its service. The number of households with an OVHD service is estimated at 1 200 000. As a result, MultiChoice commands about 65% of the market. Therefore, in terms of section 67(5) of the ECA MultiChoice has significant market power in the market for the retail distribution of basic-tier subscription television services and satellite based free-to-air television services in South Africa.

The market for the retail distribution of premium subscription television services in South Africa

- 7.3.9 The Authority determined that MultiChoice and Deukom are the only players in this market. MultiChoice has 1 361 557 premium subscribers while Deukom has about 10 000 subscribers. As result MultiChoice commands 99% market share and therefore has significant market power in this market.

The market for the retail distribution of video-on-demand services in South Africa

- 7.3.10 There are currently various players of different sizes in this market. All of them are new entrants who are less than 5 years in the market and are at different stages of development. These include local, regional and international service

providers. Local players include Multichoice, through its Showmax and DStv Now services, Cell C's Black, Vodacom VideoPlay, Econet Media's Kwesé Play, Telkom LIT and DEOD. International service providers with a local presence include Netflix, Google Play, Amazon Prime and iflix among others.

7.3.11 The Authority notes that MultiChoice is increasing its presence in the video-on-demand market. MultiChoice states that Netflix subscribers are only two-thirds of its Showmax subscribers, indicating that MultiChoice is currently leading in terms of subscriber numbers in this market. There are concerns that MultiChoice may use its dominant market position in subscription television services to limit competition in the video-on-demand market. In its Pay TV Movies investigation Ofcom noted that Sky also acquired subscription video-on-demand rights to first run movies, although it was not at that time heavily utilising these rights. Ofcom concluded that this was evidence that BSkyB had market power in the linear channel distribution of premium movies. And at a time when growing SVOD services were disrupting the pay TV market, Ofcom concluded that Sky's position in the market could also limit competition in on-demand services in the future.

7.3.12 The Authority will monitor developments in this market and will intervene when required. The Authority notes further that there are collaborations among players, including between subscription service providers and OTTs as well as between electronic communications service providers and OTTs. Again, the Authority will monitor the nature of the collaborations to ensure that they are competition enhancing.

7.3.13 Various stakeholders also raised concerns with the fact that OTTs are currently not subject to any form of regulation in South Africa, including BEE and local content requirements. It must be recognised that this inquiry is based on section 67 of the ECA, in terms of which, regulations can only be imposed on licensees who are found to possess significant market power in an instance where there is ineffective competition in an identified market. However, nothing prevents the Authority to embark on a separate process to consider the regulation of OTTs in general, should the need arise.

The market for the wholesale acquisition of non-premium content for distribution in South Africa

- 7.3.14 As explained in the Discussion Document, the Authority considered the broadcasting and video-on-demand value chain as depicted in Figure 3 above to indicate that some broadcasters are able to produce content in-house. In most instances this would be non-premium content. Those with no such capabilities acquire content from third parties. Over the years, commercial and community television broadcasters have managed to enter the broader television broadcasting and video-on-demand sector.
- 7.3.15 The Authority views this market as not having high barriers to entry. There are many suppliers of non-premium content locally and internationally. Both free-to-air and subscription television broadcasters and channel producers can acquire content in this market. Vertical integration here does not appear to cause any harm to competition and as such there is no need for regulatory intervention.

The market for the wholesale supply and acquisition of premium content for distribution in South Africa

- 7.3.16 The Authority identified three categories of premium content, being FSPTW Hollywood movies and series; live soccer matches; live rugby matches; and live cricket matches. The Authority has considered the fact that MultiChoice currently holds movie rights in four of the six Hollywood movie houses; it owns the majority of the rights to the major live soccer matches, including the PSL, EPL, Bundesliga, La Liga and Serie A. MultiChoice has also acquired rights to the major rugby tournaments as well as the cricket competitions. MultiChoice has held these rights over an elongated period of time. It has used access to these rights to exert its market power in the downstream retail market. Thus Authority also considered the fact that MultiChoice is vertically integrated in a manner that could harm competition. As such, MultiChoice is found to possess significant market power in this market.

8. PRO-COMPETITIVE LICENCE CONDITIONS

8.1 Overview

8.1.1 This section of the Discussion Document considered possible pro-competitive licence conditions that may be imposed on a licensee with significant market power in the relevant markets that have been determined to be characterised by ineffective competition, in order to remedy the market failure. Having identified possible market failures and the fact that there could be ineffective competition in the proposed relevant markets, the Authority is required to consider appropriate remedies to deal with the market failure. According to section 67(7) pro-competitive licence terms and conditions may include but are not limited to:

- (i) obligations to publish any information specified by the Authority in the manner specified by it;
- (ii) obligations relating to accounts, records and other documents to be kept, provided to the Authority, and published;
- (iii) obligations concerning the amount and type of premium, sport and South African programming for broadcasting; and
- (iv) distribution, access and reselling obligations for broadcasters.

8.1.2 The Discussion Document went on to discuss other possible remedies in addition to the ones already listed in section 67(7) of the ECA, including shortening exclusive contracts; introducing unbundling; imposing rights splitting; impose wholesale-must-offer; opening up the dominant firm's network; and introducing set-top box inter-operability.

8.1.3 A firm also has significant market power if it has a vertical relationship that the Authority determines could harm competition. Whilst vertical integration does not raise competition concerns per se, it can be used to limit competition.

8.1.4 The following two questions were posed in this section of the Discussion Document:

Q23. Do you support the Authority's proposed approach in identifying players with significant market power? Kindly elaborate?

Q24. Does the nature of any licensee's vertical integration in this market raise competition concerns?

8.2 Stakeholder comments

- 8.2.1** Telkom supports the shortening of exclusive contracts, arguing that this is in line with best corporate governance in South Africa and will allow new players a fair opportunity to bid for and acquire key rights. However, Telkom points out that unless this is linked to requiring an open and fair bidding process, it will not alone address the problems associated with long term contracts and relationships between incumbents and rights holders. The length of time for such exclusive rights would also probably ideally be negotiated with both content providers and rights holders.
- 8.2.2** Telkom opines that rights splitting and unbundling of content rights can only be effective as a remedy to address unfair competition if used together. These conditions are generally imposed on rights holders (e.g. sporting codes) and therefore would need the cooperation of the competition authorities and rights holders.
- 8.2.3** Telkom fully supports the imposition of wholesale must offer in the South African context. The OTT market is not yet developed enough to address the issues and Telkom does not expect it to develop rapidly.
- 8.2.4** When it comes to the remedy of opening up the dominant player's network, Telkom refers to Ofcom who seems to have successfully addressed concerns about access through such interventions and Telkom supports the notion that ICASA explore this further.
- 8.2.5** Telkom also supports set-top box interoperability as a crucial licence condition in ensuring ease of switching by subscribers – allowing new operators to target both existing and potential customers.

- 8.2.6 In its written submission Econet Media provides an analysis of various remedies imposed by authorities in Europe, to deal with challenges of accessing content by third parties before outlining its views on the proposed remedies. Econet Media supports the proposal that exclusive contracts be shortened and believes that the approach adopted by the European Commission in limiting agreements for the acquisition of sports content to two years and agreements for the acquisition of premium entertainment content to three years, is an appropriate measure.
- 8.2.7 Econet Media proposes that in addition to shorter contract periods, the Authority should also consider a pro-competitive licence condition which would limit MultiChoice's (and its affiliates) ability to enter into output and volume licensing agreements to no more than two Hollywood studios. MultiChoice should also be prohibited from entering into any form of output licensing agreement with independent suppliers of content
- 8.2.8 Econet Media supports the approach adopted by the European Commission in respect of the acquisition of sports rights, including the unbundling of sports rights.
- 8.2.9 Another pro-competitive measure which Econet Media believes will be important to ensuring that the barriers to acquiring premium entertainment and sports content are lowered would be for the Authority to impose a requirement on MultiChoice that precludes it from acquiring DTT, Internet and mobile rights on an exclusive basis.
- 8.2.10 Econet Media is also in favour of the implementation of a wholesale 'must offer' obligation as it will unlock content which is currently subject to long term exclusivity arrangements and proposes that such an obligation be imposed on MultiChoice's premium entertainment and sports channels.
- 8.2.11 However, wholesale 'must offer' obligations will only be effective, if they are subject to substantial regulatory oversight with regard to access, the terms of access and the resolution of disputes between the parties. In addition, there is a need for ancillary pro-competitive licence conditions to accompany the wholesale 'must offer' obligation. These obligations include an obligation that

all channels which are made available to other pay television operators be offered on the same basis as those offered by MultiChoice to itself

8.2.12 Econet Media believes that the Authority should consider the introduction of set-top box interoperability together with technical platform service guidelines similar to those introduced by Ofcom.

8.2.13 In addition to the above remedies, Econet Media also proposes that anticompetitive contractual terms such as automatic renewal clauses, rights of first refusal in respect of the licensing of new or additional content and any form of restraint placed on content suppliers or local producers by MultiChoice should be prohibited

8.2.14 According to the Competition Commission, the South African Pay-tv broadcasting services market is characterised by the presence of an overwhelmingly dominant incumbent, significant barriers to entry, limited countervailing power (by both sellers of content rights and end consumers), and ineffective entry. Given this state of affairs it proposes various remedies, in line with the Discussion Document.

8.2.15 The Commission's view is that while shortening the duration of exclusive contracts can reduce the likelihood of anti-competitive outcomes, this is not sufficient. While short duration contracts are unlikely to raise competition concerns, the possibility for the renewal of these contracts with the same broadcaster still remains as a risk factor. The continuous renewal of exclusive contracts with the same broadcaster serves to entrench incumbency. This confers upon incumbents a competitive advantage in the market and effectively forecloses new entry and/or expansion by existing players.

8.2.16 The introduction of unbundling could be a welcome long-term remedy. Given the limited uptake and usage of alternative broadcast platforms such as mobile tv and IPTV, the Commission submits that such a remedy would not provide the necessary resolution to the identified market failures and competition concerns in the market. From a long-term perspective and in order to allow for these broadcast platforms to gain traction, the Commission is of the view

that if such unbundling is necessary it should be effected as part of the suite of regulatory intervention instruments in this market.

- 8.2.17 The introduction of rights splitting is a welcome potential remedy. The Commission notes that while the splitting of rights, subject to the terms set out in the Discussion Document, allows for numerous players to have access to a critical input, due regard must be given to the design of the various rights packages. This is to ensure that all rights acquirers are afforded the opportunity to acquire sufficiently compelling packages that will enable them to effectively compete in the market.
- 8.2.18 The Commission contends that the imposition of a wholesale-must-offer obligations on the dominant firm can serve to promote competition by ensuring that smaller and new market participants are able to access critical inputs such as premium content. However, such an obligation would necessitate the regulation of terms of access as vertically-integrated broadcasters may have incentives to stifle competition at the downstream retail level. Such incentives could be effected through strategies that would result in the raising of rivals' costs and/or constructive refusal to deal with competitors.
- 8.2.19 Access to a dominant firm's network may reduce barriers to entry for smaller and new entrants into the market. However, the Commission believes that this will also require the regulation of terms of access. A wholesale access regulatory framework, which regulates terms of access on non-discriminatory and cost-based (with a reasonable return) terms would have to be developed.
- 8.2.20 According to the Commission, the lack of interoperability of STBs can potentially raise barriers to entry for subscription television service providers as this has implications for the ease with which individual incumbent broadcasters' STBs interoperate with signals from other subscription television service providers. Ultimately, this also has implications for the ease with which customers can switch between different service providers. Inter-linked with the issue of operability is the issue of conditional access, particularly in the context of access to premium content.

- 8.2.21 As such, it is imperative that an appropriate regulatory framework in respect of interoperability and conditional access is put in place to safeguard the pro-competitive and consumer-welfare enhancing outcomes that are likely to arise from the implementation of such a system.
- 8.2.22 The Commission believes that none of the proposed remedies would be sufficient if considered in isolation. Rather, a combination of the proposed remedies, underpinned by effective regulation would serve to deal with the identified market failures and competition challenges.
- 8.2.23 Deukom expresses a concern that any regulations which may be developed relating to the imposition of pro-competitive licence conditions will inadvertently further trample the business activities of small broadcasters.
- 8.2.24 e.tv proposes that advertising revenue income streams for MultiChoice be capped at R1 billion per annum. e.tv further proposes that hoarded rights, especially sports rights, should be made available to FTA broadcasters on a cost effective basis.
- 8.2.25 Cell C proposes the following remedies to be imposed on Multichoice:
- to publish information concerning long term and/or exclusive contracts concluded by MultiChoice for premium content (as defined) with a view to **shortening exclusive rights periods**;
 - disclosing the terms on which such content is available for **acquisition by third parties**;
 - to maintain **separate accounts** for each of its various offerings by platform, premium and non-premium type of content, and wholesale and retail content;
 - to make programmes and channels available separately on terms regarding distribution, reselling and access to be imposed by ICASA (**rights splitting**);
 - to be subject to **rate regulation on wholesale services**, such that no content should be made available on terms that are less favourable than MultiChoice first acquired it, pro rata to the total price if content is sold by programme;

- relating to **accounts, records and other documents to be disclosed** to ICASA and published;
- regarding the amount and type of premium, sports and South African programming for broadcasting over a period of time, in the aggregate and **unbundling sports rights**; and
- to **carry the channels and advertising of third party products** that are not in the same market as Multichoice.

8.2.26 Over and above its call for the amendment of Must Carry Regulations, Sports Rights Regulations and Digital Migration Regulations, the SABC supports the Authority's new, proposed pro-competitive regulations and licence conditions.

8.2.27 The SOS & MMA support all the proposed pro-competitive licence conditions to be imposed on a licensee with significant market power. It further proposes that the Authority should:

- require that MultiChoice be responsible for the collection of the SABC licence fee (provided for in terms of the Broadcasting Act) from the nearly 6 million subscribers that it has;
- ensure that it regularly collects critical market related broadcasting information.
- collect information for the Authority's ICT sector review reports however the information gathered for broadcasting and OTT services is extremely limited; and
- ensure that the reports include detailed year on year broadcasting market information

8.2.28 SA Rugby indicates that the rights it owns are in relation to international and domestic matches in South Africa, but that the sale of domestic rights are factored into the sales of rights as part of joint venture competitions. Therefore, the broadcast rights to Super Rugby, Rugby Championship and PRO14 are part of alliances with SANZAAR and Celtic Rugby (unlike other SA sports). SA Rugby further argues that Sports bodies and their consultants are best placed to decide how, and to whom, to sell these rights taking into consideration various factors.

8.2.29 The above factors include:

- balancing the need for income with maximising exposure;
- funding development to expand opportunities for participation; and
- promoting social cohesion by ensuring that sport teams represent all sectors of society.

8.2.30 SA Rugby supports exclusivity arguing that it is a global practice because it:

- maximises revenue for the sporting body;
- promotes investment in the quality of production of the sport;
- enables broadcasters to differentiate their product offering, innovatively package the content and promote and market the content to the benefit of viewers; and
- promotes competitive bidding to maximise revenue

8.2.31 SA Rugby does not support the proposed pro-competitive measures. It argues that shortening of the rights period would jeopardise values and have the knock on effect of calling into question the SANZAAR and Celtic Rugby joint ventures as it would threaten the alignment of the arrangement and their reason for existence. Broadcaster appetite would be reduced as they require a reasonable period to recover costs and earn a reasonable return on a big investment. The consequences would be a material negative impact on the amount of the rights fee, the investment by the broadcaster in the product, and consequently the experience of the viewer.

8.2.32 With respect to rights splitting SA Rugby contends that the multiplication of rights holders has the potential to multiply transaction costs as sports bodies may have to enter into and manage multiple agreements.

8.2.33 SA Rugby then raises legal questions and concerns regarding both the process and the potential implications of the Authority's intervention for third parties such as SARU and the parties it in turn contracts with.

- 8.2.34 According to the PSL, the Discussion Document does not provide substantiation why remedies are required, given how the PSL sells its rights and the history of participation in the PSL rights-selling process. It argues that the remedies are disproportionate and damaging to sport. For instance, the remedies limit participation of buyers in bids which undermines demand and consequently revenue for the PSL thus unduly interfering with the normal working of the market for acquisition of rights. The proposed remedies increase costs and complexity associated with administration and negotiation of contracts and these are not offset by commensurate gains in income.
- 8.2.35 Cricket SA submits that the broadcasting sector is currently highly concentrated and in need of greater competition. It further submits that it is unable to maximize the commercial viability of its content offering in the absence of adequate competition particularly in the subscription tv market. It is of the view that the growth of broadband in the future will provide new opportunities for live streaming. Therefore, Cricket SA supports the unbundling of rights. It also notes that rights splitting has been implemented in Australia and thus is not a new measure, although it might bring negligible economic benefits in the South African context given limited competition. Insofar as opening up the incumbent's network Cricket SA supports the proposal as it might facilitate market to entry by new competitors.
- 8.2.36 Mr Whoolf, a consumer of subscription broadcasting services argued for the right and ability to select channels of his choice instead of the current bouquet model of providing services.
- 8.2.37 MultiChoice submits that the electronic audio-visual services do not fall within the limited rationale for ex ante regulation. This is the case because ex ante regulation has inherent risks; it can create barriers to entry; may generate inefficiencies, thereby increasing costs ultimately borne by consumers; and the threat of regulation may discourage investment.
- 8.2.38 It argues that each of the Authority's contemplated conditions is not warranted and likely to produce adverse consequences.

- 8.2.39 For instance, there is no basis for rights splitting and unbundling as it may reduce the value of rights to retailers and rights owners are likely to receive less revenue from the sale of their rights.
- 8.2.40 Similarly, there is no basis for shortening the duration of exclusive contracts since, among other things, rights negotiations are usually protracted and thus not desirable to negotiate rights on a yearly basis. Longer contracts give rights owners greater certainty of their revenue over a number of years. Lengthier contracts provide incentives for audio-visual retailers to invest in the marketing and promotion of the sport.
- 8.2.41 By the same token, MultiChoice argues that wholesale must offer obligations interfere with exclusivity in retailing. Wholesale must offer are also likely to reduce the revenues for rights owners and the incentive for retailers to invest.
- 8.2.42 Regarding set-top-box interoperability MultiChoice states that the Discussion Document did not attempt to identify a market for set-top-boxes and consider the effectiveness of competition in such a market.

8.3 The Authority's findings

- 8.3.1 The Authority notes the various comments submitted with respect to the proposed licence conditions to be imposed on licensees with significant market power. There is general support of the proposed measures especially by television broadcasting service providers and video-on-demand service providers. However, there is a lot of opposition and concerns raised by MultiChoice and sports bodies (SA Rugby and PSL), with the exception of Cricket SA which supports the proposed remedies.
- 8.3.2 The Authority agrees with a number of stakeholders who argued that none of the remedies would effectively work in isolation but that they need to be implemented as a suite of solutions to the competition challenges in the relevant markets. At this stage the Authority still considers all the proposed remedies contained in the Discussion Document as possible remedies. However, following the publication of the final Findings Document the Authority will have to embark on a separate regulation process in order to consult on any possible licence conditions.

8.3.3 The following remedies are supported by most stakeholders:

- Reducing contract duration
- Rights splitting - split content rights and sell them to more than one broadcaster
- Unbundling - offering the rights to more than one buyer
- Wholesale must offer
- Limiting access to the number of Hollywood movie studios

Reducing long term contracts and prohibiting automatic renewals

8.3.4 Long-term contracts are a common and at times inevitable feature of economic activity. There are various reasons why companies would prefer to enter into long-term contracts as opposed to transacting on the spot market¹⁶⁵. One of the reasons why long-term contracts are preferred in the market for the acquisition of premium content has to do with the transaction costs of going to market on a regular basis. Where repeated and multiple interactions between players in the market are expected, long-term contracts can be used to reduce transaction costs, including search costs, negotiation costs, cost of engaging in exchange and contract writing. However, there are two fundamental factors to consider when analysing long-term contracts from a competition perspective – (a) the rationale for entering into the contract and the context or prevailing circumstances at the time of contracting and (b) the competition effects of the contract in the relevant market.

8.3.5 One of the effects of long-term contracts in the market for the acquisition of premium content is input foreclosure. Whosoever wins an exclusive contract forecloses competitors from accessing the content. As a way of limiting the harm to competition created by long-term contracts their duration could be reduced. The European Commission considers that contracts longer than 5 years raise concerns, as a general rule because any efficiencies arising from such a contract usually do not offset foreclosure effects beyond that

¹⁶⁵ Including risk sharing, hold-up and asset specificity

duration¹⁶⁶. Whilst the South African market may be different from the European market, the Authority believes that it may be useful to consider possible lessons from the European market.

Introducing rights unbundling

8.3.6 The unbundling of sport rights involves offering the rights to more than one buyer, usually making the rights available on different platforms such as subscription tv and mobile tv and OTTs for instance. Jurisdictions that have unbundled sport rights into separate packages include Brazil¹⁶⁷ and the broader European market¹⁶⁸. The European Commission has adopted an approach that the sale of sport rights must satisfy the following conditions:

- (a) they must be sold on open tender
- (b) the rights must be "unbundled" allowing more than a single buyer;
- (c) no excessive exclusivity (a term of three years being regarded as a general norm);
- (d) no automatic renewal of contracts (regarded as a disguised extension of the term of the exclusivity).¹⁶⁹

8.3.7 It is worth noting that in the South African context, the winner of the PSL rights also acquires rights to other distribution channels such as mobile and the Internet. There is no reason why this should be the case.

Imposing rights splitting

8.3.8 Rights splitting requires a rights owner to split content rights and sell them to more than one broadcaster¹⁷⁰. The design of the split is paramount to ensure wider access and benefit to the rights owner. There are various arguments for

¹⁶⁶ European Commission. Guidelines on Vertical Restraints, 2010. Available at

http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf

¹⁶⁷ Mattos, C. Broadcasting Football Rights in Brazil: 2012. The Case of Globo and "Club of 13" in the Antitrust Perspective. *Estudos Econômicos*, vol. 42, No.2, p. 337-362

¹⁶⁸ Blackshaw, I. 2013. Collective sale of sports television rights in the European Union: competition law aspects. *De Jure*

¹⁶⁹ Dec 2003/778.

¹⁷⁰ Germany's federal cartel office has approved plans to stop any single buyer from winning all the live television rights for Bundesliga soccer matches for the four seasons starting in 2017, see

and against the splitting of rights. In the end the Authority would be interested in a condition that has long term benefits on the market. The advantage with splitting rights into many packages is that it facilitates access by new smaller entrants who may not have deep pockets to bid for the full package of rights. On the downside, however, consumers may find it difficult to subscribe to various service providers in order to get access to specific matches. In the long run, however, the splitting of rights should enhance overall competition in the market¹⁷¹.

Imposing wholesale-must-offer

- 8.3.9 In 2010, following a three-year investigation, communications regulator Ofcom imposed a wholesale must-offer regulation on BSkyB's premium Sky Sports channels, requiring these to be made available to other distributors at regulated prices. In 2014 Ofcom undertook a review of the wholesale-must-offer obligation and found that in the intervening period there had been a number of developments in the subscription-tv sector including the wider availability of sports content on competing retail offerings and platforms, an increased presence of over-the-top internet services and new devices providing additional means of accessing subscription tv content¹⁷².
- 8.3.10 There was also entry into the subscription-tv market by British Telecommunications plc (BT) which was able to acquire key sports rights and offer other channels. As a result, Ofcom decided to remove the wholesale-must-offer obligation on Sky.
- 8.3.11 The South African market broadband market is still not mature as yet in respect of suitable alternative retail offerings and widespread OTT services. Although mobile broadband connection has gained traction, fixed broadband connection is still at low levels when viewed as a whole¹⁷³. As a result, the uptake of OTT services in South Africa may not (in the short to medium-term)

¹⁷¹ Toft, T. Football: joint selling of media rights. Competition Policy Newsletter. Number 3 – Autumn 2003

¹⁷² Ofcom. 2014. Review of the pay TV wholesale must-offer obligation. Available at <http://stakeholders.ofcom.org.uk/binaries/consultations/wholesale-must-offer/summary/condoc.pdf>

¹⁷³ ICASA. State of ICT Sector in South Africa. 2016

be as rapid as in the UK. Thus, a regulatory intervention in the form of a wholesale-must-offer might still be a possible and feasible remedy¹⁷⁴.

Limiting access to the number of Hollywood movie studios

- 8.3.12 The Authority considers access to Hollywood movies as constituting a competitive advantage. For new entrants it may be difficult to break into the market without such access. As such, the Authority will limit the number of Hollywood studios that a player may enter into exclusive agreements with for purposes of distributing movies.

Set-top-box interoperability

- 8.3.13 In order to access DTH satellite subscription television broadcasting services at the moment viewers have to purchase customer premise equipment in the form of set-top-boxes and satellite receiver dishes. In the event that a customer wants to switch service providers a new set-top-box and dish are required. This is due to lack of interoperability of the CPE, which leads to high switching costs and hassle factor for consumers. Interoperability of CPE can help to stimulate competition by lowering switching costs. However, due to the technical complexities surrounding set-top-box interoperability, the Authority would have to undertake further work and separate consultations on the issue before proposing it as a licence condition on players with significant market power.
- 8.3.14 The Authority does not agree with MultiChoice that in order to effect set-top-box interoperability the Authority needs to first identify such a market and assess the effectiveness of competition. Set-top-box interoperability is being proposed as a remedy to deal with ineffective competition at the retail level of the market.

¹⁷⁴ Elsewhere in Europe, wholesale must-offer remedies have been imposed on a number of pay-tv mergers which created a dominant operator with control over premium content (e.g. Sogecable/Via Digital, Spain 2002; Newscorp/Telepiù, Italy 2003; CanalSat/TPS, France 2006, 2012)

A la carte model

- 8.3.15 The Authority's consumer survey revealed that consumers are looking for value for money services. There is general dissatisfaction with the service being offered. MultiChoice also states that its premium subscribers are under financial pressure and are dissatisfied with having to content with repeat programmes.
- 8.3.16 At a time when the cost of subscription television is increasing with no corresponding increase in value for money, consumers are calling for an ala carte model where individuals can pick and choose channels they prefer and pay only for those.
- 8.3.17 While it may be an appealing proposition, the Authority notes that it would take technical configuration and re-engineering of business models by current subscription broadcasters. The Authority also notes that there are few countries in the world that have implemented ala carte models with inconclusive results in terms of benefits to consumers¹⁷⁵. The Authority will embark on a separate process should it become necessary to introduce ala carte option in the South African market.
- 8.3.18 For now, the Authority is of the view that if the above proposed remedies are correctly implemented, they will lead to effective competition which should result in increased access and lower prices for television broadcasting and video-on-demand services.

¹⁷⁵ India and Canada have an ala carte model

9. CONCLUSION

- 9.1.1 This Draft Findings Document is the culmination of a process that began July 2016 with the Authority 's notice of its intent to conduct an inquiry into the state of competition in subscription television broadcasting services. This was followed with the dissemination of a Questionnaire in July 2016, to gather information from various stakeholders; and publication of a Discussion Document in August 2017.

The Discussion Document was based on responses to the Questionnaire and internal research. It sought to present an analysis of competition issues in subscription television broadcasting services and solicit stakeholder views. Public hearings were held in May 2018, affording stakeholders an opportunity to make oral presentations, in addition to their written responses to the Discussion Document. During the public hearings some stakeholders were requested to submit additional information clarifying questions posed or in further support of their written submissions was followed by the publication of a Discussion Document in August 2017. The Discussion Document was based on responses to the Questionnaire and internal research. It sought to present an analysis of competition issues in subscription television broadcasting services and solicit stakeholder views. Public hearings were held in May 2018, affording stakeholders an opportunity to make oral presentations, in addition to their written responses to the Discussion Document. During the public hearings some stakeholders were requested to submit additional information clarifying questions posed or in further support of their written submissions.

- 9.1.2 This Draft Findings Document summarises the stakeholder responses to the Discussion Document and information submitted during and after the public hearings, undertakes further analysis and presents the Authority's findings on each issue discussed. Most stakeholders agree with the Authority's analysis and preliminary views contained in the Discussion Document. MultiChoice, on the other hand, generally disagrees with the Authority's analysis and preliminary views expressed in the Discussion Document. Where the Authority arrives at a finding that differs from views expressed by stakeholders reasons are provided.

- 9.1.3 In defining the relevant markets, the Authority considered the impact of OTTs and DTT and came to the conclusion that both services do not compete directly with subscription television broadcasting services. The Authority defined relevant markets at the retail and wholesale levels.
- 9.1.4 At the retail level the Authority defined the following relevant markets: (a) a market for the retail distribution of analogue based free-to-air television services in South Africa; (b) a market for the retail distribution of basic-tier subscription television services and satellite-based free-to-air television services in South Africa; (c) a market for the retail distribution of premium subscription television services in South Africa; and (d) a market for the retail distribution of video-on-demand services in South Africa.
- 9.1.5 At the wholesale level for content acquisition the Authority defined the following relevant markets: (a) a market for the supply and acquisition of premium content for distribution in South Africa and (b) a market for the supply and acquisition of non-premium content for distribution in South Africa.
- 9.1.6 The Authority did not deem it necessary to define a wholesale market for channel acquisition since it is a function of content acquisition and would not have a significant impact on the analysis.
- 9.1.7 When it comes to assessing the effectiveness of competition in the relevant markets, the Authority found competition to be ineffective in the following markets: (a) the market for the retail distribution of basic-tier subscription television services and satellite-based free-to-air television services in South Africa; (b) the market for the retail distribution of premium subscription television services in South Africa; and (c) the market for the wholesale acquisition of premium content for distribution in South Africa.
- 9.1.8 The above relevant markets accord with the European Commission's views in the recent *Liberty Global/Ziggo*¹⁷⁶ case which considered the impact of OTTs on traditional television broadcasting services. Although in some instances the European Commission did not deem it necessary to be conclusive about a

¹⁷⁶ European Commission. *Liberty Global / Ziggo*. Case No M.7000

particular market definition, it did nonetheless express a view on how it would approach market definition in such instances. The Authority is also satisfied that the approach to market definition in the Discussion Document found support from the Competition Commission.

- 9.1.9 The Authority found MultiChoice to possess significant market power in the relevant markets that are characterised by ineffective competition and thus proposes various licence conditions to remedy the market failure. The following licence conditions have been identified, in addition to those provided in section 67(7) of the ECA: (a) reducing rights contract duration; (b) prohibiting automatic renewal of rights contracts; (c) rights splitting; (d) rights unbundling; (e) limiting number of agreements with major movie studios; (f) wholesale must offer; and (g) set-top-box interoperability.
- 9.1.10 This Draft Findings Document provides stakeholders with an opportunity to respond to the Authority's findings before a Final Findings Document is developed.
- 9.1.11 Depending on the outcomes of the Final Findings Document, the Authority may consider developing regulations in terms of section 67(4) of the ECA to give effect to these findings. A separate public consultation process would be followed in that case.